



LAND USE APPEAL APPLICATION

1. **GENERAL DATA REQUIRED** [to be completed by the appellant]

Case No: SUB-ADJ19-02

June 6, 2019

Case # Being Appealed

Decision Date

500 to 600 Blocks of Salem Heights Avenue S. Salem, Oregon 97302

Address of Subject Property

475 Salem Heights Ave. S. Salem, Oregon 97302

Appellants Mailing Address with zip code

nathan@rietmannlaw.com

503-551-2740

Appellant's E-mail Address

Day-time Phone / Cell Phone

Appellant's Representative or Professional to be contacted regarding matters on this application, if other than appellant listed above:

Name

Mailing Address with ZIP Code

E-Mail Address

Day-time Phone / Cell Phone

2. **SIGNATURES OF ALL APPELLANTS**

Signature: _____

Date: June 21, 2019

Nathan R. Rietmann

Printed Name: _____

Signature: _____

Date: _____

Printed Name: _____

3. **REASON FOR APPEAL** Attach a letter, briefly summarizing the reason for the Appeal. Describe how the proposal does not meet the applicable criteria as well as verification establishing the appellants standing to appeal the decision as provided under SRC 300.1010

FOR STAFF USE ONLY

Received By: _____

Date: _____

Receipt No: _____

Appeal Deadline: _____

Case Manager: _____



RIETMANN LAW, P.C.

June 21, 2019

City of Salem Planning Division
Attn: Olivia Glantz
555 Liberty Street SE, Room 305
Salem, Oregon 97301

RE: Subdivision / Class 1 Adjustment Case No: SUB-ADJ19-02
Application No: 18-125034-LD & 18-125035-02
Applicant: Thomas Kay Co.

Ms. Glantz:

My name is Nathan R. Rietmann. I reside at 475 Salem Heights Ave. S., Salem, Oregon 97302 along with my wife and two young children. Our home is located on 1.3 acres immediately bordering the eastern boundary of the subject property. A picture taken from our deck earlier this week showing the relationship between our property and the subject property is attached as Exhibit 1. The subdivision proposal Thomas Kay Co. is asking you to approve would replace the trees and wildlife habitat depicted in the photo with thirty-three (33) houses, six (6) of which would be within feet of our property line. I therefore have standing to make this appeal.

REQUEST FOR CITY COUNCIL REVIEW

City Council has authority to stop this appeal and undertake its own review of the Notice of Decision. SRC 300.1050. I encourage anyone reading this appeal to immediately contact every member of the City Council and request that they vote to conduct its own independent review of the Notice of Decision. This Notice of Decision allows Thomas Kay Co. to destroy eight (8) acres of trees and unique wildlife habitat in the heart of Salem. If the Notice of Decision is affirmed, **55% of the impacted significant white oaks will be destroyed**. Instead of proposing a development that is compatible with the existing community, Thomas Kay Co. is seeking to move forward with an overcrowded and outmoded cookie-cutter subdivision that diminishes surrounding property values, destroys the character and livability of the neighborhood, and exacerbates existing street safety problems. Much like the Costco land use approval the City Council recently rejected, the Notice of Decision disregards bends over backwards to allow Thomas Kay Co.'s development by making strained legal interpretations and factual findings unsupported by substantial evidence. City Council review is warranted to ensure the Salem Revised Code is properly applied and that Thomas Kay Co. is required to comply with all applicable laws.

Rietmann Law, P.C. • Nathan R. Rietmann • 1270 Chemeketa St. NE • Salem, Oregon 97301

Ph: 503-551-2740 • Fax: 1-888-700-0192 • nathan@rietmannlaw.com

GROUNDS FOR APPEAL

The grounds of appeal set forth below are organizationally presented to track with the Notice of Decision and the numerical order of the applicable requirements set forth in the Salem Revised Code. They are not presented in order of importance.

1. SRC 205.010(d)(1): Findings that tentative subdivision complies with all applicable lot standards and city infrastructure standards are not supported by substantial evidence and wrong as a matter of law.

A. Class 1 Zoning Adjustment for Lot 7 should be denied

Double frontage lots with street frontage adjacent to both their front and rear property lines are required to have a minimum lot depth of 120 feet pursuant to SRC 511.010(a). Lot 7 does not meet the 120-foot depth requirement. Thomas Kay Co. has requested a class one adjustment to allow this non-conforming lot. Pursuant to SRC 250.005(d)(1)(A), the adjustment should only be granted if the purpose underlying the specific development standard proposed for adjustment is:

- i. Clearly inapplicable to the proposed development; or
- ii. Clearly satisfied by the proposed development.

The Notice of Decision asserts the purpose underlying the 120-foot depth requirement is to ensure that double frontage lots have “increased lot depth to provide potential for additional privacy and separation from the street...” Notice, Pg. 30. The Notice of Decision then goes on to opine that privacy “is of greater importance for lots abutting collector and arterial streets which convey greater levels of traffic.” Id.

There is no substantial evidence in the record to support the City’s contention that the purpose of the 120-foot depth requirement was predominately aimed at enhancing privacy for double frontage lots on collector and arterial streets, as opposed to other types of streets. Nor is there any legal basis for the City’s suggestion that the legal privacy interests of people living on busy arterial streets are greater than the privacy interests of people who have chosen to live on local streets. Furthermore, if the purpose of the 120-foot requirement was to protect the privacy of people living in double frontage lots on arterials, but not the privacy of people living in double frontage lots on local streets, the City Council could have said as much in the Salem Revised Code. It didn’t. Similarly, if the City Council thought 111-foot lot depth was sufficient for people living on local streets, it could have said so. It didn’t.

In short, there is no substantial evidence to support the City’s factual finding that a 111-foot lot depth clearly satisfies the purposes that caused City Council to set the

minimum lot-depth at 120-feet instead of 111-feet. As a result, the City's approval of the Class 1 adjustment is arbitrary.

The one and only reason for authorizing the Class 1 adjustment is to accommodate Thomas Kay Co.'s desire to place more houses on the property than its desired development design would allow under the code. Accommodating a developer's desire to cram more houses onto a piece of property than the requirements of the code permit is not a legitimate basis for granting a Class 1 adjustment. If this were the basis for granting exceptions (and it is not), the exception would swallow the rule.

B. Designation of front lot line for Lot 16 does not comply with SRC 800.020(a).

The requirements for designating the front property line for various types of lots is set forth in SRC 800.020(a). Pursuant to those standards, Lot 16 in the tentative plan is a corner lot. "For corner lots, the front property line shall be the property line abutting a street designated by the building permit applicant, provided that lot dimension standards are met. The Notice of Decision states on page 16 that "[t]he front lot line of Lot 16 shall be the *east* property line." (emphasis added). However, there is no street abutting the east property line and therefore the front of Lot 16 should not be the east property line.

C. The Notice of Decision finds criteria compliance with City infrastructure standards using conditions of approval without any showing of feasibility, which is a basic LUBA requirement.

- **Storm water requirements**

The proposed subdivision is subject to the storm water requirements of SRC Chapter 71 and the revised Public Works Design Standards (PWDS) adopted in Administrative Rule 109, Division 005. These requirements limit runoff from the development to levels not exceeding pre-existing conditions. *See*, Notice Pg. 19. The Notice of Decision states that "[t]o demonstrate that the proposed lots within the subdivision can meet the PWDS, the applicant shall provide an engineered tentative storm water design to accommodate the future impervious surface on all proposed lots. *Id.* The Notice of Decision also requires the Thomas Kay Co., to demonstrate that the proposed lots within the subdivision can meet the PWDS by complying with Condition 4, which requires the design and construction of storm water facilities pursuant to SRC Chapter 71 and PWDS. *Id.* However, there is no substantial evidence showing that it is feasible for Thomas Kay Co., to comply with the requirement that run-off from the development be limited to pre-existing levels through fulfillment of Condition 4. Nor is there any finding regarding the feasibility of developing a storm water facility on land currently zoned as RS.

- **Sewer connection requirements**

SRC Chapter 802.015 requires development to be served by city utilities designed and constructed according to all applicable provisions of the Salem Revised Code and PWDS. The Notice of Decision highlights that the existing sewer main in Salem Heights is in poor condition and may not be able to accommodate new connections. Notice, Pg. 19. The Notice of Decision therefore seeks to ensure that the requirement of SRC Chapter 802 is satisfied by imposing Condition 5, which requires the Thomas Kay Co. to “Construct water and sewer systems to serve each lot.” With this condition, the Notice of Decision concludes that the requirement of SRC Chapter 802.015 is satisfied. However, there is no finding supported by substantial evidence that it is feasible for the Thomas Kay Co. to satisfy this condition (which is nothing more than a requirement that the Applicant somehow comply with SRC Chapter 802.015).

- **Tree removal issues**

The Notice of Decision finds that the conditions of SRC Chapter 803 and the City’s Transportation System Plan are satisfied based on Conditions 6-10. *See*, Notice, Pg. 22. However, satisfaction of Conditions 7-8 is contingent upon the issuance of tree removal permits, tentative approval for removal of trees labeled as 10001 – 10004, and 10012, and a tree preservation and protection plan pursuant to SRC Chapter 86 and Administrative Rule 109-500, signed by a certified arborist. There is no substantial evidence or legal findings demonstrating that it is feasible for the Applicant to obtain the necessary permits and approvals - or secure final approval of trees labeled as 10001 – 10004, and 10012. In this regard, several of these trees are significant white oaks. In addition, trees within the City right-of-way may only be removed due to construction pursuant to SRC 86.090(8) “if there is no reasonable alternative.” In this situation, where the City’s removal of a tree to accommodate a development is completely optional, there are obviously reasonable alternatives and removal is not appropriate under SRC 86.090(8). In addition, myself and others will appeal the issuance of any permit and pursue litigation, code changes, and any other available action to prevent the removal of the trees in question. Consequently, there is no substantial evidence to support a finding that it is feasible to comply with SRC 803 through Conditions 7-8.

- **Urban growth preliminary declaration required**

See discussion in section 10.

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2. SRC 205.010(d)(2): Finding that tentative subdivision plan does not impede the future use or development of the property or adjacent land is not supported by substantial evidence and wrong as a matter of law.

The Notice of Decision finds that “the only adjacent land on the perimeter of the subject property that has the potential for further development are two properties located adjacent to the northwest corner of the subject property.” Notice, Pg. 6. This finding is erroneous. Our 1.3-acre property at 475 Salem Heights is zoned as rural residential and capable of being divided and further developed. While we have no intention of further developing our property at the present time, we or a future owner may desire to do so in the future if the livability and character of our property is substantially changed by an incompatible neighboring subdivision. Completely barricading our western boundary with a row of houses and depriving our property of any access to Doughton or Felton would impede the future use or development of our adjacent land.

Additionally, the record does not contain substantial evidence showing that the storm water run-off from the impervious surface contemplated for the proposed subdivision will not result in trespass upon our property, interfere with or overwhelm our existing storm drainage, or result in other encroachments upon our property.

3. SRC 205.010(d)(3): The Notice of Decision improperly finds compliance with city infrastructure requirements based on conditions without any finding of feasibility.

The Notice of Decision finds that the tentative subdivision plan can be adequately served by City infrastructure “as conditioned.” Notice, Pg. 25. The conditions include the construction of water and sewer systems to serve each lot and an engineered storm water design to accommodate future impervious surfaces. However, as elsewhere noted in this appeal, there is no substantial evidence showing that compliance with these requirements is feasible or that fulfillment of these conditions will result in compliance with city infrastructure with other sections of the Salem Revised Code, such as the requirement that runoff from the development will not exceed pre-existing conditions.

4. SRC 205.010(d)(4): There is no substantial evidence to support finding that street *system* in and adjacent to the tentative subdivision plan conforms to the Salem Transportation System Plan and this finding is wrong as a matter of law.

The proposed subdivision is adjacent to Salem Heights Ave S, which is designated as a collector street in the Salem Transportation Plant (“TSP”). The proposed subdivision contemplates that this street *system* will provide access into the subdivision. Salem Heights does not conform to the Salem Transportation System Plan in terms of dimensions, lanes,

signaling, in-fill etc. There is no substantial evidence showing the required improvements to the miniscule portion of Salem Heights actually abutting the proposed subdivision will cause the street *system* adjacent to the subdivision to conform to the Salem Transportation System Plan. This is to say: once these improvements are made, Salem Heights will still fail to meet collector street standards. However, if the City were requiring Thomas Kay Co. were required to obtain a Preliminary Urban Growth Declaration in accordance with the Salem Revised Code, Thomas Kay Co. would be required to bring Salem Heights to collector street standards and the requirements of SRC 205.010(4)(d) would be satisfied.

5. SRC 205.010(d)(5): There is no substantial evidence to support the finding that the street system in and adjacent to the tentative subdivision is designed so as to provide for the safe, orderly, and efficient circulation of traffic into, though, and out of the subdivision.

The Notice of Decision concludes this requirement is satisfied because “the subdivision, as proposed and condition, is served with adequate transportation infrastructure in conformance with the Salem Transportation Plan.” Notice, Pg. 27.

There is not substantial evidence to support this finding. The Notice of Decision states, and the record plainly shows, that the Salem Heights Street system does not conform to the Salem Transportation Plan. Furthermore, there is no evidence that satisfaction of the conditions set forth in the Notice of Decision (requiring improvements abutting the development) will cause the street *system* in and adjacent to the subdivision (i.e., Salem Heights) to conform to the Salem Transportation Plan so as to allow safe, orderly, and efficient circulation of traffic into and out of the subdivision.

The record of this proceeding is replete with evidence that Salem Heights is terribly unsafe. The proposed subdivision will worsen the safety situation by increasing the amount of traffic. The proposed subdivision will increase the number of people in the area, which in turn, will increase the number of pedestrians and bicyclists using Salem Heights. This means an increased number of vehicles will have to navigate an increased number of bicyclists and pedestrians trying to navigate Salem Heights without proper sidewalks or bicycle lanes. Increasing the vehicle, bicycle, and pedestrian usage of an already highly dangerous collector street that admittedly does not meet collector street standards will not provide safe, orderly and efficient circulation of traffic in and out of the subdivision. Moreover, there is no substantial evidence showing that it is feasible for the miniscule changes to the portion of Salem Heights immediately abutting the subdivision to mitigate the real and substantial dangers that increased traffic, pedestrians, and bicyclists on Salem Heights will present for vehicles coming in and out of the subdivision.

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6. SRC 205.010(d)(6): Finding that tentative subdivision plan provides safe and convenient bicycle and pedestrian access from within the subdivision to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development is unsupported by substantial evidence and wrong as a matter of law.

The record shows and the Notice of Decision concedes that “existing bicycle and pedestrian access in the vicinity of the subdivision is limited. However, the Notice of Decision contends that the subdivision will incrementally improve bicycle and pedestrian access” by virtue of the “required boundary street improvement of Salem Heights.” Notice, Pg. 27.

As a threshold matter, the relevant standard is not whether the proposed subdivision “will incrementally improve bicycle and pedestrian access” as the Notice of Decision finds. Rather, the standard is whether the “subdivision plan provides safe and convenient bicycle and pedestrian access...to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development.” SRC 205.010(d)(5). Quite plainly, if a street is extremely dangerous and a subdivision makes the extremely dangerous street 1% less dangerous, it does not follow that the street is now “safe.” However, that is precisely what the Notice of Decision concludes. This conclusion is wrong. Regardless of the relative safety and convenience of Salem Heights before and after the subdivision, there is no substantial evidence in the record showing that Salem Heights provides safe and convenient access from within the subdivision to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development.

Secondly, SRC 205.010(d)(6) notably requires that the tentative plan provide safe and convenient bicycle access *to* locations one-half mile away – not merely within the subdivision or on portions of streets immediately abutting it. The placement of a sidewalk immediately abutting the subdivision that stops does not provide safe or convenient access *to* the neighborhood safety activity center if the remainder of the path to the activity center is highly dangerous.

While the question of whether the tentative plan marginally improves pedestrian and bicycle safety and access to certain locations one-half mile away is not the issue, there is no substantial evidence to support the City’s finding that the proposed subdivision provides any degree of marginal improvement. For example, there is no substantial evidence in the record showing that putting sidewalks on the portion of Salem Heights immediately abutting the proposed subdivision will reduce the overall chance of getting killed biking or walking from the subdivision to the neighborhood activity centers on Liberty St. and Commercial. To survive the trip from the subdivision to the neighborhood activity centers on Liberty/Commercial by walking or bicycle, a person has to make it the entire way. Just because there is sidewalk and wider road immediately outside the

subdivision, it doesn't necessarily follow that the total risk derived from making the walk to Liberty/Commercial is any less than it was before. In fact, it could be just the opposite. For example, the wider road might give vehicles a false sense of security, cause them to drive faster, and actually increase the risk to pedestrians and bicyclists on the trip from the subdivision to Liberty/Commercial. Similarly, on the portion of Salem Heights abutting the subdivision might give people (and children) a false sense of security and increase the number trying to walk or bicycle along Salem Heights. There is certainly no evidence in the record to show this is not the circumstance.

Finally, to the extent the list of Neighborhood Activity Centers listed on Page 27 of the Notice of Decision is purported to be exclusive, there is no substantial evidence to support that finding as there are also neighborhood activities centers (e.g. shopping/employment) on Liberty St.

7. SRC 205.010(d)(7): Finding that tentative subdivision plan mitigates impacts to the transportation system consistent with the approved Traffic Impact Analysis because traffic impact analysis is not required is arbitrary and capricious, violates the Equal Protection Clause of the 14th Amendment, and violates SRC 803.015.

SRC 803.015(a) sets forth the purpose of the traffic impact analysis requirements as follows:

The purpose of a traffic impact analysis is to ensure that development generating a significant amount of traffic provides the facilities necessary to accommodate the traffic impacts of the proposed development.

SRC 803.015(b) sets forth the requirements for when a traffic impact analysis is required, stating as follows:

An applicant shall provide a traffic impact analysis *if one of the following conditions exists* (emphasis added):

1. The development will generate 200 or more daily vehicle trips onto a local street or alley, or 1,000 daily vehicle trips onto a collector, minor arterial, major arterial, or parkway. Trips shall be calculated using the adopted Institute of Transportation Engineer's Trip Generation Manual. In developments involving a land division, the trips shall be calculated based on the proposed development that will occur on all lots that will be created by the land division.
2. The increased traffic resulting from the development will contribute to

documented traffic problems, based on current accident rates, traffic volumes or speeds, and identified locations where pedestrian and/or bicyclist safety is a concern.

3. The City has performed or reviewed traffic engineering analyses that indicate approval of the development will result in levels of service of the street system that do not meet the adopted level of service standards.

The Notice of Decision finds that a traffic impact analysis is not required because Salem Heights is a collector street and the subdivision will not generate more than 1000 trips per day. Notice, Pg. 28. This finding is legally incorrect for several reasons and not supported by substantial evidence.

First, the assertion that the development must generate 1000 trips per day to trigger a traffic impact analysis is based on the contention that Salem Heights Ave. S. is a collector street. However, Salem Heights Ave. S *does not* meet the requirements for a collector street in point of fact. The City cannot treat Salem Heights Ave as a collector street for purposes of determining whether a traffic impact statement is required when, in fact, it does not meet the requirements of a collector street.

“The purpose of a traffic impact analysis is to ensure that development generating a significant amount of traffic provides the facilities necessary to accommodate the traffic impacts of the proposed development.” SRC 803.015(a). The 1000 trip per day threshold for requiring a traffic impact statement on collector streets is based on the assumption that collector streets are in fact collector streets and can handle a 1000 trip per day increase in traffic without endangering lives. This is not the circumstance with Salem Heights Ave. The street is highly dangerous, does not afford the safety of a collector street, and any increase in traffic upon it directly threatens lives. Using the collector street designation to determine whether a traffic impact analysis is required when the record shows the designated collector is really more akin to a local street makes the requirements for a traffic impact analysis arbitrary. This violates the equal protection requirements of the 14th Amendment by providing different safety protections to similarly situated people without any rational basis.

Second, there is no substantial evidence in the record establishing that a traffic impact statement is not required by virtue of SRC 803.015(b). The record is replete with testimony from neighborhood residents identifying Salem Heights as a location where pedestrian and bicyclist safety is a concern due to traffic volumes and speeds and the fact that Salem Heights does not meet collector street standards. In addition, the City recently collected data that would show that the volume and elevated speed of traffic is a concern given the fact that Salem Heights does not meet collector street standards. However, it is not known whether the City has seen fit to put this evidence in the record. In short, there is

no substantial evidence in the record to support the City's erroneous legal conclusion that a traffic impact analysis is not required by virtue of SRC 803.015(b).

Third, there is no substantial evidence in the record showing a traffic impact analysis is not required by SRC 803.015(b)(3).

8. SRC 205.010(d)(8): Criterion is not satisfied because the Class 1 Zoning Adjustment for Lot 7 should be denied.

This requirement is only satisfied if the conditional the Class 1 zoning adjustment for Lot 7 is granted. As elsewhere asserted herein, the Class 1 Zoning adjustment should be denied.

9. SRC 205.010(d)(9). There is not substantial evidence to support the finding that the tentative subdivision takes into account topography and vegetation such that the least disruption will result from the reasonable development.

The tentative plan contemplates the cutting of significant white oaks on both the subject property and property that would be conveyed to the City. There is no substantial evidence in the record demonstrating that the cutting of significant white oaks is necessary to reasonably develop the property. Quite plainly, Thomas Kay Co., could reasonably subdivide the property into fewer lots and thereby avoid cutting the significant white oaks. The Salem Revised Code does not state that a development is only reasonable if it provides the developer with the precise number of lots the developer wants. A development such as this one, which results in the cutting of white oak, even though the property could be reasonably subdivided without cutting any white oak, does not take into account the vegetation of the site "such that the least disruption of the site will result." The City's contrary conclusion may only be achieved by interpreting the phrase "the least disruption" to mean "any disruption necessary to carry out the developer's desired plan." This interpretation deprives the requirement of SCR 205.010(d)(9) of all meaning and is therefore not a correct interpretation as a matter of law.

In short, there is no substantial evidence showing that Thomas Kay Company cannot reasonably develop the property without cutting significant white oak. Additionally, as noted elsewhere, there is not substantial evidence establishing the feasibility of removing white oak on the City's property along Salem Heights.

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10. SRC 205.010(d)(10): Finding that Urban Growth Preliminary Declaration is not required is legally wrong.

SRC 803.035(r) provides that “[w]here a subdivision...is located in...the Urban Service Area, and the construction of street improvements by the City has not yet occurred, the street improvements and dedications shall meet the requirements of SRC Chapter 200.” In turn, SRC 200.010 states that “[d]evelopment proposed...inside the USA, if development precedes city construction of *required facilities*, shall require an urban growth area development permit and must conform to the requirements of this chapter.” (emphasis added). SRC 200.020 and 200.025 provide similarly. “Required facilities” are defined as “all major and minor facilities necessary to provide adequate...transportation...for a development for which an Urban Growth Preliminary Declaration must be obtained.” SRC 200.005. In turn, a “major facility is defined as “an arterial or collector street as shown in the Salem Transportation System Plan.” *Id.*

The Notice of Decision acknowledges, and the record establishes, that Salem Heights is designated as a collector street in the Salem Transportation Plan. Therefore, Salem Heights is a “required facility” within the meaning of SRC 200.005. The Notice of Decision also concedes, and the record establishes, that Salem Heights “does not meet collector street standards.” Notice, Pg. 6. Consequently, the proposed development located inside the USA precedes city construction of required facilities and “shall require an urban growth area development permit” pursuant to SRC 200.005; 200.020; 200.025; and ORS 803.035(r).

The Notice of Decision contends that an Urban Growth Preliminary Declaration is not required because the Urban Service Area “is comprised of two distinct area: (1) the boundary formerly called the ‘Current Developed Area’ prior to the establishment of the USA; and (2) boundaries added to the CDA through USA amendments pursuant to SRC.015.” Notice, Pg. 12. According to the City, Urban Growth Preliminary Declarations “are not required for areas within the original CDA boundary because that area was not subject to the USA amendment criteria in SRC 200.015.”

The Notice of Decision is wrong. The City’s Comprehensive Planning Code (SRC chapter 64) defines the “urban service area map” as “the map of that certain area originally referred to as the ‘Current Developed Area’ originally delineated on the official zoning map by Ordinance No. 129-70, enacted July 23, 1970, and subsequently amended, and readopted by Ordinance No. 6-13, enacted June 10, 2013.” As may be seen, the Current Developed Area and the Urban Service Area are legally defined as the same thing and the distinction the City seeks to draw between the Current Developed Area and the Urban Service Area is a false one. Moreover, if development of any property within the Current Developed Area, which is one and the same as the Urban Service Area, was not required to have a Urban Growth Preliminary Declaration, the provisions of SRC 200.005, 200.020,

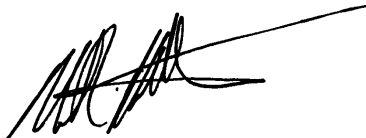
and 200.025 would be completely meaningless. These code provisions stating that “[d]evelopment proposed...inside the USA, if development precedes city construction of *required facilities*, shall require an urban growth area development permit” will not be interpreted to be meaningless. Moreover, if the City wanted to draw a distinction between land originally included in the USA and land subsequently added to the USA, the City could have written this distinction into the Salem Revised Code. However, it plainly didn’t. The City’s finding that an Urban Growth Preliminary Declaration is not required is arbitrary, capricious, an abuse of discretion, and results in unequal protection of the laws without rational basis in violation of the 14th Amendment to the United States Constitution.

An Urban Growth Preliminary Declaration is required to “list all required facilities necessary to fully serve the development and their timing and phasing which the developer must construct as conditions of any subsequent land use approval for the development.” Among other things, Thomas Kay Co. should be required to submit a Urban Growth Preliminary Declaration providing for how it is going to fully improve Salem Heights Ave to collector street standards consistent with SRC 200.035. In addition to meeting the fundamental standards, this should include, but not be limited, providing the sidewalk/infill provided for along Salem Heights in the Pedestrian System of the Salem Transportation Plan.

11. Conclusion

The Notice of Decision make makes numerous findings that are unsupported by substantial evidence and contains erroneous legal conclusions. For this reason, the Notice of Decision should be reversed and Thomas Kay Co.’s tentative plan should be denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nathan R. Rietmann', with a long horizontal line extending to the right.

Nathan R. Rietmann

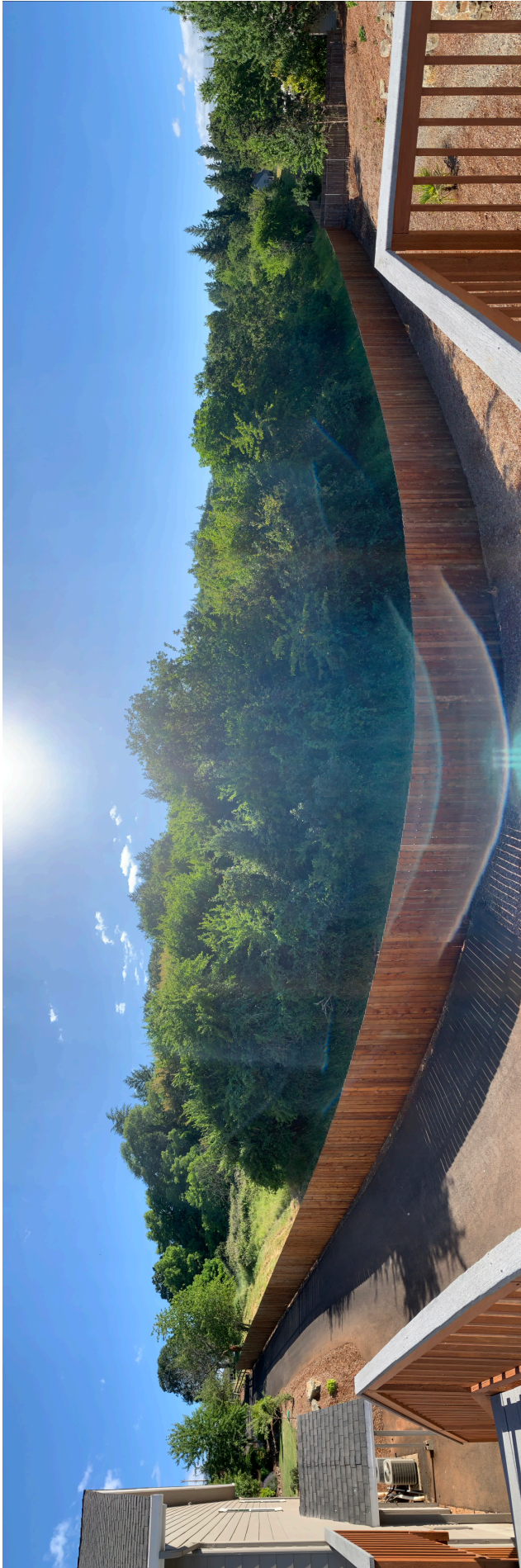


EXHIBIT 1