

CITY OF SALEM
Written Testimony
City Council

555 Liberty St SE
Salem, OR 97301

Monday, September 9, 2019

6:00 PM

Council Chambers

4. b. [19-409](#)

Reconsideration of City Council's denial to form the Aspen Grove Reimbursement District.

Ward(s): 8

Councilor(s): Jim Lewis

Neighborhood(s): West Salem Neighborhood Association

Result Area(s): Safe, Reliable and Efficient Infrastructure.

Attachments: [Resolution - Aspen Grove Reimbursement District](#)

[Exhibit 1 - Aspen Grove Reimbursement Application](#)

[Exhibit 2 - Aspen Grove Reimbursement District Boundary](#)

[Exhibit 3 - Properties within District Boundary](#)

[Aspen Grove Sewer Reimbursement Certification of Costs](#)

[Cost Allocation Map](#)

[Written Testimony](#)

Add - Written Testimony

4. c. [19-420](#)

Appeal of the Planning Commission's decision approving Fairview Refinement Plan / Class 2 Adjustment / Tentative Subdivision Plan Case No. FRP-ADJ-SUB19-01 for property located in the 4100 to 4200 blocks of Pringle Road SE and the 4200 Block of Battle Creek Road SE.

Ward(s): Ward 3

Councilor(s): Nanke

Neighborhood(s): Morningside

Result Area(s): Welcoming and Livable Community

Attachments: [Attachment 1 - Vicinity Map](#)

[Attachment 2 - Fairview Woods Refinement Plan](#)

[Attachment 3 - Tentative Subdivision Plan](#)

[Attachment 4 - Planning Commission Decision \(July 26, 2019\)](#)

[Attachment 5 - Notice of Appeal Submitted by Jerry Mumper](#)

[Attachment 6 - Neighborhood Association Comments](#)

[Attachment 7 - Public Comments](#)

[Attachment 8 - Fairview Training Center Redevelopment Master Plan](#)

[Attachment 9 - Fairview Plan Street Network Plan](#)

[Attachment 10 - Street Network Plan Compared with Subject Property](#)

[Written Testimony](#)

Add - Written Testimony

Ruth Stellmacher

From: dewoina@aol.com
Sent: Monday, September 09, 2019 10:17 AM
To: citycouncil
Subject: FW: Public Comment on Agenda Item 4.b.--Aspen Grove Reimbursement District; Property Lots 700 & 603

Categories: Council Dox

Mr. Shaw asked me to forward this testimony to you for tonight's hearing.

Thank you,

KD

From: HERB and JOAN SHAW <HERBERTJOAN_SHAW@msn.com>
Sent: Sunday, September 8, 2019 5:25 PM
To: City Councilor-Jim Lewis <jlewis@cityofsalem.net>
Subject: Public Comment on Agenda Item 4.b.--Aspen Grove Reimbursement District; Property Lots 700 & 603

Dear Mayor & City Council

The proposed Reimbursement District should not be approved.

Subject application is does not qualify for at least two reasons, as follows:

1. Contrary to Staff report, the 180 day code requirement is in fact applicable since the issues and delays by the City were settled years ago and the application still was not submitted within the allowed time restraints.
2. As a resident effected by this application up until our sale of property Lots 700 & 603 in January of 2019, we were not given notice of any such actions by the City or Mr. Thygeson or potential leans against the properties.

Respectfully submitted;

Herbert & Joan Shaw

MEMO

To: The Honorable Mayor and City Councilors

From: Alan Sorem and Mark Shipman

Date: September 6, 2019

Re: Fairview Refinement Plan / Class 2 Adjustment / Subdivision Case No.: FRP-ADJ-SUB19-01



This firm represents the Olsen Design and Development, Inc., an Oregon corporation ("**Applicant**"), with respect to the above-referenced consolidated limited land use applications (the "**Applications**"). The Applications are for the development of the real property located at the 4100 to 4200 Blocks of Pringle Road SE and the 4200 Block of Battle Creek Road SE (Marion County Assessor Map and Tax Lot Number: 083W1100202) (the "**Subject Property**"). On July 26, 2019, the Planning Commission (the "**Commission**") unanimously voted to approve the Decisions on behalf of the City of Salem (the "**City**") issued a Notice of Decision (the "**Decision**") approving the Applications. A notice of appeal was filed by Sean Malone on behalf of his client, Jerry Mumper (the "**Appellant**"). The Appellant owns a residence at 1454 Grantham Lane SE, Salem OR 97302, which is located within Fairview Addition West immediately adjacent to the Subject Property.

The City Council accepted the appeal of the Appellants for a de novo hearing to take place on September 8, 2019. Applicant offers the following evidence and argument to supplement the evidence, arguments, and findings already submitted into the record. This response memorandum will address issues raised in the appeals to the Applications and comments submitted in opposition to the Applications.

Applicant's memo is divided into two sections. The first section summarizes and responds to the specific issues raised by the Appellant. The second section describes the applicable state and federal laws that apply in addition to the City's Unified Development Code ("**UDC**") that circumscribe the City Council's role in reviewing the appeal of the Decision.

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Section I

Response to Appellants' Comments

I. The Applications satisfy the criteria for refinement plans set forth in SRC 530.030(e).

On September 24, 2003, the City Council adopted amendments to the Salem Area Comprehensive Plan and Salem Revised Code establishing the Fairview Mixed Use Zone. The Fairview Training Center Redevelopment (the "**Fairview Plan**") was adopted in 2005 setting forth general development principles and concepts for the area encompassed by the Fairview Plan. Refinement plans are detailed regulatory plans that implement the Fairview Plan. Standards and processes stipulated in an approved refinement plan are used as review criteria for any specific development proposal within the area covered by the refinement plan. The criteria for approval of a refinement plan is set forth in SRC 530.030(e), which follows:

(e) Criteria. A refinement plan shall be approved if all of the following criteria are met:

(1) The refinement plan is consistent with the fairview plan.

(2) The refinement plan conforms with the applicable provisions of the Salem Area Comprehensive Plan.

(3) The refinement plan is compatible with adjoining land uses.

(4) The refinement plan is physically feasible, given consideration of existing or proposed infrastructure and public services.

(5) The refinement plan conforms to all applicable standards of the UDC, except where alternative standards are proposed.

(6) The refinement plan conforms to the following goals:

(A) Encourage mixed-use development, improved protection of open spaces and natural features, and greater housing and transportation options;

(B) Encourage the innovative integration of park and school uses;

(C) Encourage the principles of sustainable development and sustainable business practices;

(D) Support affordable housing options and mixed-income neighborhoods;

(E) Facilitate the resourceful use of land through the efficient arrangement of land uses, buildings, circulation systems, open space and infrastructure;

(F) Encourage economic opportunities that comply with and support business practices;

(G) Recognize the historic significance of buildings, structures, and sites, including archaeological sites, through appropriate means, including, but not limited to, obtaining official historic resource designation; and

(H) Encourage energy conservation and improved air and water quality.

The Fairview Plan sets forth twelve sustainable land use principles¹ (the “**Principles**”) that operate as the stated principles for the Fairview Plan. Appellant argues generally that the proposed refinement plan is not in conformance with these Principles, with specific focus on Principle 6 (Respect the Landscape) and Principle 12 (An interconnected Street System). Applicant agrees with Staff’s determination that the Applications satisfy the applicable approval criteria, in conformance with the Principles, and has included additional responses to Appellant’s particularized arguments below.

a. Appellant argues that the Applications are not consistent with Principle 6 of the Fairview Plan which states that development on the Subject Property should respect the landscape.

Applicant agrees with Staff’s determination that the proposed development is in conformance with the Fairview Plan as it pertains to this Principle. *See Notice p. 5-7; Staff Report 7-9.* In order for Applicant to satisfy the criteria set forth in SRC 530.030(e) Applicant must demonstrate that, on balance, the proposed refinement plan is consistent with and conforms to with the Principles set forth in the Fairview Plan. There is tension inherent in the Principles, strict compliance with one Principle may be in conflict with compliance with another Principle. For example, compact residential development within the Fairview Addition and Pringle Creek Community Refinement Plans in conformance with Principle 1 at times may be in conflict with, but also provide opportunity for, wide swaths of open space in the remainder of the development, including the pocket parks in Fairview Addition West and the Village Center in Pringle Creek Community.

The Applications focus on making reasonable economic use of the Subject Property through large tract residential development, which is a permitted use in the FMU zone and promotes social and economic diversity (Principle 1) by a model of housing that does not currently exist within the zone. These large tracts are designed to emphasize the wooded nature of the area, maintaining existing

¹1: Build Economic and Social Diversity
2: Create a Center
3: Re-use, retrofit
4: Create Local Improvement
5: Build Innovative Green Buildings
6: Respect the Landscape
7: Zero impact to the regional watershed
8: Layer the system
9: Close the Cycle of Energy and Material Flows
10: Green Corridors for People and Other Living Things
11: Transit Close at Hand
12: An interconnected Street System

habitat for native species through the provision of wildlife passages, exceeding the City's general requirements for tree preservation, and providing trails and open space for the use of residents of the development as well as Fairview Training Center as a whole. Applicant's refinement plan exceeds the standards set forth in the UDC for the preservation of trees, in reasonable compliance with Principle 6 by providing for the preservation of trees ranging from 63.3 percent to 84 percent, which greatly exceeds the 25 percent required by the UDC in chapter 808. Applicant has demonstrated that the refinement plan is consistent with Principle 6.

- b. Appellant argues that the Applications are not consistent with Principle 12 of the Fairview Plan which requires development on the Subject Property to provide for an interconnected street system because the streets and corresponding improvements are not depicted on the Illustrative Plan, which is part of the Fairview Plan.**

Applicant agrees with Staff's interpretation that the Illustrative Plan is intended to be conceptual in nature and is not meant to dictate the ultimate development within the FMU zone. *See Notice p. 6; Staff Report 9-10.* This is consistent with the development that has already occurred throughout the Fairview Training Center, where variation has happened based on practical concerns that were either not addressed or not anticipated at the formation of the Fairview Plan.

Regardless of the deviation, the Proposed Refinement Plan remains consistent with the Fairview Plan by providing streets that intersect with existing and planned streets in Fairview Addition West, as indicated on pages 24 and 25 of the Woods Refinement Plan. There will be two internal private streets that have been designed to connect to the existing Braden Lane in Fairview Addition and two proposed streets in future phases of Fairview Addition. *Notice p. 24-26.* These streets will be built to the standards required by the Fairview Plan and the UDC and provide the necessary connectivity for the Subject Property in conformance with the Fairview Plan.

- c. Appellant argues that the Applications are not consistent with the Fairview Plan because it constitutes the development of reserved Open Space which was meant to offset higher density development in other areas.**

Again, Applicant agrees with Staff's determination that the Fairview Plan is illustrative in nature and is not intended to depict the exact development of the Fairview Training Center. *Notice p. 6; Staff Report 10-11.* Further, as Staff points out, the Amended Fairview Refinement Plan II (the "**Amended Plan**") modified the refinement plan detailing development of the southeast portion of the Fairview

Training Center by adding a previously unplanned twenty-eight-acre community park. The distinction between the City's parkland within the FMU Zone and Subject Property is shown on the City's Buildable Lands Inventory, which identified the Subject Property as developable vacant land without any identified constraints, unlike the park property. *See attached Exhibit 1.*

The addition of this previously unplanned park provides a significant decrease in the overall development of housing within the boundaries of the FMU zone and more than compensates for the additional sixteen residential lots under the proposed refinement plan. The City's newly designated open space has created space for additional residential development elsewhere, which is discussed in the Amended Plan and further detailed in the Notice. *FRPII p. 12; Notice p. 9.* This park alone, without consideration of any of the remaining planned open space throughout the FMU zone, provides more than the "20 acres of land within the FMU zone reserved as natural open space." The depiction of the Park in the Amended Plan indicates that a significant amount of the northeast portion of the park shall remain wooded as "natural open space" as well as the portions of the area along the riparian corridor. *Amended Fairview Refinement Plan II p. 27.* These stands of trees were added to the inventory through the Amended Plan. *Id.* Additionally, the refinement plan identifies two portions of the Subject Property that are designated for public open space and labeled on the Refinement Plan as "Oak Park" and "Little Oak Park," along with a series of trails and pathways. These spaces are intended to be rehabilitated and maintained as natural landscapes, including native plants found in similarly wooded areas. *Fairview Woods Refinement Plan p. 36-38.*

II. Appellant argues that the Decision is inconsistent with the Fairview Plan, requiring Applicant to file a Major Amendment to the Fairview Plan.

Applicant agrees with Staff's Determination that the Applications do not require an Amendment to the Fairview Plan. *Staff Report 11-12.* The Fairview Plan is meant to serve as a guiding document, identifying the goals and policies, for development within the FMU zone. SRC 530.020. The Fairview Plan is implemented through localized Refinement Plans, that provide detailed regulatory plans and applicable criteria. If an Applicant wishes to make a substantial change to the Fairview Plan, an amendment to the Fairview Plan is necessary. SRC 530.035. A substantial change to the Fairview Plan includes changes to "designated buffers, perimeter landscaping, or significant natural resource areas delineated in the fairview plan that were established to adapt the FMU zone to specific site characteristics or mitigate development impacts on the site and surrounding area." SRC

503.025(b)(2)(C). However, the Applications are not proposing a substantial change to the Subject Property.

As discussed in detail above, the Applications are proposing reasonable use of the Subject Property while retaining the site characteristics that led to its identification as a natural resource on the Fairview Plan. Appellant argues that the area was designated under the plan as open space; however, this area, as with any other area within the Fairview Plan, was conceptually identified with the potential for development through a refinement plan that met the applicable approval criteria. In addition to the conceptual plan map that Appellant points to, the Fairview Plan contains a depiction of the overlays throughout the zone which designates the Subject Property as “Mixed Intensity,” which specifically allows for the type of development proposed by the Applicant.

III. Appellant argues that at Class 2 Adjustment is prohibited under SRC 250.005(2).

Applicant agrees with Staff’s determination that the reduction in the minimum required size of a refinement plan area from 40 acres to 14.07 should be approved, as Applicant has provided sufficient evidence into the record to meet the applicable adjustment criteria. *Staff Report 13-16*. The Class 2 Adjustment process is set forth in Section 250.005 and applies when an applicant is requesting an adjustment of a UDC development standard which adjusts a numerical standard by more than 20 percent or adjusts any non-numerical standard. The minimum size of a refinement area is a numerical standard, being reduced more than twenty percent, meaning that a Class 2 Adjustment is appropriate.

a. Appellant argues that a Class 2 Adjustment is prohibited under SRC 250.005(2)(B) because approval would change the status of an activity under the UDC.

The FMU zone itself is divided into four land use overlays. The Fairview Mixed-Use Overlay Plan is set forth in Figure 503-1. The Subject Property is within the MI (Mixed Intensity) overlay and with a boundary of LI (Low Intensity) overlay within the right of way of Pringle Creek and Battle Creek Roads. Single family detached dwellings are outright permitted in the MI overlay, where the development will occur. SRC 503.040(a). As the proposed development of the Subject Property is an outright permitted use in the FMU zone, the approval of the Class 2 Adjustment does not change the status of an activity under the UDC.

b. Appellant argues that a Class 2 Adjustment is prohibited under SRC 250.005(2)(C) because the approval would modify the definition of “Refinement Plan.”

SRC 530.030 states as follows, “Refinement plans are detailed regulatory plans that implement the fairview plan.” The requested Class 2 Adjustment adjusts section (b) which reads:

(b) *Minimum refinement plan area.* The area subject to a refinement plan shall contain no less than 40 acres.

The proposed adjustment is confined to adjusting a numerical standard within the UDC, reducing the minimum refinement plan area from 40 acres to 14.07 acres. Appellant’s argument would render the Class 2 Adjustment process meaningless for any adjustment minimum size standards, e.g. minimum lot size standards. Approval of the Applications does not change the definition of a refinement plan, but adjusts the minimum acreage requirement as permitted under the UDC. Applicant has provided sufficient evidence into the record to comply with the applicable approval criteria for a Class 2 Adjustment.

c. Appellant argues that a Class 2 Adjustment is prohibited under SRC 250.005(2)(E) because the approval would modify the applicability of a requirement under the UDC.

Again, the Applications are requesting an adjustment to the minimum area standard for a refinement plan. This is an appropriate Class 2 Adjustment and is permissible under the UDC. Applicant is not requesting that the Refinement Plan criteria not apply to the Subject Property, but is requesting that due to the isolated nature of the Subject Property and the proposed use of that property as a separate development, an adjustment to the minimum acreage requirement allows for the most logical development of the Subject Property. Applicant agrees with Staff’s assessment that the Applications meet the established criteria for a Class 2 Adjustment.

IV. The findings set forth in the Notice are a plausible interpretation of the UDC.

On appeal the Land Use Board of Appeals (LUBA) will determine whether the City’s interpretation that the Applications conform to the UDC criteria is plausible. Appellant will bear the burden of demonstrating that the City’s interpretation of the UDC is wholly implausible. An interpretation under this standard is not plausible only if it is inconsistent with “all of the ‘express language’ that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations.” ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247,259,243 P3d 776 (2010)(Emphasis in original). Importantly, the City’s interpretation is not rendered implausible by the

existence of a stronger or more logical interpretation. *Mark Latham Excavation v. Deschutes County*, 250 Or App 543, 552,281 P3d 644 (2012); *Siebert v. Crook County*, 246 Or App 500,509,266 P3d 170 (2011). This means that LUBA will determine if the government's interpretation, standing alone, is plausible and will not consider how that interpretation compares to other possible interpretations.

Section II

Applicable State and Federal Laws

I. The Subdivision and Class II Adjustment Applications are limited land use decisions and are subject only to the standards and criteria authorized in ORS 197.195.

Each of the pending Applications meet the definition of a "limited land use decision" in the Oregon Revised Statutes (ORS) and should be treated as such in the City's review of the Applications. ORS 197.015(12) defines a limited land use decision as:

"a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

1. The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (Application for approval of subdivision or partition) (1).
2. The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

Tentative subdivision applications and Class 2 adjustments are both designated by the City's UDC as Type II procedures. SRC 205.010(b) and SRC 250.005(b). Type II applications are limited land use decisions. SRC 300.100(a). Therefore, both the local code and the applicable state definitions require the City to apply the limited review of ORS 197.195 as to the subdivision and class 2 adjustment criteria.

ORS 197.195(1) states "[a] limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations." The Oregon Land Use Board of Appeals (LUBA) prohibits general incorporation of a city's planning documents as a standard or mandatory approval criterion in a limited land use decision.

"[I]n our view ORS 197.195(1) contemplates more than a broad injunction to comply with unspecified portions of the comprehensive plan. In order to 'incorporate' a comprehensive plan standard into a local government's land use regulations within the meaning of ORS 197.195(1), the local government must at least amend its land use regulations to make clear what specific provisions of the comprehensive plan apply to a limited land use decision as approval criteria." *Paterson v. City of Bend*, 49 Or LUBA 160, *aff'd*, in 11 part, *rev'd and rem 'don other grounds*, 201 Or App 344, 118 P3d 842 (2005).

LUBA expanded on this general prohibition in the recent decision, *Oster v. City of Silverton*, LUBA ____ Or LUBA ____ (LUBA No. 2018-103, Opinion May 7, 2019). In *Oster*, the City of Silverton denied a tentative plat subdivision application because the application failed to conform to a transportation development standard contained in the City's transportation system plan. LUBA ruled that local governments were prohibited from general incorporations of development standards contained within their "public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Id.*, 11-12. The City may only apply as a basis to deny an application a standard that is either expressly codified in the UDC or the incorporation to the applicable standard within such plan documents is plainly stated in the approval criterion.

II. The Applications are for "the development of housing," and therefore, the City may only apply standards and criteria that are clear and objective, and the City is prohibited from applying standards and criteria in a manner that cumulatively or individually cause unreasonable cost or delay.

The Applications are for the development of housing. Accordingly, the City is prohibited from denying the Applications or requiring further conditions of approval based on ambiguous standards or criteria. ORS 197.307(4) states:

"(4) Except as provided in subsection (6) of this section, *a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing.*

The standards, conditions and procedures:

- (a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
- (b) ***May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.***

The only exception to prohibitions of ORS 197.307(4) for development requests for housing on lands zoned in Salem for residential use are developments within historic areas designated for protection under Principle 5. ORS 197.307(5)(b). The City adopted the Salem Historic Preservation Plan to conform with its obligations under Principle 5. The Historic Preservation Plan identifies the four recognized historic districts in the City: Court Street-Chemeketa Street Historic District, Downtown Historic District, Gaiety Hill Bush Pasture Park Historic District, Oregon State Hospital Historic District. Appendix G of the Historic Preservation Plan contains a complete list of the City's Historic Resources. The Subject Property contains no buildings and is not included in a Historic District. The exception under ORS 197.307(5)(b) is inapplicable in this case.

Salem has not adopted a clear and objective tract for single family residential development. Thus, the City cannot find that ORS 197.307(6) exception applies. *See also. City of Corvallis Enforcement Proceedings*, LCDC Enforcement Order 17-ENF-001881 (March 2017)(finding that a property owner had a right to request the application of clear and objective standards to a property even if it was part of an overlay zone or prior master plan that required subjective criteria).

Land use regulations are ambiguous or unclear if they are capable of one or more reasonable interpretations. *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000). This definition of ambiguity or unclear standards and criteria applies to the prohibition against needed housing. If a development standard can be interpreted in a manner that reasonably requires either a denial of an application or an approval of an application, the significant discretion is prohibited by the needed housing law. The City may not use such discretion to deny the application for needed housing, and if it does so, LUBA shall reverse the decision and award attorney fees to the applicant. *Group B LLC v. City of Corvallis*, 72 Or LUBA 74 (2015), *aff'd* 275 Or App 577, 366 P3d 847 (2015), *rev den* 359 Or 667 (2016). Standards that impose “subjective, value-laden analyses that are designed to balance or mitigate impacts” are inherently ambiguous and are prohibited by ORS 197.307(4) as a basis of denial or conditions of approval. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998). Even seemingly objective standards may be ambiguous and prohibited by ORS 197.307(4) if it is unclear how an applicant can satisfy the criteria. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 402 (2002) (ordinance provision that requires that new dwellings must be within four or five minutes of emergency services is unclear and subjective where it is not clear how the response time is measured, i.e., as the crow flies or by surface streets).

LUBA has held that certain standards are so inherently ambiguous as to be prohibited as a matter of law from needed housing matters. For example, development code requiring the applicant to demonstrate something is “safe” without defining such a standard in an objective manner is prohibited. *Rudell v. City of Bandon*, 62 Or LUBA 279, 288-89 (LUBA No. 2010-037, November 29, 2010) (a code standard requiring that the property be “safe to build” is not clear and objective). Similarly, criteria requiring an applicant to “minimize” impacts or conflicts is prohibited as a development standard for needed housing. *Home Builders Association*, 41 Or LUBA at 399 (code language requiring developments to “minimize vehicular/pedestrian conflicts” conflicts violated ORS 197.307).

The consolidated Applications are subject to ambiguous criteria, including but not limited to, the criteria identified by the Appellant. Appellant asks that the City reverse the Decision. If the City were to

adopt the interpretations suggested by the Appellant, the City would deny the Applications based on ambiguous criteria, in violation of ORS 197.307(4).

III. The City Council must either approve the Applications or afford Applicant all procedural rights required under ORS 197.522(2) and (3).

The Applications are for housing and the Planning Commission has concluded that Applicant has satisfied the mandatory approval criteria in the Decision. Therefore, the City Council cannot deny the Applications without affording Applicant a prior opportunity to modify the Applications or propose an alternative condition of approval. Such an opportunity to cure any deficiency in the Applications must be preceded by a written determination identifying what, if any, mandatory approval criteria have not been satisfied by the evidence in the record and an explanation identifying how Applicant may cure such a deficiency. Failure to do so will prejudice Applicant's substantial rights by causing unnecessary delay and cost.

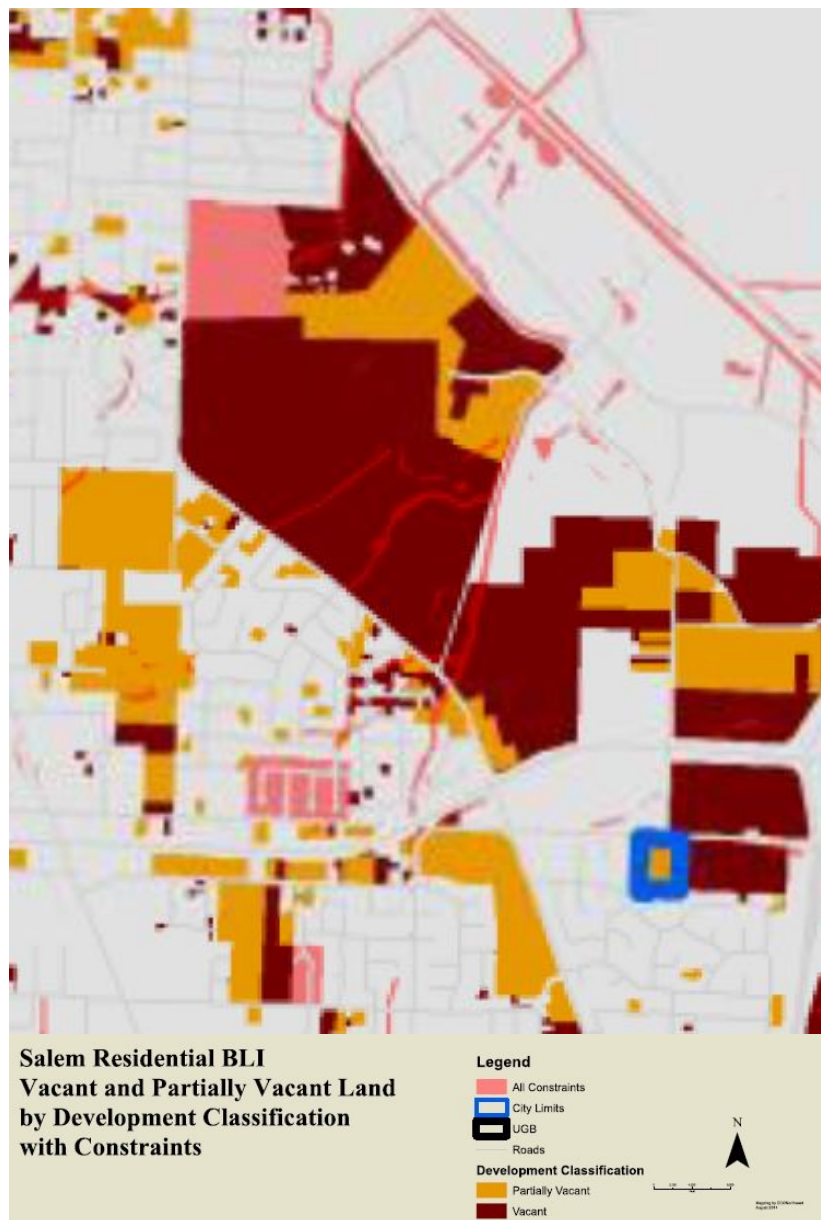
IV. The City cannot deny the Applications based on Applicant's unwillingness to accept conditions of approval that lack an adequate nexus to the applicable criterion or are roughly disproportionate, nor can the City condition approval of the Applications based on such unconstitutional conditions.

Applicant accepts the conditions of the approval in the Decision. However, if the City were to either require additional conditions of approval or deny the Applications based on Applicant's objection to any additional condition of approval requested by Opponents, Applicant reserves the right to challenge the potential additional condition of approval on constitutional grounds. For example, any proposed conditions requiring Applicant to bear the entire cost of additional public facilities are subject to judicial review for unconstitutional takings under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 120 L Ed 2d 304 (1994) and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013). The City may not condition approval based on an unconstitutional exaction and may not deny an application in lieu of such an approval.

V. Conclusion

Applicant agrees with Staff's determination that the Applications satisfy the applicable approval criteria in conformance with applicable Federal and State laws. Applicant respectfully requests the City Council adopt Planning Commission's approval of the Applications without modification.

Exhibit 1
Salem's Buildable Land Inventory Map



Jerry Mumper
1454 Grantham Lane SE
Salem, Oregon 97302

RECEIVED

September 9, 2019

SEP 09 2019

City of Salem Mayor and City Council
Case No. FRP-ADJ-SUB-19-01

COMMUNITY DEVELOPMENT

To: Mayor Bennett and City Council

For the following reasons the City Council must reverse the July 26, 2019, decision of the Planning Council for Fairview Refinement Plan/Class 2 Adjustment/Tentative Subdivision Plan Case No. FRP-ADJ-SUB 19-01.

The September 9, 2019, staff report states that "In comparison of the Illustrative Plan included in the Fairview Plan with the layout of the proposed refinement plan, the Illustrative Plan identifies approximately 25 structures which are assumed to be single family dwellings, or potentially single-family dwellings with accessory dwelling units (ADUs), that would be located on the eastern third of the subject property. Instead of concentrating this development on the eastern portion of the property, the proposed refinement plan distributes it throughout the site on larger lots together with identified areas of open space. Because of the larger proposed lot sizes, trees and existing site features can be preserved consistent with the goals and policies of the Fairview Plan."

The staff report also states that "In the appellants appeal it is indicated that the proposal is inconsistent with the Fairview Plan as it relates to the street network plan because the street network plan does not contemplate any streets within the area proposed for development. This, however, is incorrect because when the boundaries of the subject property are overlaid on the street network plan (Attachment 10), two local streets and an alley serving approximately 35 structures clustered on the eastern portion of the site can be identified on the subject property."

Staff has used these two uses of overlaying the boundary of the proposed refinement plan onto the Illustrative Plan and the street network plan as two of their main arguments to approve the refinement plan. This seems contradictory as they also state "The 'Illustrative Plan' shown on page 6 of the Fairview Training Center Redevelopment Master Plan, and the corresponding off-street pathway and open space plan, mobility plan, and street network plan are all conceptual in nature and not intended to prescribe exactly how property within the Fairview site should be developed ...".

Exhibit 1 of the Fairview Plan makes multiple references to the protecting, preserving and enhancing, etc. of open spaces and natural areas. On page 2 it states "in addition to open spaces and an urban forest." On page 3, it states "... and an extensive network of linked parks, open spaces and protected natural resources." Also on page 3 it states that it will "Protect nature ...". On page 4, it states "SFA shares its neighbors interest in maintaining significant open space and preserving the natural environment. FTCCR will

maximize common open spaces, parks and nature preserves." It also states on page 4, "Its emphasis on environmentally sustainable buildings, walkable environments, aesthetic open spaces, nature preserves ...". On page 6 it states "Large existing forest blocks and wetlands are preserved, and, will be expanded over time." On page 11 "Another mature grove of trees is located atop the northwestern edge of the site. It also will be protected and enhanced as neighborhood park or community open space. Scrub oak and native plants at the southwestern edge of the property will be protected for their ability to serve as wildlife habitat and serve as an ecological buffer." On page 28 is a map with two forested areas that make up the Fairview refinement area that are labeled B and C. The text states "Another mature grove of firs to be protected and enhanced as neighborhood park or community protected open space sits atop the northwestern most ridge of the site. (B)" and "At the southwestern edge of the property is a considerable acreage of scrub oak and native species that will be protected for its ability to serve as wildlife habitat and provide an ecological buffer. (C)" I have attached a copy of page 28 of Exhibit 1 of the Fairview Plan

Area B includes the area that staff identified as having 25 structures within it. Staff also said the illustrative plans are conceptual in nature and not intended to prescribe exactly how the property within the Fairview site should be developed. The only way that the refinement plan can be consistent with the Fairview Plan is if area B is protected and enhanced as neighborhood park or community open space.

The refinement plan proposes to remove up to 281 trees, or 36%, of the total trees on site. This includes four significant white oak trees. This will certainly change the character of the site. This again is not consistent with the Fairview Plan.

There are four maps included in the attachment to the Fairview Plan. The FAIRVIEW MASTER PLAN is an aerial schematic of proposed development and it shows The Woods as an open area. The OFF-STREET PATHWAY AND OPEN SPACE PLAN shows The Woods as open area with pathways through it. The MOBILITY PLAN, again shows The Woods as open area with pathways through it. The STREET NETWORK plan shows The Woods as open area. Besides the comments and maps that I have referenced, there are other smaller maps that show this area should remain open, and not be developed. Even though these are only conceptual, they are all consistent in showing that the two forested areas should be protected as a neighborhood park or community open space.

On page 9 of Exhibit 1, under Principle 13, Walk Every Day is the statement, "The design promotes walking at all levels, from walkways on both sides of all streets", on page 4, Exhibit 3, Mobility Plan, is the statement "Sidewalks are required on all streets except the alleys" and on page 21, Exhibit 3, under Sustainable Fairview Principles, "13. Walking Every Day. Fairview will be a walkable community in all aspects. Sidewalks will line both sides of each street."

The typical street sections on page 15 of the Fairview Refinement Plan application show no sidewalks on Long Loop and sidewalks on only one side of Braden Woods Lane. Because the streets do not have required sidewalks, there will be even more trees removed than shown in the refinement plan. Neither the staff report nor the refinement plan addresses why the streets will not have sidewalks on both sides of the streets, as

required by the Fairview Plan. This is another instance where the refinement plan is not consistent with the Fairview Plan.

SRC 530.030 (e)(1), states "Criteria. A refinement plan shall be approved if all of the following criteria are met: The refinement plan is consistent with the Fairview Plan."

In summary, the refinement plan by failing to protect, preserve and enhance the two fir and oak habitats and the failure to require sidewalks on both sides of both streets have shown that they are inconsistent with the approval criteria of the refinement plan, therefore I am asking the City Council to reverse the July 26, 2019 Planning Commission decision.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jerry Mumper", written in a cursive style. The signature is positioned above the printed name "Jerry Mumper".

Jerry Mumper

NATURAL RESOURCES

The natural environment of plant, wildlife, and topographical elements includes slopes, views, wetlands and ponds, trees, streams, and wildlife habitat.

A broad range of tree species and woodland characters are present. Much of the site was developed and landscaped over the past century. There are mature trees that have been planted and cultivated around existing buildings and roads.

Along Pringle Creek a mature grove of fir trees creates a park-like environment that will be protected and enhanced as either neighborhood park or community protected open space. (A)

Another mature grove of firs to be protected and enhanced as neighborhood park or community protected open space sits atop the northwestern most ridge of the site. (B)

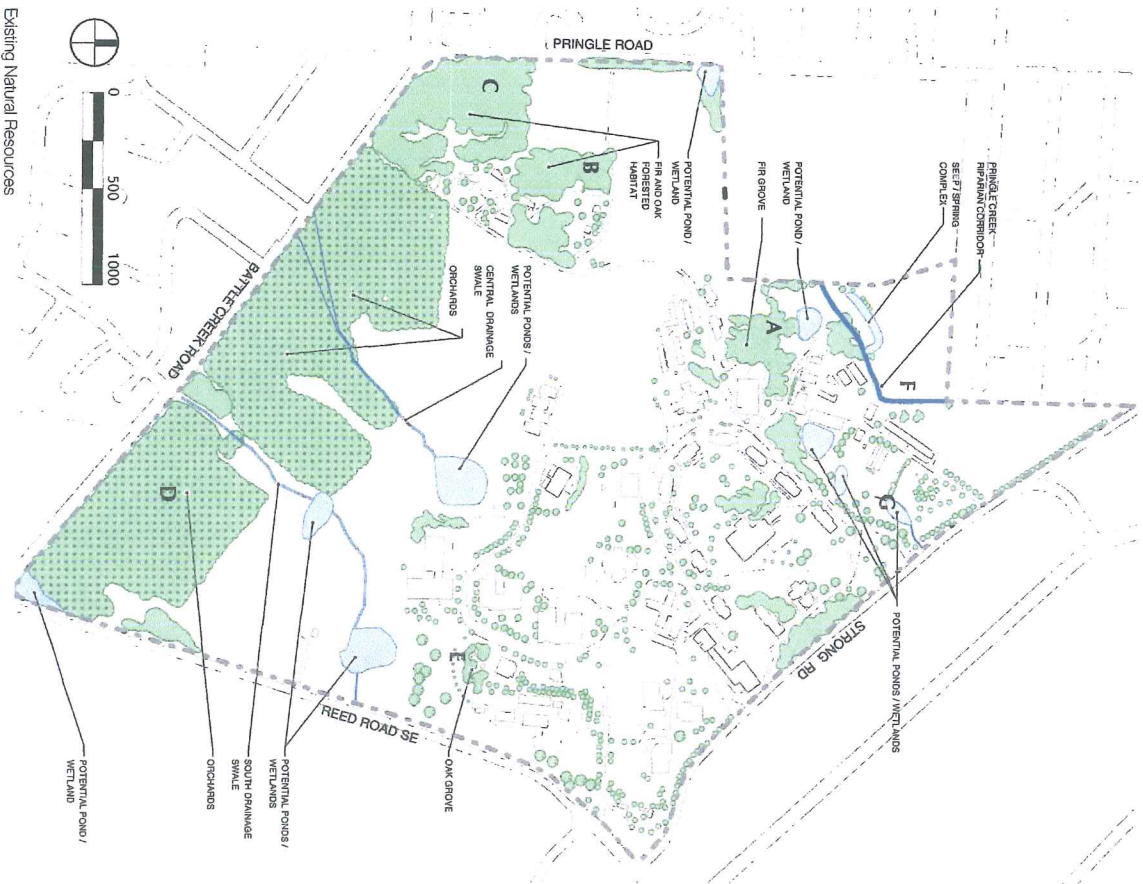
At the southwestern edge of the property is a considerable acreage of scrub oak and native species that will be protected for its ability to serve as wildlife habitat and provide an ecological buffer. (C)

The southeastern corner of the property once served as an orchard that generated fruit and nut products for residents of Fairview. While this orchard is seriously degraded and has served its useful life, it will be memorialized with a replanting of similar species. (D)

A small mature oak grove on the eastern edge of the property frames the "front door" entrance to Fairview from the south. (E)

Wetlands serve an essential ecological function in our natural and built environments. This master plan recognizes existing wetlands and potential wetlands at several locations near Pringle Creek and in the southeastern central area. (Refer to legend on adjacent map)

Pringle Creek is a salmonoid bearing stream that has suffered serious degradation as a result of human settlement and past approaches to water and stream management. In addition to the Pringle Creek riparian corridor identified (F), there is an artificial pond that serves as part of the current gateway entrance to Fairview. (G)



Existing Natural Resources