



# NOTICE OF DECISION

**TAX LOT:** 2S130DA2700 and 2200  
**CASE NO:** LU 2021-009 MM Cedar Creek Plaza Multifamily – Appeal  
**DATE OF NOTICE:** July 21, 2022

**Applicant**

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

**Appellant**

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

**Owner (TL 2200)**

DD Sherwood Two, LLC  
901 NE Glisan St., Suite 100  
Portland, OR 97232

**Owner (TL 2700)**

DD Sherwood One, LLC  
901 NE Glisan St., Suite 100  
Portland, OR 97232

## NOTICE

You are receiving this notice because you are the applicant, appellant, or because you provided testimony on the application. **On July 14, 2022, the Sherwood City Council AFFIRMED the Planning Commission decision and denied land use application 2021-009 MM Cedar Creek Plaza Apartments.** The denial is for a 67-unit multi-family building and associated site improvements located at 16864 SW Edy Rd. in the Retail Commercial zone.

**INFORMATION:** The full land use record can be viewed at:

<https://www.sherwoodoregon.gov/planning/project/lu-2021-009-mm-cedar-creek-multifamily-development> or can be obtained by contacting Eric Rutledge, Associate Planner, at 503-625-4242 or [rutledgee@sherwoodoregon.gov](mailto:rutledgee@sherwoodoregon.gov)

## APPEAL

Pursuant to SZCDC § 16.76.040, this is the City's final decision on the matter. Pursuant to ORS 197.830, any person who appeared before the local government orally or in writing on this matter may file an notice of intent to appeal to the Oregon Land Use Board of Appeals no later than 21 days from the date of this notice.

I, Eric Rutledge, for the Planning Department, City of Sherwood, State of Oregon, in Washington County, declare that the Notice of Decision LU 2021-009 MM was placed in a U.S. Postal receptacle, or transmitted via electronic mail, on July 21, 2022 before 5pm.

Eric Rutledge, Associate Planner

**CEDAR CREEK MULTI-FAMILY**  
**CASE FILE NO. LU 2021-009**  
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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On July 14, 2022, the City Council held an on the record hearing to consider an appeal of a site plan modification request for multifamily housing that was denied by the Planning Commission. After considering all of the arguments and evidence presented, the City Council found a lack of compliance with SZCDC § 16.12.030 Residential Land Use Development Standards, 16.22.020 Uses (Commercial Land Use Districts), and 16.90.020(D)(1) Site Plan Review Findings, as discussed in greater detail below. All of these criteria relate to the City’s standards for minimum lot area.

These findings specifically incorporate the Planning Commission findings dated May 31, 2022, the Staff Report for Land Use Appeal Hearing dated July 7, 2022, as well as the supplemental explanation provided below. Where there is any conflict between those documents, these findings shall control.

**Background Information**

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

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

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

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

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

C. Current Zoning: Retail Commercial (RC)

D. Review Type: Type IV Major Modification / Appeal

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

### **Application Summary**

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

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

### **Planning Commission Review**

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

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

**City Council Review**

The decision was appealed to City Council and, on July 14, 2022, after holding a hearing on the record, the Council voted to affirm the Planning Commission’s decision.

**Analysis of Issues Raised on Appeal**

The Appellant / Applicant’s appeal issues all relate to the requirement that each lot is appropriately sized to accommodate multi-family housing. The property is zoned Retail Commercial (RC) and subject to SZCDC § 16.22. SZCDC § 16.22.020 specifies the uses that are allowed in commercial zones set forth in tabular format and for multi-family housing, it provided:

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

(emphasis added)

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

“16.12.030 - Residential Land Use Development Standards

A. Generally

No lot area, setback, yard, landscaped area, open space, off-street parking or loading area, or *other site dimension* or requirement, existing on, or after, the effective date of this Code shall be reduced below the minimum required by this Code. Nor shall the conveyance of any portion of a lot, for other than a public use or right-of-way, leave a lot or structure on the remainder of said lot with less than minimum Code dimensions, area, setbacks or other requirements, except as permitted by Chapter 16.84. (Variance and Adjustments)

B. Development Standards

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

C. Development Standards per Residential Zone

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

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

<sup>2</sup>Maximum height is the lesser of feet or stories (emphasis added.)

The Lot Area Standard is a “Dimensional Requirement”

The Appellant argues that the lot area standard is not a controlling “dimensional requirement” as it is separately listed in the SZCDC § 16.12.030(B) categories of uses directed to the Development Standards SZCDC § 16.12.030(C) table. It asserts that because lot area, dimensions and setbacks are stated separately, only the standards stated in the following table that are not lot area or setbacks can be applied as a dimensional requirements for multi-family housing in the RC zone. In the alternative, the Appellant believes that this standard is not clear and objective, running afoul of ORS 197.307 and cannot apply to this needed housing proposal.

The City Council finds that the list of standards set forth in SZCDC § 16.12.030(B) does not serve to limit the “dimensional requirements” obligation as referenced in SZCDC §

16.22.020. Such an interpretation would divorce the term “dimensions” from its plain meaning, as well as its context and purpose, creating an artificial distinction between siting standards that the Code does not support.

The “dimensional requirements,” as used in SZCDC § 16.22.020, includes all of the siting standards set forth in the SZCDC § 16.12.030(C) table because all of them can be measured to determine the size of the space. The term “dimensional” is an adjective meaning “of or relating to dimension.” The dictionary definition of the term “dimension” is “the quality of spatial extension” or “the range over which or the degree to which something extends,” in addition to “the measure of a single line,” as the applicant proposed.<sup>1</sup> *Webster's Third New International Dictionary of the English Language*, Unabridged, copyright 1986.

The Council rejects the Appellant’s reliance on an overly narrow definition of the term “dimensional,” to suggest that it only includes only the “measure of a single line (as length, breadth, height, thickness or circumference).” Rather, the term “dimension” includes any measurements to determine the degree of spatial extension. For example, the definition of “gross floor area” in SZCDC §16.10.020 serves to illustrate that area, once calculated, results in a “dimension” that the Council finds offers additional instructive context:

“Ground Floor Area: The total area of a building measured by taking the largest outside dimensions of the building, exclusive of open porches, breezeways, terraces, garages, exterior stairways, and secondary stairways.”

Similarly, “lot area” is defined as:

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

The Council interprets the code to find that any form of measurement resulting in a spatial determination is a “dimensional requirement.”

In addition, the lot area requirements plainly and unambiguously apply to multi-family development where they say: “Minimum lot area (multifamily, first 2 units)” and

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<sup>1</sup> During the hearing, the contract city attorney raised some concern that the Appellant’s presentation of a dictionary definition during an on the record hearing might be inadmissible as new evidence. Staff clarified that under SZCDC 16.10.010, where terms are not otherwise defined, the dictionary should be referenced to aid in determining the common meaning. As such, the Appellant and the City are free to consult the dictionary to resolve any ambiguity, even after the evidentiary record has closed. *Rawson v. City of Hood River*, 77 Or LUBA 415 (2018).

“Minimum lot area (multifamily, each additional unit after first 2).” This reference offers a clear and objective connection between the minimum lot size requirements to multi-family development in the RC zone. To suggest that these same lot area standards do not apply to multi-family development when they are expressly directed to the same is implausible.

Further, the Appellant’s reading of “dimensional requirements” is inconsistent. Appellant argued that using the Webster definition, a dimensional standard is one that can be measured on a single line. Yet, Appellant’s primary argument is that because lot area and setbacks are referred to separately with the term dimensions in SDC 16.12.030.B, lot area and setbacks are not dimensional requirements. Setbacks can be measured by a single line and thus, would fall squarely within Appellant’s offered definition of a dimensional standard. This reinforces the Council’s understanding that the term “dimensional requirements” is not constrained by the list set forth in SZCDC § 16.12.030(B). Therefore, interpreting the term “dimensional requirements” to exclude setbacks, as well as lot area is not plausible. Rather than treat SZCDC § 16.12.030(B) as distinct regulatory thresholds, the Council finds that it includes nothing more than general descriptions of the list of obligations found within the table. This list does not serve to constrain the term “dimensional requirements” within SZCDC § 16.22.020.

The Council finds additional contextual support for the finding that the “dimensional requirements” is an all-inclusive term where SZCDC § 16.12.030(A), quoted in relevant part from the complete standard above, provides:

“No lot area, setback, yard, landscaped area, open space, off-street parking or loading area, or other site dimension or requirement... shall be reduced...”

Use of the term “other site dimension” suggests that “lot area” is included within a set of “dimensional requirements” which apply to the subject application that cannot be reduced. It would make no sense to include “lot area” in the list of things that cannot be reduced, when such a standard would not apply in the first instance.

Because the Appellant’s interpretation of the “dimensional requirements” fails to take a broad approach inclusive of setbacks, height, as well as lot area and is inconsistent with the context of the whole of SZCDC § 16.12.030, it is rejected. Rather, the text and context of the term “dimensional requirements” of SZCDC § 16.12.030 includes lot area obligations.

With respect to the Appellant’s argument in the alternative that the term “dimensional requirements” is not clear and objective, the City Council disagrees because: (1) the standard to be applied is “clear and objective” or (2) considered within its context, the term has only one plausible meaning.

The language of ORS 197.307(4) requires that local governments “adopt and apply only clear and objective standards, conditions and procedures regulating the development” of “needed housing.” The Council agrees that this standard applies to the subject application as it is for “needed housing” as defined in ORS 197.303(a). However, the lot area standard requires that a certain amount of lot area be available to accommodate each unit. This is not a subjective standard.

In *Roberts v City of Cannon Beach*, the Court of Appeals made clear that determining whether a term is ambiguous is not a question to be answered in the abstract by separating words from their context. Rather, it requires considering the term in context or the purpose resolves any ambiguity. If there is ambiguity after considering the context and purpose, the terms are not clear and objective. 316 Or App 305 (2021); *See also Home Builders Assn v City of Eugene*, 41 Or LUBA 370 (2002). As explained in greater detail above, considering the text of SZCDC § 16.12.030 as a whole and taken in context, it is clear and unambiguous that “lot area” is a “dimensional requirement” to which all multi-family housing must abide.

In conclusion, the Council finds that the lot area requirements of SZCDC § 16.12.030 are applicable “dimensional requirements” for multi-family housing in the RC zone. To the extent the City’s determination of which standards to apply must be “clear and objective,” the scope of the “dimensional requirements” is not subjective and to the extent it regulates density, it does so to no greater degree than the setback or height standards.

#### The Minimum Lot Area Standards are not Satisfied

The Appellant goes on to argue that the definition of “lot” allows for aggregation of non-contiguous lots for the sole purpose of satisfying the “lot area” requirements. This aggregation or transfer of lot area between Lots 2 and 7 allows for a greater number of housing units on Lot 2 than otherwise would be allowed. Again, if such aggregation is not permitted, the Appellant argues that the “lot area” standard is not “clear and objective” and therefore, does not apply.

First, the Council agrees with the Planning Commission that nothing in the regulations cited by the parties suggests any intent to allow for the transfer of lot area to accommodate additional residential density.

Turning to the text of the term “lot area,” SZCDC 16.10.20 defines “lot” as:

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



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

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

“Lot area” is defined as:

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

As the starting point, the Council finds that, as a matter of fact, Lots 2 and 7 are disconnected and not contiguous. A “lot” is “a parcel of land.” The use of the article “a” indicates that the term is singular suggesting a singular coterminous unit of land. The lot area is defined as including the area within “a lot” as can be accomplished in combination with otherwise undersized lots of record or pursuant to a metes and bounds description so long as it may be singularly described. None of these categories of lots include non-adjacent parcels.

Appellant’s reliance on that part of the definition that allows a parcel to consist of more than one lot of record does not render the definition ambiguous. A lot, which must be a single parcel, can consist of more than one contiguous lot of record for purposes of meeting development requirements. As noted above, undersized lots of record can be combined to meet requirements and be described with a single metes and bounds description.

Any ambiguity about this point is resolved by looking to the definition of “dwelling, multifamily” which provides:

“Dwelling, Multi-Family: A single structure containing three or more dwelling units that share common walls or floor/ceilings with one or more units. *The land underneath the structure is not divided into separate lots.* Multi-family dwellings include structures commonly called garden apartments, apartments and condominiums. Multi-family dwellings that are attached on one or both sides to similar adjacent but distinct units are considered townhomes (see definition above).”

By using Lot 7 to obtain the necessary lot area to serve 67 units the Appellant is using land from a separate lot. This is not what multi-family housing entails. Rather, the land area used to support multi-family must be located on a singular lot. These definitions

unambiguously suggest that the land area necessary to serve the proposed multi-family density underneath the structure must be accommodated on a single lot.

Interpreting the term “lot” in the singular is reinforced using one of the interpretive principles set forth in *PGE v Bureau of Labor and Industries*, 317 Or 606, 859 P2d 143 (1993) where the same term throughout a statute is to be given the same meaning throughout. *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210, 214 P3d 68, 72 (2009) (this same principle was applied to local government ordinances.) Uniform application of the term “lot” with respect to “minimum lot width,” “lot depth” as well as the application of setbacks requires a singular coterminous lot for development.

Finally, with respect to the clear and objective challenge, the Appellant has not proffered an interpretation that is plausible given the text of the relevant provisions, taken in context. The operable term is “lot area” which only includes the area within “the lot lines of a lot.” See *Roberts supra* at 316 (the term “lot” cannot be used to create ambiguity when divorced from the operative term “buildable lot.”) An interpretation that defines the term “lot area” one way for purposes of determining the lot area and another way with respect to establishing compliance with the remaining dimensional requirements is not plausible.

The only plausible interpretation of “lot area” is as a singular parcel of land. Lots 2 and 7 do not make a singular parcel of land. 67-units cannot be accommodated on Lot 2 in satisfaction of the minimum lot area requirements.

#### The Singular Tract Status of the Original Site Plan as it Existed in 2017 is Irrelevant

If the lot area standards apply and are clear and objective, the Appellant urges the City to view Lots 2 and 7 as part of a singular 2017 Cedar Creek Plaza site plan approval that is now before the Council for modification.

The Council finds that the initial 2017 site plan approval under file numbers SP 16-10/CUP 16-06/VAR 17-01 did not include a multi-family component. After this approval, the larger tract was subdivided to create seven new lots, each meeting the minimum lot area and any other applicable dimensional requirements. SUB 17-02. Once this subdivision was approved, it created legally distinct lots. ORS 92.017(1). The minimum square footage allowed for a multi-family unit development is expressly directed to “lot area” and not to any initial site plan approval or parent-parcel development tract.

Again, following the maxim that where a term is given a particular meaning in one place, it is assumed to have that same meaning throughout. As such, the term “lot” for purposes of minimum lot area does not take into account the whole of the parent parcel

or the Cedar Creek Plaza approval area allowing for a uniform application of the scope of the term "lot" when applying all of the dimensional requirements.

For these reasons, the Council finds that the lot lines created in 2017 control the evaluation of determining compliance with the minimum lot line requirements of SZCDC § 16.12.030.

**Conclusion**

Based on the forgoing analysis, the Council finds that SZCDC § 16.12.030, 16.22.020 and 16.90.020(D)(1) are not satisfied. The additional conditions offered by the Appellant are insufficient to establish compliance with these standards. Therefore, the Planning Commission's decision is affirmed and the application is denied.

  
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**Keith Mays, Mayor**  
*On behalf of the Sherwood City Council*

7/19/2022  
**Date**

Attest:

  
\_\_\_\_\_  
**Sylvia Murphy, MMC, City Recorder**