

Amy Johnson

From: Jennifer S. Marshall <jmarshall@sglaw.com>
Sent: Monday, August 12, 2019 9:49 AM
To: CityRecorder
Cc: Mark D. Shipman; Alan M. Sorem; Hannah F. Stevenson; Rhiya M. Grimmitt; Olivia Glantz
Subject: Wren Heights SUB-ADJ 19-02
Attachments: Final Legal Argument, 4812-2513-0911, 4.pdf

Good morning:

Attached please find Applicant's Final Argument for incorporation into the record in the Wren Heights Subdivision application.

Please confirm receipt of this document.

Thank you,

Jenny Marshall

Legal Assistant - Real Estate & Land Use Practice Group



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MEMO

To: Olivia Glantz

From: Alan Sorem

Date: August 12, 2019

Re: Final Legal Argument

Wren Heights Subdivision: City of Salem Case No. SUB-ADJ 19-02, 18-125034-LD & 18-125035



As you are aware, this firm represents the Thomas Kay Co., an Oregon corporation ("**Applicant**"), with respect to the above-referenced consolidated limited land use applications (the "**Applications**") concerning property located in the 500 to 600 blocks of Salem Heights Avenue (Marion County Assessor Map and Tax Lot Numbers: 083W04AA10400, 10600, 10601, 10700, and 10800) (the "**Subject Property**"). On June 6, 2019, the Planning Administrator's designee (the "**Administrator**") for the City of Salem (the "**City**") issued a Notice of Decision (the "**Decision**") approving the Applications. Two appeals were filed, one by Nathan Rietmann and one by Ron Eachus. The City Council called up the Applications, and a hearing took place on July 22, 2019. Certain individuals testifying in opposition to the Applications (herein "**Opponents**") requested the record be kept open following the hearing. This memorandum is Applicant's final argument. Applicant's original application materials together with the Decision, supplemental staff report, and Applicant's memorandum dated July 22, 2019 all adequately address the issues of the appeal. Therefore, the City Council must affirm the Decision.

1. A TIA is not necessary under SRC 803.015 or 205.010(d)(7).

The record contains substantial evidence supporting the Administrator's conclusion that a TIA is not required under SRC 803.015(b)(1)-(3) or SRC 205.010(d)(7). As explained previously, the evidence establishes that the proposed subdivision will not generate an average daily trip total of more than 200 average daily trips onto the local roads located to the north of the Subject Property nor more than 1,000 average daily trips onto Salem Heights Avenue, a collector street. The traffic analysis and testimony provided by Mr. Mike Ard, a professional engineer and traffic engineer, concludes that there is no documented traffic problem, and even if there was, the development will not contribute to such an alleged problem based on the current accident rates, traffic volumes, or speeds. Opponents offered no evidence of documented traffic problems based on accident rates or traffic volumes, i.e., wait times.

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The speed data was submitted into the record and reviewed by Mr. Ard and found not to be the type of data that would warrant a TIA. He disagreed that the data demonstrated an existing traffic problem notwithstanding some evidence of speeding. Moreover, he concluded that even if such speed data were determined to constitute a problem, the proposed development would not contribute to the problem. The presence of the new intersection is expected to result in a decrease of such speeding – not an increase. Therefore, there is substantial evidence in the record supporting approval of the Decision. Finally, the City’s Public Works Department Traffic Engineer, Tony Martin, has reviewed the proposal and testified through department written comments and oral testimony that no TIA is needed. Therefore, there is no evidence to substantiate an argument that the additional traffic caused by the development will exceed the adopted level of service standards required under the code.

In the alternative, Applicant contends that Opponents’ argument that they have established that there is a documented traffic safety problem violates ORS 197.307(4), as such an interpretation requests the denial of the Applications based on an inherently ambiguous development standard. LUBA has held that a development code requiring an applicant to demonstrate something is “safe” without defining such a standard in an objective manner is prohibited under the needed housing rules. *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, the development standards incorporated herein are those standards contained in the City’s Transportation System Plan (TSP) – not its code. Denial of the Applications based on development standards contained within the TSP and not expressly codified is prohibited. *Oster v. City of Silverton*, LUBA ____ Or LUBA ____ (LUBA No. 2018-103, Opinion May 7, 2019) 7-12.

2. There is no evidence in the record to support requiring additional sidewalk or road improvements.

Opponents argue that the finding that SRC 205.010(6) is satisfied is not supported by substantial evidence. Additionally, Opponent’s contention that Applicant’s burden to prove conditions of approval requiring additional street or sidewalk improvements is not constitutional. Opponents are mistaken as to the evidence in the record and they misstate the law. Testimony from Mr. Ard explains that the proposed subdivision will improve the bicycle and pedestrian access in the vicinity by improving Salem Heights Avenue along the frontage of the Subject Property. Moreover, pedestrian and bicycle traffic will be able to make use of the increased connectivity connecting the properties south of Salem Heights Avenue through to Felton Street, Earhart Street and Doughton Street. There is no negative traffic

impact for Applicant to mitigate. This is particularly important as the primary open space and only school within a half-mile is located north of the Subject Property. Applicant's accepted conditions of approval will substantially improve the traffic safety serving this nearby recreational use. The code does not expressly require Applicant to add sidewalks to the approximate quarter-mile to Liberty Street, irrespective of the unreasonable cost or disproportionality as suggested by Opponents.

Applicant renews its argument in the alternative that the City Council is prohibited from reversing the Decision or requiring such a condition of approval as a matter of law. Whether or not the development provides for safe and convenient bicycle and pedestrian access is an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4). Moreover, even the application of the one-half mile standard is a potentially ambiguous standard capable of multiple reasonable meanings, and therefore, it may not be a basis of denial or additional conditions of approval. If the City were to adopt conditions of approval requested by Opponents, such as being obligated to purchase additional right-of-way or improve all or additional portions of Salem Heights Avenue, such conditions would cause unreasonable cost and delay and would be in violation of ORS 197.307(4)(b) and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013).

The estimated construction costs of the Salem Heights Avenue street improvements are in excess of \$170,000.00. This amount is above the costs of the right-of-way acquisition, the costs of construction of the internal streets and sidewalks that will be dedicated to the City upon construction, and in addition to the transportation system development charges (\$2,873.00 per home) assessed to ensure Applicant pays for its proportionate share of costs for reimbursement of the existing transportation system and planned needed facilities. As explained by Mr. Ard, the proposal will not create a negative traffic impact, and it will not cause any road to fail under the City's development standards. The evidence clearly demonstrates any additional conditions of approval would be in excess of what is reasonable and constitutional.

It is the City's burden to prove compliance with ORS 197.307(4). ORS 197.831 ("In 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.") It is the City's burden to prove compliance with the prohibitions on unconstitutional conditions of approval. *JC*

Reeves Corp. v. Clackamas County, 131 Or App 615, 618, 887 P.2d 360 (1994) (*Dolan* held “the “burden” of showing compliance with the applicable Fifth Amendment standard “properly rests” on the governmental body that has “made an adjudicative decision” to place conditions on the approval of a permit for the development of particular property. 512 U.S. at ---- n. 8, 114 S.Ct. at 2316 n. 8, 129 L.Ed.2d at 320 n. 8”). The comment from Opponents that Applicant has somehow failed to demonstrate such additional conditions of approval or denial would not be unreasonable or unconstitutional is factually inaccurate and misstates the law.

3. A UGA Permit is not needed by the code and is prohibited by state law.

Opponents’ reiterate their argument that City staff and Applicant have failed to explain why a UGA permit is not necessary.

Applicant’s development does not precede the construction of Salem Heights Avenue as evidenced by the fact it was originally developed as a county road. Opponents’ attempt to equate the fact that Salem Heights Avenue is currently developed below standards provided in the TSP to a circumstance in which Salem Heights Avenue does not *exist*. The construction of Salem Heights Avenue has long preceded the proposed development. The fact that the most recent TSP states that additional improvements should be planned for Salem Heights Avenue is inapposite to SRC 200.010(c). Opponents’ interpretation that any traffic facility within 260 feet of a development site that is currently developed below TSP standard requires a UGA permit is inconsistent with the text, purpose and policy of SRC Chapter 200 and SRC 200.010(c). Opponents may disagree with this explanation and interpretation of the code, but their argument that there is no basis to support such an interpretation is in error.

Applicant renews its argument that in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. If the City were to adopt conditions of approval requested by Opponents, such as being obligated to purchase additional right-of-way or improve all or additional portions of Salem Heights Avenue, such conditions would cause unreasonable cost and delay in violation of ORS 197.307(4) and would be unconstitutional conditions in violation of *Koontz*. Opponents’ convoluted argument demonstrates that the language of SRC 205.010(d)(10) and Chapter 200 are ambiguous. Such standards and procedures that either require approval or denial of the proposal are ambiguous and cannot be a basis of denial under ORS 197.307(4). Moreover, the requirement for a subdivision application to conform with an uncodified TSP unlawfully expands the scope of review of a limited land use decision. ORS 197.195.

4. Applicant has adequately raised the issue of nonconformance with ORS 197.195 and ORS 197.307(4).

Opponents' comments suggest that Applicant has not adequately raised the issue that if the City Council were to reverse the Decision or require additional street improvements as conditions of approval, the City Council would violate ORS 197.195 and ORS 197.307(4). Opponents' comments are without merit. Applicant has explained in great detail how these laws generally apply to this case and cited numerous standards and criterion in contention explaining how Opponents' requested interpretation would result in a violation of law.

5. Real estate law claims should not be a basis for reversal of the Decision.

Opponents have raised two comments that the proposed development will cause a violation of a third party's legal rights. First, Mr. Rex Anderson testified that the Subject Property was bound by a sale agreement to himself and his wife. He states he will file a claim against the property owner and Applicant. Second, Mr. Bruce Kilby testified that the proposed development will encroach on a driveway located immediately west of proposed Lot 7. Neither allegation is factually accurate and neither allegation is supported by any documentation or other evidence in the record.

The Administrator deemed the Applications complete, including the requisite evidence of authority from the property owner. Applicant's tentative plat identifies that an easement and private roadway serving Mr. Kilby's property will be unaffected by the proposal as the existing improvement is not located on the Subject Property. Applicant's proposal depicts a minor modification to a driveway that splits off of the access easement serving Mr. Kilby's property, but there will be no modification of the roadway serving the Kilby property. Lot 7 will not take access from Mr. Kilby's property or the related easement. There is no evidence to substantiate Mr. Kilby's comments. Moreover, neither Mr. Kilby nor Mr. Anderson have submitted any comments explaining why such claims, even if substantiated, would require reversal of the Decision. Allegations that a proposal may create a private claim for relief or violate a private agreement do not authorize justify denial of a land use decision. *Brydon v. City of Portland*, 2 Or LUBA 353, (1981) ("Restrictive covenants between private parties do not make up the law of the city and may not be used to deny the request") *citing* Anderson, *American Law of Zoning*, at 19.24; *see also Long v. Marion County*, 26 Or LUBA 132 (1993).

6. Conclusion

Applicant requests the City Council to affirm the Decision. Opponents disagree with the Administrator's interpretation of the code and weighing of the evidence, but the Decision is consistent

with the plain text of the code and all the findings of fact are supported by substantial evidence. The Applications are for limited land use decisions and needed housing. The City Council must affirm the Decision without modification.

August 12, 2019

Mayor Chuck Bennett and City Council
c/o Lisa Anderson Olgilvie, Planning Administrator
City Hall, Room 305
555 Liberty St. NE
Salem, Oregon 97301
via email lmanderson@cityofsalem.net

**RE: WREN HEIGHTS SUBDIVISION, SUB-ADJ19-02
APPLICATION SUMMARY**

Dear Mayor Bennett and Councilors:

This summary of the Wren Heights subdivision proposal is provided for the record on behalf of the Applicant, during Applicant's final rebuttal period.

The subject property is designated Single Family Residential on the Salem Area Comprehensive Plan (SACP) map, and it is correspondingly zoned RS. Single-family homes are permitted outright in the RS zone. Subdivisions are permitted according to the development standards and criteria of the Code, and subject to Administrative Review. The Planning Administrator found that the proposal meets the applicable development standards and satisfies the criteria.

The subdivision proposes 34 lots, of which 33 are residential lots and one is for storm drainage detention and treatment. The lots in the proposed subdivision range from approximately 5,495 sq. ft. to 18,845 sq. ft., and the 33 residential lots average 7,343 sq. ft. The minimum lot size for single-family homes in the RS zone is 4,000 sq. ft.

The property has remained vacant to date by choice of the property owner. It is not designated as public land, open space, or as any type of wildlife or vegetation preserve or habitat.

The proposal represents infill of vacant urban property. It is situated between developed neighborhoods on all sides. Public services exist at the property boundaries, and only need to be extended into the property to serve the development. No major service extensions are required.

The property is close to the city center, close to schools, and close to commercial services including food stores, restaurants, and personal and financial services, among others. These nearby services can reasonably be reached without the use of a motor vehicle. The development of public streets within the property will improve the connection between the neighborhoods to the north and south for all modes of transportation.

The ready availability of public services, and its location, cause the property to be a preferred location for new residential use within the city, and serve to maintain and promote compact urban development.

The surrounding neighborhoods mainly developed long before the density standards and improvement requirements of the City's currently adopted development policies and Code. While the surrounding neighborhoods exhibit their own particular character and charm, under existing State and local land use directives, policies, and requirements, it is not appropriate or possible for the proposed development to replicate the development pattern of these existing, older neighborhoods. The requirements to provide additional housing in urban areas is further emphasized by recently adopted State legislation, HB 2001, which enables various forms of increased density housing in single-family zones. Significantly, that legislation allows a local government to allow such housing without consideration for whether transportation facilities will be significantly affected.

For these reasons, along with the others that have been provided in support of this application, we request that the Planning Administrator's Decision be affirmed.

Thank you.

Sincerely,
[signed]

Jeffrey R. Tross
Tross Consulting, Inc.