HATHAWAY LARSON

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May 20, 2022

VIA EMAIL

Jean Simpson, Chair
City of Sherwood Planning Commission
22560 SW Pine Street
Sherwood, OR 97140
planningcommission@sherwoodoregon.gov

Re: Case File LU 2021-009 MM-Cedar Creek Multi-Family Development

Dear Ms. Simpson and Commission Members:

This firm represents the owners of three properties in the Cedar Creek Plaza: Bob Barman, H & C Holdings, LLC, and Jaffe Sherwood, LLC. We previously submitted a letter to staff on December 3, 2021, and letters to the Planning Commission on January 24, 2022 and February 21, 2022. Our prior submissions all related to the original proposal for an 84-unit apartment building on Lot 2 in the Cedar Creek Center. One issue we, and others, raised about the original proposal is that to get a lot area large enough to allow density of 84 units, the applicant had to include two additional lots, Lot 3 and Lot 7, upon which the apartments are not proposed to be constructed. We, and others, explained that the applicant did not own or control Lot 3 and did not have consent to include it in any development proposal. We further explained that there is no provision in the development code that allows an applicant to transfer density from one lot to another.

Before the continued March 24, 2022 hearing, staff issued a revised recommendation changing its recommendation from approval to denial. In response, the applicant requested a further continuance to submit a revised proposal. On or about March 21, 2022, the applicant submitted its revised proposal in which it removed Lot 3 and reduced the number of proposed units from 84 to 67. The revised proposal still includes Lot 7 and the applicant is using lot area from that lot to get to a lot area that supports 67 units. If the lot area of Lot 7 is not included, the lot area of Lot 2 alone will support only 47 units. The applicant continues to assert that it is only required to provide 90% of the required off-street parking for the proposal, which it calculates to be 85 spaces. As we will explain, the revised proposal does not comply with the code and should be denied.

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1. The maximum allowed density on Lot 2 is 46 dwelling units and the express text in the development code does not permit any form of density transfer.

The residential density applicable to the application is in Sherwood Development Code ("SDC") 16.12.050. The number of units of multi-family housing one can place on a lot is determined by the lot area. In this matter, the base standard requires 8,000 square feet for the first two units in a multi-family development and 1,500 square feet for every additional unit. In an attempt to circumvent the plain text in the SDC, the applicant contrived a scheme to effectively transfer 30,492 of square feet from Lot 7 into Lot 2 under the theory that 19 units that could be placed on Lot 7, can be placed on Lot 2 because it owns both lots.

In the revised recommendation, before the March 22, 2022 hearing, staff recommended denial based upon the applicant's inclusion of Lot 3 in the application and did not specifically mention the applicant's proposal to use residential development rights associated with Lot 7 to add 19 units to Lot 2. In the revised staff report for the May 24, 2022 hearing, staff addressed the applicant's proposal to use the lot area for Lot 7 to allow it to place 67 units on Lot 2. Staff does not accept the applicant's position and expressed that the only lot area the applicant can use is the lot area for Lot 2. Thus, staff concluded that the proposal for 67 units exceeds the allowed number of units and recommends denial of the current proposal. Staff further stated that using the lot area for Lot 2, the applicant can submit a revised proposal that seeks approval for not more than 46 units but cautioned that even 46 units may exceed the allowed density based on an issue with an existing easement.

Our clients agree with staff's position and urge the Planning Commission to accept it. To determine lot area, one must first identify the lot. A lot cannot consist of multiple non-contiguous pieces of land. In addition to staff's reasoning, our clients and Mr. Fisher (owner of Lot 3), through his attorney David Petersen, previously submitted argument explaining the defects in the applicant's attempt to interject a density transfer provision that does not exist in the city code. We incorporate by reference the arguments Mr. Petersen presented in his February 18, 2022 letter and those we made in our February 21, 2022 letter.

To summarize the critical point we both made, no provision in the city code or state law allows staff to effectively amend the code to add a provision in a quasi-judicial land use application proceeding. The authority to amend the code is vested in city Council and there is a legislative process Council must follow to amend the code. A local government may not use a quasi-judicial, decision-making process to create a development standard. Rather, it must decide quasi-judicial decisions applying the standards that already exist in its comprehensive plan and land use regulations. ORS 227.173. Based on the above points, it was appropriate that Chair Simpson and Commissioner Kia both openly questioned the applicant's position noting that the code does not have any provision to allow a density transfer.

Without a code provision that allows the applicant to transfer development rights from Lot 7 to Lot 2, the current revised application must be denied. SDC 16.12.030 plainly provides that the minimum

lot area dictates the number of units that are allowed on that lot. An applicant must have 8,000 square feet of lot area for the first two units and 1,500 square feet for every additional unit. Simple math demonstrates that for a lot with 73,359 square feet, an applicant can propose either 46 or 47 units, depending on how rounding is applied. They can have two units for the first 8,000 square feet and 44 or 45 units for the remaining 67,359 (67,359/1,500=44.9). There is no provision in the SDC that allows an applicant to use square feet in a separate lot, not part of the lot on which the development is proposed, and which is already fully developed, to factiously expand the development lot area.

The applicant presents a code interpretation argument ostensibly to justify the density transfer. We will demonstrate that the applicant's argument is legally deficient. The oddest aspect of the applicant's argument is that the applicant claims that its argument supports a density transfer allowing it to use development rights from Lot 7, but the argument leads to the conclusion that a density transfer is not necessary. The applicant recites that pursuant to SDC 16.22.030.A (Table), multi-family development is allowed in the RC zone subject to the dimensional standards in the HDR zone set out in SDC 16.12.030. Next, the applicant asserts that SDC 16.12.030.A and B include standards, including lot area, lot depth, lot width, maximum height, and setback but not all of those are dimensional standards. The applicant proceeds to cherry pick those standards it wants as dimensional standards and submits that lot area does not fit within its views of a dimensional standard. The applicant's argument is that for a residential use in the RC zone, there is no limitation based on lot area for the number of units one can propose. An applicant could develop as many units as it can fit applying the setbacks and height limitation. The obvious question is if there is no lot area limitation, why would one use the argument it did to support a density transfer based on transferring lot area from Lot 7 to Lot 2?

The answer is that the applicant knows that its argument that lot area is not a dimensional standard that an applicant must address in the RC zone is unsupportable. It cannot make any straight-faced argument that it can propose 67 units on only 73,359 square feet and, thus, does need to rely on the non-existent development right transfer provision. First, the applicant accepts that lot width and lot depth are both dimensional standards. The city's definitions are critical on this point and show that for the same reason lot width and depth are dimensional standards, lot area is also a dimensional standard. The SDC defines lot depth as the average horizontal distance between the front and rear lot lines. The SDC defines lot width as the horizontal distance between the side lot lines. Thus, it is clear in the SDC any standard determined by measuring the horizontal distance, is even under the applicant's view, is a dimensional standard. Going to the definition of lot area, the SDC defines that as the total horizontal area within the lot lines. It is the product of two horizontal measurements. Thus, lot area is indisputably a horizontal measurement. To determine the lot area then, one uses the lot width and lot depth, both of which are dimensional measurements. It is textually impossible to conclude that lot width and lot depth are dimensional standards and yet, conclude that a lot area which is simply the product of those two standards is not a dimensional standard.

Further, the applicant's argument leads to an unreasonable and unwanted result. As we explained above, if multi-family development in the RC zone is only subject to dimensional standards and lot

area is not a dimensional standard, there is no limit on the number of units and density an applicant can put on a lot. The SDC limits density in HDR zones using the lot area. An applicant can only place that number of units that comply with the lot area standard-two units for the first 8,000 square feet and one additional unit for every 1,500 feet over 8,000. If the lot area standard does not apply, there is no limit other than setbacks and height. It seems implausible that the drafters intended to not have any density limitations on multi-family development in just one zone.

In addition, as Mr. Petersen illustrated in his February 18, 2022 letter, allowing staff to interject a density transfer into this application will lead to unanticipated impacts that were not mitigated in the original approval. The applicant already developed Lot 7 as a commercial use and the impacts from that were considered and addressed in the prior approval. However, if the residential development rights are transferred to Lot 2 now, it is as if Lot 7 was developed with both uses creating impacts that were never considered in those prior approvals. One would certainly expect that if a local government allowed a density transfer from one parcel to another, it would have a code provision to restrict the development on the transferee parcel so that the compounding of impacts is avoided, or at least addressed.

We want to also reinforce that Deacon's reference to deference under *Kaplowitz v. Lane County*, 285 Or App 764 (2017) is clearly misplaced. The deferential standard applies to LUBA's review of interpretations of land use ordinance provision made by the governing body. In this matter, the only person who seems to have accepted Deacon's unsupported interpretation is staff which is not entitled to any deference.

Finally, Deacon attempts to interject ORS 197.307 into this matter. As we note above, there is no subjective element to the dimensional lot size standard. The minimum lot size is 8,000 square feet for two units and an owner needs 1,500 square feet over that for every additional unit. The fact that one has to conduct a mathematical calculation does not make a standard less than clear and objective. Deacon's argument that the standards are not clear and objective because one has to select between two charts is simply wrong. There is only one chart that applies. SDC 16.16.22.020 plainly directs that for multi-family development in the RC zone, the application is subject to the dimensional standards in SDC 16.12.030. There is no merit to the argument that a lot size standard is not a dimensional standard. There is no choice between charts.

2. The 2017 Approval requires that Lot 2 be developed with a hotel and the application fails to present a basis to remove that specific condition.

In our January 24, 2022 letter, we discussed *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007), where LUBA held that when an application states that the proposed development is for a specific type of development, specific conditions of approval limiting the use to that proposed are not necessary. The evidence of specific and detailed representations by the applicant is in the record. The Planning Commission must determine whether those representations created a condition that Lot 2 be developed as a hotel. We reiterated

this argument in our February 21, 2022 letter. This remains an important issue that the Planning Commission must decide.

As we noted in our February 21, 2022 letter, if the Planning Commissions agrees with us, the application is deficient. The applicant has not addressed any questions over whether it can remove that condition. As we noted previously, the application assumes Lot 2 is vacant and there is no condition requiring that it be developed with a hotel. If there is a condition requiring a hotel, the applicant must carry the burden of showing that it is appropriate to remove that condition before it can propose a revised or modified site plan for an apartment. Currently, the applicant has not attempted to show why it should be allowed to remove a condition requiring a hotel.

3. Minimum parking requirements are not met.

The revised proposal does not eliminate the code problem associated with off-street parking. The applicant asserts that based on the reduced number of units and applying the shared parking reduction for mixed-use developments, it needs only 86 off-street parking spaces (90% of the code minimum) and all of those can be accommodated on Lot 2. As we read the latest staff report, staff used the shared parking reduction but came to the conclusion that for 67 units, 88 off-street spaces are required. Our clients continue to assert that the applicant is not entitled to use the shared parking reduction.

As we explained in our February 21, 2022 letter (discussing the proper methodology for interpreting local regulations), the analysis of the required minimum off-street parking involves the interplay between SDC 16.94.010.C (options to reduce required parking) and SDC 16.94.010.E (location of parking). For ease of reference, we presented the following:

> SDC 16.94.010.E requires that for residential uses all required off-street parking must be on the lot or within the development in which the use is proposed. Nothing in the text of that provision allows any reduction in parking. It simply provides where it must be. SDC 16.94.010.C allows a reduction in the required minimum, but only if certain conditions are met. The provision the applicant here wants to use is the reduction for uses that are located in a mixed-use development. If a proposed use is in a mixed-use development and parking demands do not overlap, the primary use in the development must have 100% of the required parking but other uses can have a reduced number. That provision does not apply automatically just because a proposed residential use is in a mixed-use development. The plain text requires that the proponent of the reduction provide proof that it has the legal right to use parking that is not on the lot where the development is located. A residential use may be in a larger development but if it does not have the legal right to use other lots for residential parking, the applicant for that development cannot apply the reductions in SDC 16.94.010.C.

Our clients still contend that in the context of this development, the Deacon Tract upon which the retail center was developed, should be considered a separate development and, thus, the mix-use parking provisions are entirely inapplicable. However, even if one allows the applicant to consider the Deacon Tract part of a larger mixed development, the applicant does not automatically get to use the shared parking provisions, specifically, the reduction in required parking. To use the parking reduction provision in SDC 16.94.010.C, the applicant must have evidence that it has the right to use parking on the Ackerly and Providence Tracts for residential use. There is no dispute; the applicant cannot use either of those tracts for residential parking. The 2017 Declaration of CC&Rs prohibits residents on Lot 2 from parking on the Ackerly and Providence Tracts.

If Deacon does not have the right to use parking for its proposed residents on the Providence and Ackerly tracts, it cannot use the shared parking reduction to claim that the proposed use is not the primary use. The only legal right to shared parking is limited to shared parking for residential uses is on the Deacon Tract. There is no dispute that uses on Lot 2 can use parking on the entire tract subject to certain specific restrictions noted in the Kittelson analysis. That means the proposed apartment is the primary use on the tract that is subject to shared parking and the applicant must meet 100% of the off-street parking requirements. Thus, it must provide 97 off-street parking on the Deacon tract (Staff Report P.66; Packet p. 79). It appears that staff and the applicant agree that the correct parking analysis requires that one examine the needed and available parking on the larger Deacon Tract even if the applicant could place all 97 spaces on Lot 2. That makes sense because everyone agrees that there is shared parking on the Deacon Tract. Thus, Lot 2 is not available only to the apartments on that lot.

The problem with that is under its own expert's analysis, it appears that because of the high number of restricted parking spaces, there will be a shortfall of at least 39 spaces on the Deacon Tract. Mr. Petersen demonstrated that when the applicant was proposing 84 units, it used the shared parking reduction provision to assert that it needed 92 off-street spaces. As Mr. Petersen illustrates, even if Deacon needs only 92 spaces, Kittleson's own numbers show that there is not enough unrestricted parking on the Deacon Tract for the apartments and other uses. Under the prior proposal there was a deficiency of 39 spaces. This remains relevant.

First, if you accept our interpretation of the code, Deacon cannot use the reduction and, thus, it needs 97 spaces, which is the code minimum. Thus, there is a shortfall on the Deacon Tract of more than 39 spaces, and the minimum number of off-street parking is not met. As we explained above, the applicant is not legally allowed to use the Providence or Ackerly tracts for that shortfall in residential parking.

Second, even with the reduction to 86 or 88 spaces, the shortfall is less, but there is a shortfall on the Deacon parcel. In the applicant's February 9, 2022 revised parking analysis using 86 as the minimum number of spaces required, it found a deficit on the Deacon Tract of 15 spaces. (Page 813 of Packet). If one uses staff's 88 required spaces, the deficit is 17 spaces. The same analysis applies. Since the applicant cannot use the Ackerly or Providence tracts for that shortfall, it does

not have sufficient off-street parking on the Deacon Tract which is subject to shared parking. It appears that Kittelson and the applicant want the city to accept that the only use of the spaces on the Ackerly and Providence tracts will be guests or invitees and that the 2017 Declaration does not legally restrict that use. To reach the conclusion Deacon and Kittleson desire, one has to assume that those 32 spaces will always be used only by invitees and guests of the uses on the Deacon Tract. Without some enforceable restriction on the apartment parking, we believe it is unreasonable and inappropriate to make the assumption Deacon needs.

The core problem related to parking with the prior application and this revised application is that the applicant's study shows that to meet the total minimum number of spaces, the applicant must use parking on the Providence Tract. Yet, it has not provided proof that it has the legal right to use that tract for residential parking and it is not reasonable to assume only non-residential users will need that parking.

Very truly yours,

HATHAWAY LARSON LLP

s/ Christopher P. Koback

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May 23, 2022

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RE: Applicant's Response to Staff Report and Public Testimony
City of Sherwood Case File LU 2021-009MM

Dear Chair Simpson and Planning Commission Members:

This office represents the Applicant in the above-referenced file. This letter sets forth the Applicant's response to (i) the Staff Report dated May 17, 2022 (the "Staff Report"), recommending denial of Applicant's major modification to an approved site plan (the "Application"); and (ii) Mr. Christopher Koback's Letter dated May 20, 2022 (the "Koback Letter"). The original application approving Cedar Creek Plaza was approved by the Commission and the City Council in 2016 under file number SP 16-10/CUP 16-06/VAR 17-01. The Applicant has diligently worked with Staff and the Commission to further refine the Application over the last 15 months in order to design a needed, multifamily housing building that, in its current iteration, contains 67 units.

Staff concludes that all applicable criteria are met or can be met with reasonable conditions of approval, with the notable exception of the minimum lot areas used to calculate the maximum residential unit count in the Application. This is an express reversal of staff's stated conclusion on residential density in the Revised Staff Report dated January 14, 2022. With the exception of staff's conclusions on that issue, the Applicant concurs with the Staff Report and accepts the proposed conditions of approval. For the following reasons, in addition to the materials previously provided by the Applicant, the Planning Commission should approve the Application.

I. THE APPLICATION IS SUBJECT TO ONLY CLEAR AND OBJECTIVE STANDARDS

The Application proposes 67 units of multifamily housing. ORS 197.307(4) (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. Clear and objective standards must have "objective benchmarks" for measuring the compliance of projects to which they apply. *Warren v. Washington County*, 78 Or LUBA 375, 388–89, *aff'd*, 296 Or App 595, 439 P3d 581 (2019). Conversely, phrases that require a "subjective analysis in order to determine [their]

meaning" violate the needed housing statute. *Legacy Development Group, Inc. v. City of the Dalles*, __Or LUBA __ (LUBA No. 2020-099, *slip op* at 12) (Feb. 24,16 2021).

As explained below, staff's construction of the term "lot" and "lot area" is unnecessary to the decision and creates substantial ambiguity in those terms, violating the needed housing statutes and ignoring the plain language of those terms. Moreover, the link between the minimum lot area requirements in the HDR zone and the use provisions in the RC zone cannot be applied clearly and objectively such that the HDR minimum lot area standards can apply to the Application. Therefore, staff's stated bases for denial are unsustainable under applicable law.

II. RESPONSE TO STAFF FINDINGS

In the Staff Report, staff provided three bases for denial: SZCDC 16.12.030, SZCDC 16.22.020, and SZCDC 16.90.020(D)(1). However, all three stem from a single issue, which is staff's conclusion that the proposed development does not meet the minimum lot area requirements based on the definition of "lot" in the SZCDC. Specifically, staff's conclusion is that the Applicant must rely on the lot area for both lots 2 and 7 in order to determine the maximum residential unit density. Staff's analysis of this issue is incorrect for two reasons.

First, 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. Second, staff reads requirements and terms into the definition of "lot" that are not in the codified definition of that term, thereby introducing substantial ambiguity into that definition.

Staff contends that the Applicant concedes that the minimum lot area requirements of the HDR zone found in SZCDC 16.12.030 are applicable to proposed development. While the Applicant has revised its application in order to continue to move the Application forward and provide needed housing in the City, the Applicant still maintains that the minimum lot area requirements of the RC zone are applicable to the proposed development for the reasons previously stated in its memorandum dated March 11, 2021, attached as **Exhibit 1**. That is, 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.

Notwithstanding those arguments, if the Planning Commission determines that the minimum lot area requirements in the HDR zone apply to the proposed development, the Planning Commission can conclude that the Application meets the standards of SZCDC 16.12.030, SZCDC 16.22.020, and SZCDC 16.90.020(D)(1) for the following reasons.

a. The subdivision was approved as a unified, mixed-use development and the Applicant is properly relying on lot area from within the approved site plan.

The land use permits for Cedar Creek Plaza, which are now proposed to be modified, were approved in 2017 under file numbers SP 16-10/CUP 16-06/VAR 17-01. The City approved a lot line adjustment and subdivision for Cedar Creek Plaza that created the existing seven-lot configuration. *See* LLA 17-02 and SUB 17-02, included as Exhibits HH and II of the Staff Report. The Applicant properly relies on lots 2 and 7 within Cedar Creek Plaza to meet the minimum lot area requirements because both lots were part of the original area approved for the Cedar Creek Plaza development.

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. In order to change any development on a lot each owner would have to file either a "major" or "minor" modification of the approved site plan, as is proposed by the Applicant. While each owner may not be authorized to change development on another owner's lot without that owner's consent, mixed ownership does not retroactively reduce the approved size of the Cedar Creek Plaza down to only lots owned by the Applicant, nor does it exclude from consideration all uses and development on other parcels not owned by the Applicant.

Staff does not appear to argue with the above premise, nor does it argue that the codes in effect were any different in 2017. Rather, staff contends that the Applicant's lots cannot be used as a basis upon which to calculate density for the proposed development solely because they are not contiguous. However, staff does not take the position that the Applicant could not have used lots 2 and 7 as a basis upon which to calculate residential density if the apartments had been proposed in 2017, after the replat in 2018, or at any time until the Applicant conveyed away the other parcels, even though lots 2 and 7 were not then contiguous.

Moreover, as this Application is a modification of the 2017 Cedar Creek Plaza approvals, it's the original approval boundary that is relevant to determining whether there is enough undeveloped "lot area" to allow the proposed residential unit density. Staff clearly understood this approach in the past and stated the following in its Revised Staff Report dated January 14, 2022: "While the City's development code does not have a process for transferring residential lot area entitlements, staff supports the approach because the proposed building is within the same commercial center / subdivision as the other lots being borrowed from…". Stated simply, the relevant "lot area" for purposes of calculating the allowable dwelling unit density can properly be the original property included within the site subject to the 2017 approvals; there is no standard in the SZCDC which restricts such an analysis to only those lots now owned by the Applicant.

Staff has changed its interpretation apparently due to a concern that an applicant could achieve a certain density on one lot by adding to that lot the area from another located across town. However, that is not what the Applicant proposes here: both lots used as a basis for the Applicant's density calculation are within the same mixed-use center development area now being modified. Similarly, staff's concerns regarding about "which" lot it must measure for purpose of setbacks and other development standards are misplaced. First, there is no finding in the staff report that the proposed apartment building does not meet setbacks and other development standards on lot 2. Second, staff's argument that multiple parcels could be used to measure density provided they are contiguous, undermines staff's conclusion that setbacks and other development standards would be difficult to assess: in either instance, the project will be on one lot of record or the other. In conclusion, this is simply not a situation in which the Applicant is "borrowing" lot area from some tenuous lot that is unrelated to the proposed development.

b. The definition of "Lot" is clear and unambiguous in the SZCDC.

Staff relies on the definitions of "lot" and "lot area" in its recommendation for denial. These are defined in SZCDC 16.10.20 as follows:

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

It is critical to note that a "lot" may be "a combination of complete lots of record, or complete lots of record and portions of other lots of record." This definition goes to some detail to allow for combinations of lots of record to establish a "lot," but at no point does it require those lots of record to be contiguous.

Even though the word "contiguous" or any similar concept is absent from the above definitions, staff nonetheless argues that both impliedly require parcels used to establish density allowances be contiguous. In so doing, staff errs in two critical respects.

First, it is simply not true that "lot area" is the only dispositive term for purposes of calculating density. The term "lot area" includes the word "lot," which itself must be interpreted according to the definition of "lot" in SZCDC. Stated simply, a "lot" used to qualify a given residential density may be "a combination of complete lots of record, or complete lots of record and portions of other lots of record." The term "lot area" simply describes a net calculation of the

size of a "lot," which excludes streets and easements. It adds no further gloss to what constitutes a "lot" in the first place.

Second, staff's assumption that a contiguity requirement is implicit in either of these terms is incorrect because the plain language of the definition of "lot" does not include such a requirement. To support its argument staff relies on various policy arguments and its concern about the "slippery slope" that the Applicant's interpretation would implicitly allow broad density transfers. This is incorrect for the reasons explained above, but even if that were the result, staff's interpretation is barred as a matter of law. ORS 174.010, provides that in the construction of a statute, the Planning Commission must look at and "ascertain and declare what is, in terms of substance, contained therein, not to insert what has been omitted…" In other words, the Planning Commission must give effect to the relevant definitions as written, not with the contiguity gloss that staff places on those definitions. In so doing, staff introduces ambiguity into the definitions of "lot" and "lot area" that would not otherwise exist, in violations of the "clear and objective" requirement of the needed housing statute.

Finally, staff's references to definitions and concepts located outside of the SZCDC in support of its flawed interpretation must be rejected. In Footnote 1 on Page 16 of the Staff Report, staff argues that a lot must be contiguous because it "believes that the meaning of the term 'parcel' as referenced in the definition of "lot" is similar to the term 'tract' as used in ORS 215.010(2)…" However, tract is not included in the definition of "lot" and staff is relying on a provision of County law that is not applicable to cities as a general matter (ORS 215 only applies to Oregon counties). There is no definition of "tract" in the SZCDC or in ORS chapter 227, which governs planning in Oregon cities.

Staff then argues that the Applicant cannot "borrow lot area from other developed" parcels. However, nowhere in the minimum lot area requirements of SZCDC 16.12.030 does it state that the lot area applicable to the minimum lot area requirements is that portion of the lot that is undeveloped.

Next, Staff states that:

> "the definition of 'lot' also requires a lot to be 'a parcel of land'. Lots 2 and 7 of the Cedar Creek Plaza subdivision are not a parcel of land because they are not contiguous and do not form a single polygon that could be described through a singular metes and bounds description as a single parcel."

While unclear in the Staff Report, staff appears to be relying on the definition "parcel" in ORS 92.010(6) in order to subjectively inject a singularity requirement into the term "lot".[1] However, the instant Application is not for a subdivision or partition, which is what the definitions in ORS 92.010 *et seq.* relate to, and there is nothing in the SZCDC that makes that definition applicable here. The only reference in the definition of "lot" to a metes and bounds description is that a "lot" may be "a parcel of land described by metes and bounds". There is no reference to a requirement

[1] Per ORS 92.010(6) "Parcel" means a single unit of land that is created by a partition of land.

that this parcel be a "single polygon" or that it can be described through a "singular metes and bounds description as a single parcel."

Furthermore, all of these interpretive sources are located outside of the SZCDC and are therefore not applicable to this limited land use application. ORS 197.195.

Ultimately, to the extent that the minimum lot areas of the HDR zone apply to this Application, the Application relies on a plain language of the SZCDC's definition of "lot," which neither includes nor references a contiguity requirement. As a result, the Applicant may properly rely on both lots 2 and 7 for purposes or computing the minimum lot area requirements. To conclude otherwise would be a clear violation of the needed housing statue, which requires clear and objective standards with respect to an application for needed housing, as well as interpretive standards of ORS 174.010.

III. RESPONSE TO LETTER FROM CHRISTOPHER KOBACK

Mr. Christopher Koback submitted a letter on behalf of three project opponents. The Planning Commission can and should reject Mr. Koback's arguments for the following reasons.

a. The maximum residential density is 67 units based on the express language of the SZCDC.

Throughout the Koback Letter, Mr. Koback argues that the Applicant is proposing a "density transfer". As an initial point, the Applicant is not proposing a "density transfer." The Applicant has pointed out that the density standards do not apply because there is no clear and objective link between the minimum lots size in the HDR zone and the RC zone; rather, as shown above, SZCDC 16.22.020 only subjects multi-family housing to the dimensional requirements of the HDR zone, not the density requirements. Staff disagreed and indicated during the review period that it believed that only lots owned by the Applicant may count towards the density calculation for the proposed apartment building. In an effort to obtain approval and based on staff's advice, the Applicant proposed to reduce the unit count to 67 to satisfy staff's concerns. Doing so in no way waives any of the legal points the Applicant has made in prior arguments and makes in this letter.

As explained above, the Planning Commission can conclude that the density standards do not apply. To the extent that Planning Commission disagrees, it can find that the Application meets those density standards, as explained in the Application. To that end, the Applicant is utilizing the definition of "lot" as it written in the SZCDC. Similar to staff, the Koback Letter argues that "[a] lot cannot consist of multiple non-contiguous pieces of land." The Applicant's response to this subjective insertion of a contiguity requirement for a lot is discussed in Section II, above. The Applicant's responses to why the minimum lot area requirements of the RC zone are applicable to the proposed development is also included in Section II, above. In summary, Mr. Koback's reasoning on this point suffers from the same flaw as staff's: it reads into the definition of "lot" a requirement for contiguity that simply is not there.

Next, the Koback Letter argues that there is no provision in the city code or state law that allows staff to amend the code to add a provision in a quasi-judicial land use application proceeding. Mr. Koback cites ORS 227.173 to support this position and states that the City "must decide quasi-judicial decisions applying the standards that already exist in its comprehensive plan and land use regulations. ORS 227.173. Mr. Koback's argument is misguided because the Application does not propose a text amendment, and interpretation of existing code provisions does not create a de-facto text amendment. *Heceta Water District v. Lane County*, 24 Or LUBA 402, 405 (1993).

Mr. Koback then relies on Mr. Petersen's February 18, 2022 letter to argue that because staff did not consider the impacts of utilizing the lot area for lot 7 for residential development on Lot 2 in the initial approval, the Commission is barred from considering those impacts now. On the contrary, staff considered the impacts of the proposal in the original application, which did not include any development on lot 2. In this Application, staff correctly considered the impacts of adding 67 units to the Cedar Creek Plaza development based on substantial evidence in the Application, which includes an update to the original traffic impact study to account for the proposed 67 dwelling units.

b. The 2017 Approval did not include a condition of approval requiring the development of lot 2 with a hotel.

The Koback Letter again reiterates the position that comments relating to a potential hotel development on the subject property are somehow binding on the Applicant. As previously stated, Mr. Koback 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 cites *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007), to support his assertion that the Applicant is somehow impliedly conditioned to construct a hotel on lot 2. However, *NE Medford Neighborhood Coalition* did not create any sort of "implied condition" doctrine. In that case, LUBA simply stated that "we do not believe the city was required to impose a separate condition of approval requiring the senior housing in order to ensure that the final PUD plan proposes the senior housing that was proposed on the approved tentative plan." *Id*. Thus, LUBA's holding was not that a condition to build what is proposed is implied (as Mr. Koback suggests), only that it is not necessary.

Regardless, the 2017 approvals included no such condition and the Applicant did not request approval of a hotel in the 2017 applications. Even if the Applicant did request and obtain such an approval, as staff correctly concludes, 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 in the Application.

c. The minimum parking requirements are met.

SZCDC § 16.94 allows for the shared use of parking on multiple parcels "when the peak hours of operation do not substantially overlap, provided that satisfactory evidence is presented to the City, in the form of deeds, leases, or contracts, clear establishing the joint use."

The Applicant submitted two sets of Covenants, Conditions, and Restrictions (CC&Rs) for the Cedar Creek Plaza center that address ownership and maintenance for commonly held improvements including parking, landscaping, and utilities. These CC&Rs are as follows:

- 2017 CC&Rs "Declaration of Easements and Restrictive Covenants" recorded as Washington County document 2017-059133 (Exhibit P)

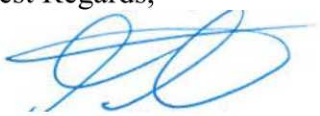
- 2019 CC&Rs "Declaration and Establishment of Protective Covenants, Conditions, Restrictions, and Grant of Easements" recorded as Washington County document 2019-026258 (Exhibit P)

The Applicant also provided a Final Parking Study which shows the expected parking demand for Cedar Creek Plaza development as a whole relative to the parking supply. This parking study clearly shows how the peak parking demand for the Cedar Creek Apartments on lot 2 is at 4:00 am, while the peak demand for the commercial center occurs at 12:00 pm. Thus, as the Staff Report correctly concludes, the Commission can find that standard of SZCDC § 16.94 is satisfied.

IV. CONCLUSION

For the reasons stated above, the Applicant satisfies the approval criteria in the SZCDC and respectfully asks that the Commission approve the Application.

Best Regards,



Garrett H. Stephenson

GST:jog
Enclosure

cc: Mr. Joseph O. Gaon (*w/Enclosure, via e-mail*)
Mr. Brad Kilby (*w/Enclosure, via e-mail*)
Mr. Steve Deacon (*w/Enclosure, via e-mail*)
Mr. Ian Lewallen (*w/Enclosure, via e-mail*)
Mr. Wayne Kittelson (*w/Enclosures, via e-mail*)
Mr. Matt Bell (*w/Enclosures, via e-mail*)
Mr. Eric Rutledge (*w/Enclosures, via e-mail*)
Mr. Josh Soper (*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.

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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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Exhibit AR

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May 23, 2022

VIA E-MAIL - rutledgee@sherwoodoregon.gov

Sherwood Planning Commission
c/o Mr. Eric Rutledge, Associate Planner
22560 SW Pine Street
Sherwood, OR 97140

Re: LU 2021-009 MM Cedar Creek Apartments

Dear Mr. Rutledge:

This letter supplements my written testimony of February 18, 2022 on behalf of Lake Bowman MHP, LLC ("Lake Bowman"), which is the owner of 16784 SW Edy Road in Sherwood, also known as Lot 3 of Cedar Creek Plaza. Specifically, I have the following comments on the applicant's revised proposal of March 21, 2022, and the supplemental staff report dated May 17, 2022.

SZDC 16.22.020 and 16.12.030

In response to evidence that the applicant does not own Lot 3 and therefore does not control any theoretically transferable residential density from Lot 3, the applicant modified its application to reduce the proposal from 84 to 67 apartment units. The revised proposal still depends, however, on the transfer of theoretical residential density to Lot 2 from Lot 7, which is owned by the applicant.

For the reasons stated in the May 17, 2022 staff report and my letter of February 18, 2022, a density transfer is not permissible and therefore Lake Bowman concurs with staff's recommendation of denial. As staff points out, lot area is a dimensional standard, and existing Code language prohibits combination of Lots 2 and 7 into the same "parcel of land" for purposes of calculating lot area (see May 17 staff report, pp. 13-19). Although not discussed in the staff report, the proposed density transfer is also impermissible because: (1) the City Council has not enacted a density transfer scheme, and land use applications must be decided based on the land use standards in effect at the time the application is complete;[1] and (2) the applicant's proposed density transfer would create unmitigated adverse impacts. I elaborated further on both of these grounds for denial in my February 18, 2022 letter, but the applicant has not responded to either argument. Accordingly, I

[1] ORS 227.175(4)(a); ORS 227.178(3)

incorporate here by reference my February 18, 2022 letter as to why the application should also be denied on either or both of these additional grounds.

SZDC 16.94.010 and 16.94.020

Lake Bowman disagrees with staff's conclusion that the off-street parking and loading requirements of SZDC Chapter 16.94 are met by the revised proposal (see May 17 staff report, pp. 58-68). In the staff report, staff cites the applicant's parking study dated January 12, 2022 (Exhibit UU) as evidence supporting its conclusion, but in fact staff's conclusion is based on the applicant's revised parking study dated February 9, 2022 which was attached to the applicant's March 21, 2022 submittal.

The February 9 study uses the same analysis and reaches the same conclusions as the January 12 study, with the numbers updated to reflect the applicant's modified proposal for 67 units rather than 84. Specifically, the February 9 study concludes (Table 4) that the 67 apartment units would produce a parking deficit of 15 spaces on the Deacon Tract (as opposed to 39 spaces for 84 units), but that the surplus on the Providence Tract is still large enough (79 surplus spaces) to absorb the deficit.[2]

This analysis suffers from the same flaws as I described in my February 18, 2022 letter regarding the earlier analysis, and I incorporate my letter here by reference. As before, the parking study disregards the limitation in the 2017 CC&Rs that only "guests, patrons and invitees" of the Deacon Tract may park on the Providence Tract. And since the Deacon Tract alone cannot provide all the parking needed for the apartments, the applicant's analysis stands or falls on the ability to get "guests, patrons and invitees" of the Deacon Tract to park on the Providence Tract. But where is the evidence that this will happen? The applicant has not shown any existing feature of the shopping center that ensures or even encourages this, nor has it proposed any mitigation to do so. Without evidence that enough parking on the Providence Tract will be used by "guests, patrons and invitees" of the Deacon Tract, the reliance on shared parking to meet Code requirements for the apartments is unreasonable. Accordingly, the City cannot conclude based on substantial evidence that the Deacon Tract has adequate parking to meet all Code requirements for the apartment project.

[2] Although the analysis fails regardless of the precise deficit, the actual deficit should be at least 20 spaces. The February 9 study assumes that the apartment project will generate a need for 92 parking spaces (Table 2), but staff concludes that 97 spaces are required (May 17 staff report, page 66).

Lake Bowman also concurs with the analysis of the insufficiency of parking from Chris Koback of Hathaway Larson LLP.

Prior Land Use Approval

Lake Bowman concurs with the analysis provided by Mr. Koback on this issue. As explained elsewhere in the record, the existing land use approval is subject to an implied condition of approval that Lot 2 must be developed with a hotel, and the applicant has not provided the necessary evidence nor engaged in the necessary analysis to remove that condition and modify the site plan approval to allow multi-family apartments on Lot 2.

Please enter this testimony into the record of this matter. Thank you for your cooperation.

Best regards,

David J. Petersen

DJP/rkb

cc: (via e-mail): Todd Fisher
Siobhan Fisher
Chris Koback, Hathaway Larson LLP

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