

From: [Brad Kilby](#)
To: [Eric Rutledge](#); [Colleen Resch](#)
Cc: [Steve Deacon](#); [Pete Snook](#); [Ian Lewallen](#); [Robinson, Michael C.](#); [Janet T. Jones](#); [Matt Bell \(mbell@kittelton.com\)](#); [Wayne Kittelson](#)
Subject: Deacon Development Hearing presentation
Date: Tuesday, January 25, 2022 5:27:34 PM
Attachments: [We sent you safe versions of your files.msg](#)
[PC Hearing Presentation_01252022.pdf](#)

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Mimecast Attachment Protection has deemed this file to be safe, but always exercise caution when opening files.

Good Evening Eric,

Please find the attached PowerPoint presentation that I intend to provide tonight. I have also discussed the lot 3 issue raised in Mr. Kobacks' letter with Mike and the rest of the team. I plan to address that specifically within my testimony. Essentially, the points raised are incorrect for the following reasons:

- Deacon owned lot 3 when the application was submitted and is vested to that position so the new Lot 3 owner's consent was not needed to proceed.
- The new Lot 3 owner is contractually bound by the CC&R's and his consent to parking pursuant to the CC&R's is not needed.
- Representation within the purchase and sale agreement is beyond the scope of this hearing and is essentially a private matter between Deacon Development and the Lot 3 owner.

Brad Kilby, AICP

Planning Manager

HARPER HOUF PETERSON RIGHELLIS INC.

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January 25, 2022

City of Sherwood, Planning Commission
Chair Simson & Planning Commission
c/o Erika Palmer, Planning Manager and Eric Rutledge, Associate Planner
22560 SW Pine Street
Sherwood, OR 97140

Re: Cedar Creek Plaza Multi-family Project

Dear Chair Simson and Planning Commission,

I am writing this letter regarding our land use application for the above noted project.

We understand that the Planning Commission may have questions regarding how the parking at this project is managed.

We offer the following information regarding the parking at the Deacon Tract and the 3-Parcel Tract (Providence/Rembold/Deacon):

- The CC&R's for both parcels allow for guests, patrons and invitees to park anywhere on any of the parcels.
- Both CC&R's have provisions for cure, should situations take place that are adverse to the intent of the documents or the code.
- There is already a property manager hired to oversee the maintenance and use of the Deacon Tract (shopping center) and there will be a different property manager hired to oversee just the maintenance and use of the apartments.
- We have hired a very well-respected traffic and parking engineer (Kittelson) to conduct multiple studies of the parking and their conclusion is that there is not currently a parking problem and that there won't be a parking problem after the apartments are open.
- Our very detailed analysis shows that our application meets and exceeds the City's code for parking and the City staff agrees with this finding.

In order to mitigate any unforeseen future parking challenges, we offer the following recommendations:

- Any potential parking issue should only be addressed if, and when, it occurs. Trying to impose further restrictions now could limit our options later and could be detrimental to the ultimate goal of having a well-functioning parking program.
- We are already committed to focusing the apartment resident parking on Lot 2, which will have 92 of its own parking spaces. These are parking spaces that are being added to support the new apartment building.
- We will guide apartment guests and invitees to use the more remote areas of the Deacon Tract or the Providence Tracts.

Page 2

- If we are made aware of a verifiable parking issue, we intend to hire Kittelson to help us evaluate the source of the challenge and potential solutions. Then, a parking management plan will be invoked, but only once the issue actually occurs and can be studied.

We remain open to questions and are willing to provide additional information, should the City or Planning Commission desire further clarification.



Steve Deacon
Manager
Deacon Development, LLC

January 25, 2022

Project #: 26974.0

Eric Rutledge, Associate Planner
City of Sherwood, Oregon
Delivered by email to rutledgee@sherwoodoregon.gov

RE: LU 2021-009 MM Cedar Creek Major Modification

Dear Eric:

I offer the following comments in response to a letter report submitted into the record for case file LU 2021-009 from Mr. John Manix PE of PBS Engineering and Environmental, Inc. and dated January 17, 2022:

1. The letter report states on page 2 that “The city’s minimum parking requirements were not verified.” This is a critically important omission in Mr. Manix’s analysis because it is the criterion the Planning Commission must use to determine whether the proposed parking supply meets City requirements. Because of this acknowledged omission, therefore, Mr. Manix cannot dispute Kittelson’s key finding, which is also supported by City staff, that the city’s minimum parking requirements are met.
2. The letter report relies almost exclusively on Mr. Manix’s recounting of personal experiences, opinions and anecdotes that are unsupported by facts or evidence. These experiences, opinions and anecdotes are often so broadly stated that they are not useful to the current decision-making process. As one example, Mr. Manix presents a finding on page 4 that “public agency parking regulations requiring only the minimum number of parking spaces often result in parking overflow off-site”. This is not a valid finding because it is not supported by any evidence. Furthermore, it is a statement of opinion that cannot be justified without considerable additional context including but not limited to
 - a. the regulation being evaluated;
 - b. the location being discussed (e.g., urban core business district vs. suburban environment);
 - c. the type, scope, scale and mix of the land uses being examined;
 - d. the availability, proximity, regulation, and suitability of alternative off-site parking options;
 - e. the hourly demand and supply profiles for each of the examined land uses; and
 - f. the temporal and spatial opportunities that exist for on-site shared parking.
3. The only real evidence presented in the letter report is in the form of aerial parking lot photos and tabulated parking lot occupancy surveys conducted on January 11-12, 2022. This evidence reveals pm peak period parking lot occupancy rates in the range of 40-60%, which is far below

the occupancy levels reported in Kittelson's September 2021 survey. This evidence therefore does not appear to support Mr. Manix's expressed concern for a parking capacity problem and instead further buttresses Kittelson's analysis and findings.

Thank you for the opportunity to provide these responses to the PBS letter report.

Sincerely,
KITTELSON & ASSOCIATES, INC.

A handwritten signature in blue ink that reads "Wayne Kittelson" with a horizontal line extending to the right.

Wayne Kittelson, P.E.
Principal Engineer

From: [Gabriel Zapodeanu](mailto:Gabriel.Zapodeanu@sherwoodoregon.gov)
To: [Eric Rutledge](mailto:Eric.Rutledge@sherwoodoregon.gov)
Cc: [Adina Zapodeanu](mailto:Adina.Zapodeanu@sherwoodoregon.gov)
Subject: Ref: https://protect-us.mimecast.com/s/9O3tCOYDgpiAjQguEy_su?domain=sherwoodoregon.gov
Date: Tuesday, January 25, 2022 8:06:43 PM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you are expecting this email and/or know the content is safe.

Dear Mr. Rutledge,

We would like to let you know our concerns related to the intent by Deacon to build a Hotel on the vacant lot from the Cedar Creek Development.

My wife, Dr. Adina Zapodeanu is the owner of the Sherwood Family Eye Health, one of the tenants in the Market Center and one of the first tenants in the Center.
Parking occupancy is significantly lower now, comparing with prior to the COVID-19 pandemic.

Prior to the beginning of 2020, I have experienced many times when during weekdays afternoons and evenings I could not find parking available in the Shopping Center.
It was common that I had to drive around, to wait for a guest from Planet Fitness or patron of the restaurants to leave to be able to park.
The same experience was common during the Saturday's afternoon.

Since she opened her office in this new location, there are few more tenants in the Shopping Center and this already increased the pressure on the limited parking available.

We strongly believe that building a hotel with a low number of parking spots will impact the available parking for our patients. Some of our patients are old and unable to walk long distances.
This will impact our business and make it harder for patients to come to visit us.

We strongly oppose changing the existing intent of use of the vacant lot to a Hotel with inadequate parking.

Please let me know if anything else I may provide you to support our position.

Sincerely,

Gabriel Zapodeanu
Cell: 502-309-4949
23742 SW Pinehurst Dr
Sherwood, OR 97140

From: [Gabriel Zapodeanu](#)
To: [Eric Rutledge](#)
Subject: Re: Ref: <https://protect-us.mimecast.com/s/IMSJC4x36ntJPDWcOIG9k?domain=sherwoodoregon.gov>
Date: Friday, January 28, 2022 9:43:04 AM

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Eric,

Thank yo for your email.
I realized this after we sent the input.

Building an apartment building would actually have even a greater impact to the existing parking as occupancy will be higher comparing with an Hotel. The average number of vehicles, and size of the vehicles, would be higher per unit comparing with an Hotel. It is likely that each tenant family would have two cars, comparing with an average of one or less for a Hotel room.

As a lot of people continue to work from home, these cars would be parked all the time in front of the apartment building and in the Shopping Center parking, closer to the proposed building.

My wife's office is in the same building with the IHOP and closer to the proposed Building, and it will be impacted by this proposal.

We oppose the change from an Hotel to an Apartment building as it will have significant impact to an already very busy parking lot.

Please let me know if any other info I may provide to you.

Gabriel Zapodeanu

On Jan 28, 2022, at 9:07 AM, Eric Rutledge
<RutledgeE@SherwoodOregon.gov> wrote:

Thank you Gabriel. We will include this comment in the record.

I wanted to let you know that the applicant is not proposing a hotel on Lot 2. They are proposing an apartment building. The application, plans, and staff report can be viewed at the link below. Let me know if you have any follow up questions or testimony.

<https://www.sherwoodoregon.gov/planning/project/lu-2021-009-mm-cedar-creek-multifamily-development>

Eric Rutledge
City of Sherwood
Associate Planner
rutledgee@sherwoodoregon.gov
Desk 503.625.4242

Work Cell 971.979.2315

From: Gabriel Zapodeanu <gabriel.zapodeanu@gmail.com>
Sent: Tuesday, January 25, 2022 8:04 PM
To: Eric Rutledge <RutledgeE@SherwoodOregon.gov>
Cc: Adina Zapodeanu <azapodeanu@sherwoodeye.com>
Subject: Ref: <https://www.sherwoodoregon.gov/planning/project/cedar-creek-multifamily-development>

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you are expecting this email and/or know the content is safe.

Dear Mr. Rutledge,

We would like to let you know our concerns related to the intent by Deacon to build a Hotel on the vacant lot from the Cedar Creek Development.

My wife, Dr. Adina Zapodeanu is the owner of the Sherwood Family Eye Health, one of the tenants in the Market Center and one of the first tenants in the Center. Parking occupancy is significantly lower now, comparing with prior to the COVID-19 pandemic.

Prior to the beginning of 2020, I have experienced many times when during weekdays afternoons and evenings I could not find parking available in the Shopping Center. It was common that I had to drive around, to wait for a guest from Planet Fitness or patron of the restaurants to leave to be able to park. The same experience was common during the Saturday's afternoon.

Since she opened her office in this new location, there are few more tenants in the Shopping Center and this already increased the pressure on the limited parking available.

We strongly believe that building a hotel with a low number of parking spots will impact the available parking for our patients. Some of our patients are old and unable to walk long distances.

This will impact our business and make it harder for patients to come to visit us.

We strongly oppose changing the existing intent of use of the vacant lot to a Hotel with inadequate parking.

Please let me know if anything else I may provide you to support our position.

Sincerely,

Gabriel Zapodeanu
Cell: 502-309-4949
23742 SW Pinehurst Dr
Sherwood, OR 97140

February 08, 2022

City of Sherwood Planning Division

Attn: Eric Rutledge, Associate Planner

22560 SW Pine Street

Sherwood, OR 97140

RE: Revised Submittal for LU 2021-009 – Cedar Creek Plaza Retail Proposed Multi-Family Development

Dear Eric

Our Take on the hearing – 1/25/2022

There is no code or rule to allow for Density transfer so the development can only support 46 units. Therefore, the developer should only be allowed to construct 46 units

The owner of Unit 2 is Opposed so the developer should have no rights to use his square footage in his application. He is also opposed to shared parking utilizing his property.

No one is a proponent other than the developer.

Why did the Staff even recommend this for approval when the mechanism to allow 84 units to be developed is not available?

The Staff are trying to find, at best, a very tenuous path to get this through planning, when clearly this path doesn't exist. The code and rules do not allow this development in its current format to proceed and should be denied.

Even with the shared parking scheme proposed and an additional 92 parking stalls the developer is 39 spaces short of the rules that support 84 units.

The Kittleson representative was very astute in his wording in support of his survey. He clearly used "weekdays" in his testimony to justify peak parking use. What about the weekends when generally more parking will be needed?

The police have stated they have concerns with noise, parking and traffic at the intersection at SW Edy Rd & SW Borchers Dr. The developer tried to deflect this in terms of response time. It should be noted their concerns are with the development.

There are NO proponents to the development other than the developer. Common sense tells you therefore something is wrong.

No developer or commissioner or staff live near this proposed development or will be truly affected by the development. For the developer this simply P&L exercise, for Sherwood Planning it's a case of does it comply with code or current rules. The only people it truly affects is the neighborhood and business owners, all of whom are against it.

Transport was stated as being not affected. Totally untrue. And even if the government figures used for justification say otherwise, Hotels simply do not, in reality, generate more traffic.

The developer Mr. Deacon stated clearly, they are not a greedy developer. With respect I disagree! Before this development was even submitted, we attended a virtual public meeting where we stated our opposition. We submitted our opinions and questions as follows:

1. The plaza wouldn't support an 84-unit development
2. We asked why not less units – reply was less than 84 was not viable.
3. We asked why not condominiums where owners are at least vested in their property and neighborhood – reply was Condos don't sell in Portland. Well Sherwood isn't Portland and Condos do sell in Sherwood and often in less than a week from being listed and for >\$250k for a one bedroom.

Interestingly factoid That came out: The developer claims to be adding 92 parking stalls. 92 extra stalls would support 46 units at 2 spaces per unit. 46 units is what the rules will allow. If the developer isn't greedy and is all for the "community" why not develop a 46-unit complex (preferably condominiums) that is self-supporting. There will still be issues in my opinion with traffic flow at the SW Edy Rd / SW Borchers Dr intersection but much less than with 84 units. 1 bed condos would bring young professional first-time buyers into Sherwood. Buyers that are vested, buyers that might work and start a family in Sherwood, buyers that pay Property Taxes! And all this all of a sudden this now means you don't need to have density transfer, now you don't need to have share parking.

Interesting concept, a concept by the way we raised virtually verbatim at the public hearing!

As stated, we are opposed to this development but based on our observations at the hearing it should simply not be approved.

Regards

A handwritten signature in black ink, appearing to read 'Mark R Light', with a long horizontal flourish underneath.

Mark R Light
17117 SW Robinwood Place
Sherwood
OR, 97140




Time Extension Form

I, Steve Deacon, pursuant to ORS 227.178(5), hereby

request to extend the 120-day period set in ORS 227.178(1) or the 100-day period set in ORS 197.311 for

LU 2021-009 MM (insert file number) by twenty-eight days.

 , MGR.
Signed DEACON DEVELOPMENT, LLC

1-28-22
Date



February 16, 2022

City of Sherwood Planning Commission
 C/o Eric Rutledge, Associate Planner
 22560 SW Pine Street
 Sherwood, OR 97140

RE: Cedar Creek Plaza Additional Testimony from the applicant – LU 2021-019

Dear Planning Commissioners:

On behalf of Deacon Development in the land use case associated with the Cedar Creek Plaza that you will be considering at your continued hearing the night of February 22, 2022, we would like to provide this additional information for the record and Planning Commission consideration. There were several issues raised in the testimony on January 25th that we feel deserve further explanation and clarity. Three of the issues raised in the testimony from opponents at the hearing are discussed in detail in the attached letter from Erin Forbes and Mike Robinson, attorneys with the law firm of Schwabe Williamson and Wyatt. Many of the items raised by the testimony of the opponents at the hearing were also discussed in prior correspondence from the project team that is already part of the record and attached to the previous planning commission packet as exhibits **(UU, VV, and WW)**. The purpose of this letter is to clarify and reinforce evidence provided previously by our team and where appropriate to provide additional information that supports the proposed development.

Parking

The adequacy of parking is discussed in exhibits referenced previously and supported by staff findings in the record. Kittelson and Associates, within exhibit UU determined that the proposed parking satisfies the requirements of the development code and applied multiple different study methodologies to confirm that there will be adequate parking provided when the apartments are constructed.

Since our last hearing, we have reached out to the Senior Commercial Property Manager with Providence. We discussed the conversation mentioned by one of the opponents with a Providence employee asserting that they would not allow cross parking. The property manager indicated that they would rely on any written agreement and the employee should not have voiced an interpretation without discussing it with the Property Management team. He indicated that Providence fully intends to honor the agreement with Deacon and Rembold as provided for in their CC&R's (Also provided within various locations throughout the record.)

We also contacted the Sherwood Police Department to determine how they would respond to parking issues on private property. Except for emergency situations or parking related to traffic or criminal offenses, police only enforce parking on improved public streets or public property within the City limits. There are instances where police will assist private property owners with abandoned vehicles and overnight camping in commercial areas, but it is generally for the purpose of identifying the registered owner. In no case is the public responsible for costs associated with towing and parking enforcement on private property.

Related to the concern that the parking studies were conducted during the Covid-19 pandemic, it is correct that the on-site counts were conducted during the pandemic, but at a time that many restrictions were beginning to be lifted and outside the Delta and Omicron surges. Further, multiple methodologies were used in conducting the parking studies for the site. Kittelson also utilized national data sources provided by the Institute of Transportation Engineers that were developed prior to the Covid-19 pandemic. Finally, I am attaching a letter from Wayne Kittelson, P.E., the Principal Engineer with Kittelson and Associates that addresses the information provided by the opponents traffic engineer. Mr. Kittelson stands by his firm's conclusions that the center will continue to meet the minimum parking requirements of the City and that there will not be a parking capacity issue at the Cedar Creek Plaza with the construction of the proposed apartments.

All property owners within the Cedar Creek Plaza are subject to the Conditions Covenants and Restrictions related to parking

The CC&R's serve as the contract that all property owners and tenants within the Cedar Creek Plaza to share parking.

Deacon Development is one of the three original declarants of the 2017 CC&R's and the sole declarant of the 2019 CC&R's for the Deacon commercial tract. The other two property owners, that are party to the 2017 CC&R's (Providence and Rembold), have not expressed opposition to the request by Deacon to modify this site plan, and as declarant to the 2019 CC&R's Deacon development can provide any needed interpretation to any ambiguities, as they have the sole authority to modify them as necessary.

Section 4.2 of the 2019 CCR's, that apply only to the six lots within the Deacon Tract, including the owner of "Lot 3," allows for the parking of passenger vehicles anywhere on the Deacon Tract. Individual owners and tenants within the development are all contractually obligated to comply with the CC&R's. As shown by the empirical evidence within the record, there is adequate room within the Deacon Tract to accommodate parking within the Cedar Creek Plaza.

Related to the testimony provided by the townhome owners behind Lot 2.

The existing 6-foot-tall privacy fence between the two properties that will remain. In addition to the fence there is a buffer composed of trees, shrubs, and groundcover within the landscape plans prepared by landscape architects at Shapiro/Didway and attached to the land use application on sheets L1.00 and L3.00 that demonstrate that the proposed project will meet the landscaping and perimeter screening standards of SZCDC Section 16.92.030 for projects that are located along property lines separating single and two-family uses from multi-family uses, and along property lines separating residential zones from commercial zones. In this instance, the property where the townhomes are located is zoned High Density Residential (HDR) and this property is zoned Retail Commercial (RC). Multi-family development is an allowed use in both zones.

One of the opponents indicated that because this site was planned to be developed with a hotel in the marketing brochure that it could not be developed as proposed. This is simply not true. A hotel on the site was the planned use and was considered in the traffic study for the original development. A hotel was never formally proposed on the site or approved by the City. If the City were to state that a use was not permitted each time a request was made to modify a site plan, then logic would follow that the community could not allow any change of use under a site plan modification. Changes of use and

additions to site plans are common occurrences throughout all Oregon communities. Deacon Development is a commercial developer that responds to the market. As stated previously, the original idea was to develop the site with a hotel, but there was no interest, and it was decided to pursue housing since there was a need and a market. Nowhere within the CC&R's is there a desire to prohibit a specific land use.

Traffic - There will not be unanticipated traffic issues as a result of this development

A traffic study was conducted by Mackenzie for the original development that forecasted trips associated with the increase in traffic, analyzed impacts associated with those increased trips and recommended mitigation measures to offset those impacts. Those mitigation measures included a new light at the intersection of SW Borchers/SW Edy and improvements to the signal timing at Highway 99W and Edy Road. With this major modification request, Janet Jones, PE, a professional and licensed traffic engineer conducted a follow up analysis which included trip generation estimates for the apartments utilizing updated trip generation rates presented in ITE's Trip Generation Manual, 10th Edition. The Trip Generation Manual is a widely accepted resource for analyzing traffic generation. That report found that the proposed change of use from a hotel to a multi-family development on Lot 2 would result in fewer AM peak hour, fewer PM peak hour, and fewer average daily trips to the site. She concluded that the decreased site trips associated with Lot 2, would result in less significant off-site impacts than originally presented in the December 2016 TIA for the Cedar Creek Plaza, including queuing at the Highway 99W/SW Edy Road intersection. Ms. Jones' report is within the record. Her report has been reviewed by the City's Engineering Department as well as the Oregon Department of Transportation. Neither agency disputed her findings or conclusions.

We have read the additional testimony from Mark Light provided on February 8, 2020. Mr. Light's comments do not respond to any of the relevant criteria. While the police may have indicated concerns about noise and parking in the Chief's testimony, these issues are no different than any other residential property in Sherwood, the concerns have to be relevant to the approval criteria. The Deacon Development will be managed and has the benefit of CC&Rs that allow the other property owners within the development to address issues like noise and parking if they arise but there's no substantial evidence that shows these issues are likely to arise from the multi-family development.

Thank you for your time and careful consideration in this matter. Our entire team intends to attend the continued public hearing on Tuesday night to answer any questions or provide any clarification on the proposal.

Sincerely,



HARPER HOUF PETERSON RIGHELLIS, INC
Brad Kilby, AICP
Planning Manager

Enc: Attachment 1 – Letter and exhibit from Erin Forbes and Michael Robinson of Schwabe Williamson & Wyatt dated February 4, 2022.

Attachment 2 - Letter from Wayne Kittelson of Kittelson and Associated dated January 25, 2022.

Attachment 1



February 4, 2022

Erin M. Forbes

Admitted in Oregon, Washington and Illinois

T: 503-796-2054

eforbes@schwabe.com

Michael C. Robinson

Admitted in Oregon

T: 503-796-3756

mrobinson@schwabe.com

Jean Simpson, Chair
City of Sherwood Planning Commission
Sherwood City Hall
22560 SW Pine Street
Sherwood, OR 97140

RE: City of Sherwood Case File LU-2021-009MM; Applicant Testimony

Dear Chair Simpson and Planning Commission Members:

This office represents the Applicant in the above-referenced file. This letter sets forth the Applicant's position relating to three important issues raised in testimony submitted before and during the January 25, 2022 Planning Commission Hearing.

First, Mr. Todd Fisher submitted a letter on January 23 (Exhibit YY to the Jan. 14, 2022 Staff Report) stating that "as the owner of Lot 3 I do not consent to the application proposing an Apartment complex" The Applicant does not dispute that Mr. Fisher is the current owner of one of the lots (Lot 3) that is part of the Deacon Tract on the subject property. However, Mr. Fisher was not the owner of Lot 3 on the date the Applicant submitted the subject Application, and as such, whether he consents to the Application now is not relevant.

To submit a land use application, the City of Sherwood's Code requires only "the signature of the applicant and authorization from the property owner of record." SZCDC 16.70.040.A. Oregon law also requires only that "[w]hen required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes." ORS 227.175(1). Post-application consent of future property owners or prospective property owners for a land use permit is not required by the Code, nor by state law. At the time the Applicant submitted the subject Application (May 5, 2021), the Applicant was the sole owner of the subject property and therefore the only entity required to sign the application.

Further, Mr. Chris Koback's reliance in his January 24 letter (Exhibit ZZ to the Jan. 14, 2022 Staff Report) on *DLCD v. Jefferson County* is misplaced. The Applicant here is not relying on the Goal Post Rule to make its application, and does not understand Planning Staff to be relying on the Goal Post Rule either. Rather, the Applicant is relying on the City's Code, which only

Jean Simpson, Chair
February 4, 2022
Page 2

requires the property owners at the time the application is submitted to sign the application form. As such, *DLCD* is not relevant.

Even if consent of a prospective or now-current property owner was required, raising such concerns on the eve of a Planning Commission hearing that had already been continued three times is inappropriate, especially given that Mr. Fisher had every opportunity to discover the pending land use application prior to January 23. Mr. Fisher signed the purchase and sale agreement (“PSA”) for Lot 3 on May 6, 2021. That agreement included a “Buyer’s Representation” to purchase the property “as-is, with all faults, without any representations or warranties by Seller.” Moreover, in the PSA, Mr. Fisher as Buyer “acknowledge[d] that Buyer has ascertained for itself the value and condition of the Property . . . and that Buyer’s payment of the Purchase Price is Buyer’s acknowledgement that it has had every opportunity to conduct whatever inspection, test, or analysis of the Property that Buyer deemed to be relevant to Buyer’s decision to purchase the Property.” Further, Mr. Fisher, during his due diligence phase, did not make any title objections, and on June 11, 2021 he waived due diligence altogether. The sale of Lot 3 closed on July 30, 2021.¹

All that is to say, Mr. Fisher’s consent is simply not necessary for the subject Application to move forward because Mr. Fisher was not an owner of the property at the time the Application was submitted.

Second, Mr. Koback submitted testimony on December 7, 2021 and again on January 24, 2022 regarding alleged “representations” made by the Applicant in its original 2017 site plan approval regarding a proposed hotel use. Mr. Koback’s position that comments relating to a potential hotel development on the subject property are somehow binding on the Applicant is, respectfully, incorrect. The Applicant proposed *no specific development* in 2017 on Lot 2. Indeed, no development whatsoever was approved for Lot 2 with the 2017 site plan.

Mr. Koback points to the *Culligan* and *NE Medford Neighborhood Coalition* decisions to support his assertion that the Applicant represented in the 2017 site plan application that a hotel would be built on Lot 2, thus creating a specific condition of approval that a hotel must be built on Lot 2. These cases both involve planned unit developments, however, and as such they cannot apply to a request for a major modification of a site plan approval. Regardless, the Applicant made no such representation, nor did it request approval of a hotel in the 2017 site plan. Even if the Applicant did request and obtain such an approval, the Major Modification provision of the Code allows the Applicant to change the use. SZCDC 16.09.030.A.1. That is precisely what the Applicant is doing here.

Finally, as mentioned above, Mr. Fisher did not make any title objections during the due diligence phase prior to closing on Lot 3, including to those found in the 2019 CC&R’s (Exhibit P to the Jan. 14, 2022 Staff Report) in Section 10.20: “No representations or warranties of any kind, express or implied, have been given or made by Declarant [the Applicant here] or its

¹ To the extent Mr. Fisher has issues relating to the PSA, those issues may be resolved in the circuit court system, and are improper for a land use proceeding.

Jean Simpson, Chair
 February 4, 2022
 Page 3

agents or employees in connection with the Project, any parcel, or any improvement, including, without limitation, physical condition, zoning, compliance with applicable laws, fitness for intended use, operations, maintenance, cost of maintenance, level of assessments or taxes.” This is further evidence that the Applicant made no representations as to the use, operations, or zoning of the subject property, including Lot 2, in the 2017 Site Plan.

Third, during the January 25 hearing, a question was raised regarding whether a residential density transfer from the adjacent lots (all of which are developed with commercial / retail uses) to Lot 2, to allow for the proposed multi-family development, is allowed under the Code. As an initial point, the Applicant does not believe it is proposing a density “transfer.” Regardless of how it is categorized, the Applicant’s proposal as it relates to residential density is allowed under the Code for the following reasons.

For one, the subject property is located in the City’s RC zone. In the RC zone, multi-family housing is a permitted use, “subject to the *dimensional requirements* of the . . . HDR zone in [SZCDC] 16.12.030.” SZCDC 16.22.020, Table (emphasis added). Residential density is not a “dimensional requirement” (see **Exhibit 1** (March 11, 2021 Memo from M. Robinson to R. Schera), attached and explaining this point in detail), and so no applicable standards from the HDR zone govern residential density in the RC zone. Further, the RC zone itself does not impose any density restrictions or requirements for residential uses. See SZCDC 16.22.030, Table. As such, residential density for the proposed multi-family development is unlimited. The Applicant understands that Staff shared this interpretation with City Attorney Josh Soper, who agrees with this reasoning. This interpretation is therefore “plausible,” and would be entitled to deference by LUBA on appeal under ORS 197.829(1). See *Kaplowitz v. Lane Cnty.*, 285 Or App 764, 774-776 (2017).

Moreover, because this Application is a mixed residential and commercial use application, it is subject to Oregon’s Needed Housing rules. ORS 197.303(1). ORS 197.307(4) does not allow the City to apply subjective provisions to such applications. As such, SZCDC 16.12.030, Table cannot be applied to this Application because determining which of the standards in that Table apply to a multi-family housing development (i.e. determining which of the standards are “dimensional requirements”) is subjective.

Finally, under the 2017 Declaration of Easements and Restrictive Covenants that govern the subject property, the Deacon Tract (which includes Lots 2, 3, and 7 as identified in the Application) is a single entity. (See Ex. P to the Jan. 14, 2022 Staff Report). As such, and assuming a residential density requirement exists in the RC zone, the allowable residential density from *all* lots identified as part of the Deacon Tract may be used by Lot 2 if not otherwise used. Lots 3 and 7 are not in residential use, and therefore any residential density “allotted” to Lots 3 and 7 may reasonably be used by the proposed multi-family development on Lot 2.

* * *

For these reasons, the Applicant requests approval of its Major Modification application.

Jean Simpson, Chair
February 4, 2022
Page 4

Sincerely,

A handwritten signature in black ink, appearing to read "Erin M. Forbes". The signature is fluid and cursive, with a prominent loop at the end.

Erin M. Forbes

A handwritten signature in black ink, appearing to read "Michael C. Robinson". The signature is cursive and somewhat stylized.

Michael C. Robinson

EMF
Enclosures

cc: Garrett Stephenson (*w/Enclosures, via e-mail*)
Joe Gaon (*w/Enclosures, via e-mail*)
Brad Kilby (*w/Enclosures, via e-mail*)
Steve Deacon (*w/Enclosures, via e-mail*)
Ian Lewallen (*w/Enclosures, via e-mail*)
Wayne Kittelson (*w/Enclosures, via e-mail*)
Matt Bell (*w/Enclosures, via e-mail*)
Eric Rutledge (*w/Enclosures, via e-mail*)

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Memorandum

VIA E-MAIL

To: Ryan Schera, Deacon Corp. fka S. D. Deacon
From: Michael C. Robinson
Date: March 11, 2021
Subject: Cedar Creek Plaza; Applicability of All Provisions of Sherwood Development Code (“SDC”) 16.12.030, Table, Where SDC 16.22.020, Table, Refers Only to “Dimensional Requirements.”

Ryan, our meeting on Friday concerns the proper interpretation of SDC 16.22.030.A, Table, which provides that multi-family housing in the RC zone is subject to the “dimensional requirements” of the HDR zone in SDC 16.12.030. The plain meaning of this language is that multi-family housing uses in the RC zone are subject to only the “dimensional requirements” in SDC 16.12.030 and not to other standards contained in that section.

SDC 16.12.030 is titled “Residential Land Use Development Standards.” SDC 16.12.030.A and B both refer to standards other than “dimensional” or “dimension.” SDC 16.12.030.A. refers to “minimum Code dimensions, area, setbacks or other requirements.” SDC 16.12.030.B refers to “minimum lot areas, dimensions and setbacks” and refers to the Table following subsection (C). SDC 16.12.030.C. simply states “Development Standards per Residential Zone” and is then followed by the Table titled “Development Standard by Residential Zone.”

The table then lists three categories of development standards consistent with SDC 16.12.039.A and B: lot area, lot width, lot depth, maximum height and setbacks.

In order to give effect to the language and context of SDC 16.12.030 and 16.22.030, the proper reading is that multi-family housing uses in the RC zone are subject only to dimensional requirements in SDC 16.12.030, Table, and these necessarily exclude area and setbacks because SDC 16.12.030 distinguishes between the three categories of development standards. The dimensional requirements can only include things that are not otherwise excluded-lot area and setbacks-leaving lot depth, lot width and height as the dimensional requirements. Said another way, “development standards” is a broader category including dimensional requirements, lot area and setbacks but SDC 16.22.030 only applies the dimensional requirements of SDC 16.12.030 to multi-family housing in the RC zone and SDC 16.12.030 has other development standards besides dimensional standards that do not apply.

Memo to: Ryan Schera
March 11, 2021
Page 2

Based on this analysis, the multi-family housing development on the RC zone is not subject to the lot area and setbacks in SDC 16.12.030, Table.

Additionally, the multi-family housing development is a mixed commercial/residential development in the RC zone. SDC 16.22.030.A, Table. The RC zone allows mixed commercial/residential uses. The development constitutes “Needed Housing” under ORS 197.303(1) because it is on land zoned for mixed residential and commercial use. Additionally, the development is a housing development in the UGB that is subject to ORS 197.307(4), which means two things: the City may apply only clear and objective standards, procedures and conditions to the development and the SDC regulations may not have the effect, cumulatively or individually, of discouraging needed housing through unreasonable cost or delay. The exceptions to these requirements in ORS 197.307(5) and (6) do not apply to this site.

This means that the City may not apply SDC 16.12.030, Table, because it is not a clear and objective standard (the standards in the Table themselves are clear and objective but determining which apply to the RC zone multi-family development means that SDC 16.12.030 and 16.22.030 are subjective) and would have the effect of imposing unreasonable cost and delay through application of the subjective standard and a subjective process to interpret the standard.

MCR:jmhi

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schwabe.com

Attachment 2



851 SW 6th AVENUE, SUITE 600
PORTLAND, OR 97204
P 503.228.5230 F 503.273.8169

January 25, 2022

Project #: 26974.0

Eric Rutledge, Associate Planner
City of Sherwood, Oregon
Delivered by email to rutledgee@sherwoodoregon.gov

RE: LU 2021-009 MM Cedar Creek Major Modification

Dear Eric:

I offer the following comments in response to a letter report submitted into the record for case file LU 2021-009 from Mr. John Manix PE of PBS Engineering and Environmental, Inc. and dated January 17, 2022:

1. The letter report states on page 2 that “The city’s minimum parking requirements were not verified.” This is a critically important omission in Mr. Manix’s analysis because it is the criterion the Planning Commission must use to determine whether the proposed parking supply meets City requirements. Because of this acknowledged omission, therefore, Mr. Manix cannot dispute Kittelison’s key finding, which is also supported by City staff, that the city’s minimum parking requirements are met.
2. The letter report relies almost exclusively on Mr. Manix’s recounting of personal experiences, opinions and anecdotes that are unsupported by facts or evidence. These experiences, opinions and anecdotes are often so broadly stated that they are not useful to the current decision-making process. As one example, Mr. Manix presents a finding on page 4 that “public agency parking regulations requiring only the minimum number of parking spaces often result in parking overflow off-site”. This is not a valid finding because it is not supported by any evidence. Furthermore, it is a statement of opinion that cannot be justified without considerable additional context including but not limited to
 - a. the regulation being evaluated;
 - b. the location being discussed (e.g., urban core business district vs. suburban environment);
 - c. the type, scope, scale and mix of the land uses being examined;
 - d. the availability, proximity, regulation, and suitability of alternative off-site parking options;
 - e. the hourly demand and supply profiles for each of the examined land uses; and
 - f. the temporal and spatial opportunities that exist for on-site shared parking.
3. The only real evidence presented in the letter report is in the form of aerial parking lot photos and tabulated parking lot occupancy surveys conducted on January 11-12, 2022. This evidence reveals pm peak period parking lot occupancy rates in the range of 40-60%, which is far below

the occupancy levels reported in Kittelson's September 2021 survey. This evidence therefore does not appear to support Mr. Manix's expressed concern for a parking capacity problem and instead further buttresses Kittelson's analysis and findings.

Thank you for the opportunity to provide these responses to the PBS letter report.

Sincerely,
KITTELSON & ASSOCIATES, INC.

A handwritten signature in blue ink that reads "Wayne Kittelson" with a horizontal line extending to the right.

Wayne Kittelson, P.E.
Principal Engineer