

TO: Mayor Keith Mays and Sherwood City Council
FROM: Eric Rutledge, Associate Planner
THROUGH: Carrie Richter, Contract Legal Counsel
DATE: July 7, 2022
SUBJECT: Staff Report for Land Use Appeal Hearing - LU 2021-009 MM
Cedar Creek Plaza Multifamily

Background Information

A. Applicant: Deacon Development, LLC
901 NE Glisan St., Suite 100
Portland, OR 97232

Appellant: Deacon Development, LLC
901 NE Glisan St., Suite 100

Owner: DD Sherwood Two, LLC.
TL 2200 901 NE Glisan St., Suite 100
Portland, OR 97232

Owner: DD Sherwood One, LLC.
TL 2700 901 NE Glisan St., Suite 100
Portland, OR 97232

B. Location: 16840 and 16864 SW Edy Rd. (Tax Lots 2S130DA2700 and 2200).
West corner of Hwy 99W and SW Edy Rd. (Cedar Creek Plaza)

C. Current Zoning: Retail Commercial (RC)

D. Review Type: Type IV Major Modification / Appeal

E. Public Notice: Notice of the appeal hearing was provided in accordance with § 16.72.020 of the Sherwood Zoning and Development Code (SZDC) as follows: notice was distributed in five locations throughout the City, posted on the property, and mailed to property owners within 1,000 feet of the site on or before June 24, 2022. Newspaper notice was also provided in a newspaper of local circulation on June 30 and July 7, 2022.

Application Summary

The applicant / appellant (“applicant”) is proposing a Major Modification to an Approved Site Plan for a new 3-story, multi-family building located within the Cedar Creek Plaza Shopping Center. The original Site Plan approval for the Cedar Creek Plaza Shopping Center was issued under Land Use Case File SP 16-10 / CUP 16-06 / VAR 17-01.

As originally proposed, the applicant proposed to construct 84 units within 3 stories located entirely on Lot 2 but relying on Lots 2, 3, and 7 within the Cedar Creek Plaza subdivision plat as providing the necessary minimum lot area. After the owner of Lot 3 objected, the applicant revised the proposal removing Lot 3 and reducing the number of proposed units to 67 units, using Lots 2 and 7 to meet the required lot area. Lot 7 was developed with a single-story commercial building that is currently occupied by local businesses including a clothing store and nail salon. A total of 90 new vehicle parking stalls are proposed for a total of 596 stalls within the Cedar Creek Plaza center. Access to the site is proposed from the existing driveways along SW Edy Rd. and Hwy 99W.

Planning Commission Decision

The Sherwood Planning Commission (Commission) held the initial evidentiary hearing on the application on January 25, 2022. At the request of the applicant, the hearing was continued to February 22, 2022 and again two additional times to a final date of May 24, 2022. The Commission unanimously denied the application on May 24, 2022 as recommended in the staff reported dated May 17, 2022.

After considering all of the arguments and evidence presented, the Commission found that minimum lot area standards reference the “lot area” where the new development is proposed to be built and does not include lot area that is not contiguous and already developed for another use. As such, the maximum number of units that can be provided on Lot 2 is 46, prior to removing any access easements from the lot area calculations. When accounting for the existing easement on Lot 2, the maximum permitted density on Lot 2 is between 44 – 46 units. The applicant proposed 67-units which exceeds the density permitted by at least 21 units.

The Commission adopted findings of non-compliance for three code sections, all of which are related to City standards for minimum lot area. The findings of non-compliance relate to: SZCDC § 16.12.030 Residential Land Use Development Standards, 16.22.020 Uses (Commercial Land Use Districts), and 16.90.020(D)(1) Site Plan Review Findings, and are discussed in greater detail below.

Appeal Procedures

The City Council acts as the Appeal Authority for Type IV land use decisions issued by the Planning Commission. Land use appeal procedures are described in SZCDC § 16.76 and are limited. No new evidence can be submitted into the record. Only individuals who testified before the Planning Commission, either orally or in writing, will

be allowed to testify before the City Council and all arguments must similarly have been raised below.

Staff Analysis on Appeal

The applicant’s notice of appeal contains eight bulleted issues that overlap and for ease of explanation, staff provides a reorganized, consolidated response. This analysis is based solely on the evidence and argument already contained in the record.

The appellant argues that the application to authorize 67 housing units must be approved because either: (1) as a modification of the same initial Cedar Creek Plaza land use approval, both of these lots were part of a single parcel allowing for shared development rights across lots; (2) the definition of “lot” includes multiple “lots of record” without requiring any lot adjacency; or (3) the lot area standards do not qualify as “dimensional requirements” under the plain language of the SZCDC and to find otherwise would run afoul of the clear and objective standard limitations of ORS 197.307(4).

Regulations at Issue

SZCDC § 16.22.020 specifies the uses that are allowed in commercial zones set forth in tabular format and for multi-family housing, it provided:¹

Uses	RC Zone
Multi-family housing, subject to the <i>dimensional requirements</i> of the High Density Residential (HDR) zone in 16.12.030 when located on the upper floors, in the rear of, or otherwise clearly secondary to commercial buildings. ^{2, 3}	P

(emphasis added)

SZCDC § 16.12.030, includes Residential Land Use Development Standards, which provide, in relevant part:

“16.12.030 - Residential Land Use Development Standards

A. Generally

No lot area, setback, yard, landscaped area, open space, off-street parking or loading area, or other *site dimension or requirement*, existing on, or after, the effective date of this Code shall be reduced

¹ SZCDC Chapter 16.22 was amended in 2021 to change how multi-family development in commercial zones must be designed including requiring its location above a commercial ground floor along with density limitations. As such, it is unlikely that the issues raised in this appeal will occur again.

below the minimum required by this Code. Nor shall the conveyance of any portion of a lot, for other than a public use or right-of-way, leave a lot or structure on the remainder of said lot with less than minimum Code dimensions, area, setbacks or other requirements, except as permitted by Chapter 16.84. (Variance and Adjustments)

B. Development Standards

Except as modified under Chapter 16.68 (Infill Development), Section 16.144.030 (Wetland, Habitat and Natural Areas) Chapter 16.44 (Townhomes), or as otherwise provided, *required minimum lot areas, dimensions and setbacks* shall be provided in the following table.

C. Development Standards per Residential Zone

Development Standard	HDR
Minimum lot area (multifamily, first 2 units)	8,000 SF
Minimum lot area (multifamily, each additional unit after first 2)	1,500 SF
Minimum Lot width at front property line	25 ft.
Minimum Lot width at building line ^[1] (multifamily)	60 ft.
Lot depth	80 ft.
Maximum Height ^[2]	40 or 3 stories
Front yard setback ^[4]	14
Interior side yard (multifamily, over 24 ft. height)	§ 16.68 infill
Rear yard	20

¹Minimum lot width at the building line on cul-de-sac lots may be less than that required in this Code if a lesser width is necessary to provide for a minimum rear yard.

²Maximum height is the lesser of feet or stories (emphasis added.)

SZCDC 16.10.20 defines "lot" as:

"A parcel of land of at least sufficient size to meet the minimum zoning requirements of this Code, and with frontage on a public street, or easement approved by the City. A lot may be:"

A. A single lot of record; or a combination of complete lots of record or complete lots of record and portions of other lots of record.

B A parcel of land described by metes and bounds; provided that for a subdivision or partition, the parcel shall be approved in accordance with this Code."

"Lot area" is defined as:

"The total horizontal area within the lot lines of a lot, exclusive of streets and access easements to other property."

Cedar Creek Plaza and the Deacon Tract Modification Issues

Grounds 1, 3, 4 and 5: The original land use approvals (SP 16-10/CUP 16-06/VAR 17-01) applied to the entirety of Cedar Creek Plaza that was approved as a unified 13.17-acre development. As this Application is a modification of that original approval, the boundaries of the relevant area are the same as those that were originally approved. Further, Deacon owns Lots 2 and 7 within the "Deacon Tract," which is itself part of the original area approved for the existing Cedar Creek Plaza. The Cedar Creek Plaza approvals run with the land and bind each successive owner of property. A change in ownership of any of the lots does not invalidate these approvals and each owner is bound by the original site plan approval. Lot 2 is currently vacant, and the Application proposes 67 units of multifamily housing. The number of units proposed is consistent with the minimum lot size requirements for multifamily housing, based on the combined area of Lots 2 and 7 within the Cedar Creek Plaza and the Deacon Tract.

Staff Analysis: The Commission findings concur that Lots 2 and 7 are within the Deacon Tract which is part of the original area approved for Cedar Creek Plaza (SP 16-10) and that these approvals run with the land so as to survive successive owners. While Lots 2 and 7 are part of the original area of the Site Plan approval, both lots are part of a commercial subdivision that created seven new lots, each meeting the minimum lot area and other dimensional standards of the zone independently from each other (SUB 17-02). The minimum square footage allowed for a multi-family unit development is expressly directed to "lot area" and not to any initial site plan approval or parent-parcel development tract. All of the lots except Lot 2 have been developed with commercial buildings, including Lot 7. As such, it is not clear how the applicant can claim in its 5th appeal point that the Cedar Creek Plaza approvals provide the basis to determine

“where there is enough undeveloped ‘lot area’ to allow the proposed residential unit density” when Lot 7 is not undeveloped.

Typically, where a term is given a particular meaning in one place, it is assumed to have that same meaning throughout. As such, if “lot” for purposes of minimum lot area takes into account the whole of the parent parcel or the Cedar Creek Plaza approval area, that same parent parcel would be the “lot” for purposes of the other dimensional standards like lot width and depth. Uniform application of the term “lot” when considering all of the dimensional standards requires treating Lot 2 and separate and distinct from Lot 7 as determined in the 2017 subdivision approval. Staff identifies no error in the Planning Commission’s approach on this issue.

Definitions of “Lot” and “Lot Area”

Grounds 7 & 8: The definition of “lot” in SZCDC 16.10.20 may include more than one lots of record that need not be contiguous.

Staff Analysis:

First, it is important to point out that nothing in the SZCDC contemplates transfer of necessary lot area across lots or developments. As such, the Commission found that while the definition of “lot” may allow “a combination of complete lots of record,” the definition of “lot” was not controlling with respect to SZCDC § 16.12.030. The more specific and applicable definition of “lot area” is defined as: “The total horizontal area within the lot lines of a lot, exclusive of streets and access easements to other property.” The reference in this definition to “area within the lot lines” is premised on the idea that the area in question would be surrounded by a single set of lot lines that can be used to determine the lot area.

The Commission found that the purpose of maintaining minimum development standards such as lot area is to establish a minimum amount of space necessary to accommodate a development. Under the applicant’s interpretation of “lot”, the minimum lot area can be met by combining one or more in contiguous lots within the same Site Plan or subdivision. Under this approach, the land used to meet the minimum lot area standard is not required to be physically available to support the development and could already be entirely developed with a different use. If the applicant is able to borrow lot area from a developed and non-contiguous parcel in this manner, it could do so again and again, frustrating the minimums required by code. Such an approach would violate the mandate that no lot area “shall be reduced below the minimum required by this Code.” SZCDC § 16.12.030.A. Further, applying such a malleable definition of the term “lot” would interject a value-laden policy judgment which would violate the clear and objective decision making obligations for needed housing as prescribed by ORS 197.307(4).

Therefore the Commission found that definition of “lot area” is the controlling definition over “lot” when determining compliance with the zone’s minimum lot area standards. The Commission found that Lot 7 could not be used to meet the minimum lot area standard for the proposed multifamily development on Lot 2.²

Dimensional Standard Limitations and Clear and Objective Standards

Grounds 2 and 6: ORS 197.307(a) (known as the "needed housing statute") provides that "[e]xcept 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." Thus, the Application may be subject only to clear and objective standards.

The "density standards" of the HDR zone cannot be imposed because there is no clear and objective link to those standards. Rather, the SZCDC applicable to the Application simply provides that in the RC zone, multi-family dwellings are permitted "subject to the dimensional requirements of the High Density Residential zone in 16.12.030." Section 16.12.030 separately lists "minimum lot areas, dimensions, and setbacks." The minimum lots areas to which staff refers as applicable to the Application are not listed as "dimensional standards" under 16.12.030. Thus, the lot area standards do not apply as a matter of plain language. To the extent that applicability of the “lot area” standards is ambiguous or unclear, such standards cannot be applied because the link between the lot area requirements of the HDR zone and the residential use allowance in the RC zone is not clear and objective.

Staff Analysis: SZCDC § 16.22.020 states that multi-family housing is permitted in the Retail Commercial zone “subject to the dimensional requirements of the High Density Residential zone in 16.12.030”. The applicant’s interpretation of the “dimensional requirements” focuses on 16.12.030 Subsection (B) “Development Standards” and the specific language that refers to “minimum lot area, dimensions, and setbacks” within this subsection. The applicant argues that because “lot area” and “setbacks” are listed

² Although not raised in the notice of appeal, applying the definition of “lot area” in SZCDC § 16.10, the Planning Commission concluded that access easements to other properties are required to be excluded from the final calculations. The proposal did not remove the access easement on Lot 2 of the Cedar Creek Plaza subdivision from the lot area calculations (Exhibit BB to the land use record – Sheet 3, Note 4). The size of the easement appears to be approximately 2,000 SF and removing it from the lot area calculations would likely impact the permitted unit count on the property and was not taken into account. This explains one of the reasons why a condition of approval could not be crafted limiting the development as necessary to satisfy the lot area dimensional standard, in addition to potentially requiring significant design changes.

separately from “dimensions” that only “dimensions” are applicable under the phrase “dimensional requirements” in 16.22.020. While it is not clear in the application or appeal, it appears that under this interpretation only lot width and lot depth would fall under the word “dimensions”. Multi-family housing in the City’s commercial zones would therefore only be subject to lot width and depth standards. This would create a nonsensical situation where the City could not impose any lot area or setback, and perhaps height requirements on multi-family housing within the high density zone. Although not without doubt, nothing in the structure of SZCDC § 16.22.020 and its reference to SZCDC § 16.12.30 suggests that the only dimensional standards applicable to multi-family housing are the lot width and depth provisions and not the area square footage dimensions as well.

The Commission findings acknowledge that the needed housing statute applies to the application. The Commission applied all of the development standards listed under SZCDC § 16.12.030 as dimensional requirements, resulting in a clear and objective path for housing development in the Retail Commercial zone. This interpretation of the code is consistent with previous land use decisions made by the Commission, whereby all of the standards listed in Table C of SZCDC § 16.12.030 are applied to housing development in the City’s commercial zones (SP 16-04). In fact, the applicant appeared to concede that the lot area limitations applied as a dimensional standard where it reduced the unit count when it concluded that it could no longer use development rights from Lot 3, as well as Lots 2 and 7.

The Commission further found that the applicant applied the City’s code in an unclear and unobjective manner. As described in the response to Grounds #1 above, the application combines Lots 2 and 7 in order to meet minimum lot area standard but does not address how other dimensional standards such as lot width, lot depth, and lot width at building line are met when two lots are involved. If the City were to agree with this flexible approach, applicants would have the ability to meet each development standard with one or more lots that they own to suit their objectives. For example, an applicant could propose a new building that meets the setbacks of the lot on which it is located, but add to its stated minimum lot width by using another lot in the same ownership, subdivision or Site Plan. The Commission found that combining lots in this way in an ad hoc manner is not consistent with City code and the needed housing statute as it interjects a value-laden policy judgment which would violate the clear and objective decision making obligations of the City.

It is also important to note that the applicant has not lost any development rights as a result of the Commission decision because the applicant can still develop Lots 2 and 7 with multifamily housing at the density allowed by the HDR’s minimum lot area requirements. While Lot 7 has been developed with a single-story commercial building, the owner is entitled to a minimum of 16 multifamily units on the lot. The lot would need to be redeveloped to accommodate the housing, but the entitlement under the code still

exists. The Commission simply found the City's code does not permit the applicant to transfer area between or combine Lots 2 and 7 to meet the lot area for 67-units on Lot 2.

In conclusion, the Commission found that the phrase "dimensional requirements" in 16.22.020 is not defined by the narrow language SZCDC 16.12.030 Subsection (B). Instead, when taken in the context of its location in the code and applicability to housing developments, the phrase "dimensional requirements" refers to a broader category of dimensional standards that include lot area and setbacks. If "dimensional requirements" were intended to be narrowly defined as proposed by the applicant, the code would have likely referenced the specific dimensional standards (e.g. lot depth and lot width).

Staff Recommendation on Appeal

After review of the applicable approval criteria, the appeal petition, and Planning Commission decision, staff recommends affirming the Planning Commission decision and denying the application.

City Council Alternatives:

The Appeal Authority may act to affirm, reverse, remand, or amend the action being reviewed. Due to the 120-day deadline, the decision cannot be remanded to the Planning Commission unless an extension is granted by the applicant.

- A. Affirm the Planning Commission decision and deny the application based on the Planning Commission Findings Report dated May 24, 2022.
- B. Amend the Planning Commission decision and deny the application with additional / amended findings of non-compliance.
- C. Reverse the Planning Commission decision and adopt findings of compliance for SZCDC § 16.12.030, 16.22.020, and 16.90.020(D)(1).