

LU 2021-023 SUB Cedar Creek Gardens

Week 3 Final Applicant Argument

Through August 24, 2022 at 5pm

Exhibit A – Applicant Material

Exhibit A35 – Final Applicant Argument

August 24, 2022

City of Sherwood Hearings Officer
C/- Eric Rutledge
Via email: RutledgeE@SherwoodOregon.gov

RE: Cedar Creek Gardens – Applicant’s Final Argument
City of Sherwood Casefile LU 2021-023 SUB
PDG Job No. 285-021

Dear Hearings Officer Turner,

Pioneer Design Group, Inc represents the Applicant, Westwood Homes, LLC. This letter is the Applicant’s final written argument without new evidence. It is timely submitted prior to the close of the final open record period at 5:00 PM on Wednesday, August 24, 2022.

1. Introduction.

The Applicant agrees with the Staff recommendation for approval of LU 2021-023 SUB “Cedar Creek Gardens”, subject to the findings and Conditions of Approval described in the July 27, 2022 Staff Report. This is based on review of the applicable code standards and approval criteria, the applicant’s submittal, agency comments, testimony presented at the hearing, and subsequent applicant and public testimony during the open record period.

2. Culturally Modified Trees

The Hearings Officer has heard that potentially culturally modified trees (CMT’s) exist on the subject property in the vicinity of Lots 40 and 41. The applicant disputes that CMT’s exist on the site. Further, were they to exist, no Code sections requiring their preservation have been identified during testimony. The record does, however, include expert testimony from the Applicant’s Arborist Todd Prager, RCA #597, ISA Board Certified Master Arborist, AICP, as included in the Updated Tree Plan for Cedar Creek Gardens (August 10, 2022) (Exhibit A 34), which found no evidence of CMT’s:

Note that a public comment provided at the August 3, 2022 public hearing for this project included an observation that western red cedars (Thuja plicata) at the site reminded the commenter of culturally modified trees by indigenous people. The specific tree numbers were not identified, but photos were provided that appeared to be codominant or multiple leaders located near the tops of the photographed trees. In my experience, this growth habit is naturally occurring and results from leader failures or defects as a result of storm events, wounding, or other factors. When a terminal bud is removed from the top of a growing tree, two or more buds often grow below the break resulting in a growth form of codominant or multiple leaders as shown in the photographs.

In any event, it is noted that the Hearings Officer need not settle this issue, as email testimony submitted during Open Record Period 1 by Ms. Robinette (dated Wednesday, August 10, 2022) (Exhibit C16), determined that *After studying the map, it appears that all of the possibly modified trees are outside of the cutting zone.* Accordingly, as the proposed tree plan preserves those trees which are of concern to Ms. Robinette, the Hearings Officer need not settle the issue here.

3. Tree Preservation and Removal

The record holds significant testimony regarding the removal of trees from the site, with a specific focus on tree removal from the vicinity of Lots 40 and 41, and Open Space Tract I.

The Applicant concurs with oral testimony given by staff at the August 3rd, 2022 hearing that the Sherwood Zoning and Development Code (SZDC) includes provisions which conflict with Oregon Revised Statute (ORS) 197.307(4). Section 5 of SB 1051 (2017) amended Oregon Revised Statute (ORS) 197.307(4) and expanded the requirement to apply only clear and objective standards, conditions, and procedures to regulate all housing development inside an urban growth boundary (UGB). The Land Use Board of Appeals (LUBA) has found that approval standards are not clear and objective if they impose subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. As described in testimony by staff, SZDC Section 16.142.070.D.(4) (which includes subjective, value-laden analysis requirements such as “is feasible and practical”, and “...or some combination thereof, as determined by the City.” cannot be considered a clear and objective standard, and therefore is not applicable to this application.

In contrast, SZDC Sections 16.142.070.D.(1) and (2) appear to provide the Applicant a clear and objective pathway to approval. Section 16.142.070.D.(1) states:

D. Retention requirements

1. *Trees may be considered for removal to accommodate the development including buildings, parking, walkways, grading etc., provided the development satisfies of D.2 or D.3, below.*

As stated in Section 16.10.010 of the SZDC, the word "may" is permissive. Further, SZCD Section 16.10.020 specifically defines development as:

Any man-made change to improved or unimproved real property or structures, including but not limited to construction, installation, or alteration of a building or other structure; change in use of a building or structure; land division; establishment or termination of rights of access; storage on the land; tree cutting; drilling; and any site alteration such as land surface mining, filling, dredging, grading, construction of earthen berms, paving, parking improvements, excavation or clearing.

The applicant has provided a Tree Plan, Preliminary Engineering Plans, and additional information in the record which demonstrates the necessity for tree removal from outside of

significant natural resource areas for a 41-lot land division, for the purpose of specific man-made changes to unimproved real property such as grading, excavation for utility installation, paving, installation, and typical construction activities. This includes trees in the vicinity of Lots 40 and 41, and Tract I. Therefore, pursuant to SZDC Section 16.142.070.D.(1), tree removal is permitted in these areas provided the development satisfies Section 16.142.070.D.(2). No further tests are specifically or implicitly applied by this Section.

Extensive testimony has been provided in the record verifying the Applicant's compliance with the tree canopy requirements of Section 16.142.070.D.(2), including the Applicant's written narrative, preliminary engineering plans, the Updated Tree Plan for Cedar Creek Gardens (August 10, 2022) prepared by Arborist Todd Prager, RCA #597, ISA Board Certified Master Arborist, AICP, and findings in the Hearings Officer Staff Report. Further, the Applicant has modified the site plan in response to public testimony to retain additional trees with extensive tree protection requirements. As per the methodology in Subsection (2), the applicant proposes to retain greatly more than the required 40 % tree canopy. As updated in Exhibit A 34 in response to public testimony, the total calculated tree canopy for the site is 177,674 square feet, or 61% (133,714 retained trees + 43,960 planted trees = 177,674 / 291,266 = 61%). This greatly exceeds the required minimum tree canopy of 40%, and represents an additional 61,167 square feet (approximately 1.4 acres) of tree canopy on the site.

Testimony provided by the Arbor Lane Home Owners Association (Exhibit C14) questions the necessity of tree removal within Tract I, which is an open space park area not subject to heightened tree retention requirements. The applicant has stated that within Tract I, tree removal includes the removal of one dead tree (Tree # 6586) immediately adjacent to the west side of the proposed trail alignment, and the removal of a number of trees to the east of the trail to allow for grading for trail construction, utility installation (storm drainage, public water, and public sanitary sewer extension), and grading for Lot 41. As shown on the revised Preliminary Plans submitted as Exhibit A 34, the relocation of the trail to the east as requested by the city has increased conflicts with trees east of the trail in Tract I. Further, as the trail will be required to be constructed to withstand the weight of maintenance vehicles and to accommodate a public sewer line and manholes, trees are less able to be retained in this area. It is noted that Consulting Arborist David Hunter has stated on behalf of the Arbor Lane Homeowners Association (Exhibit C14) that "The walking path [in Tract I] could be laid on the ground, not dug into the ground, and could be installed without removing any trees in the "open space". On the contrary, as Exhibit D10 shows, the trail (as required by the City of Sherwood for maintenance access) is required to be constructed with a subgrade compacted to 95%, geotextile fabric, 8 inches of compacted rock, and 3 inches of asphaltic concrete. Such trail construction will unavoidably require the removal of trees along and adjacent to its alignment.

Revised Preliminary Site Plans submitted as Exhibit A 34 show minor adjustments to the alignment of the driveway shared by Lots 40 and 41 in order to accommodate the retention of boundary trees, as their removal has been opposed by property owners sharing the tree ownership. Due to the close proximity to development work, the Updated Tree Plan for Cedar Creek Gardens (August 10, 2022) includes additional "best management practices" regarding tree protection methodologies to ensure the ongoing health of trees retained on site. These tree protection methodologies will be listed on construction documents prepared for the site.

The Hearings Officer can find that the Application satisfies the applicable requirements of the SZDC for tree removal as proposed.

4. On-Site Wetland Delineation

Public testimony has requested that additional wetland delineation be performed on site. In response, it is noted that the primary guidance document for this application is the Design and Construction Standards for Sanitary Sewer and Surface Water Management (Resolution and Order 19-5 as amended by R&O 19-22; Clean Water Services, 2019), which provides the methodology for assessing the presence and extent of Sensitive Areas within the development site and within 200 feet of the site, and the required Vegetated Corridors (VCs) adjacent to them.

Environmental Science & Assessment staff conducted the site investigations on February 8, April 14, and September 22, 2021. Potential wetland areas on the parcel were further evaluated using the methodology provided in the Army Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region, (U.S. Army Corps of Engineers, 2010).

The wetland delineation was reviewed by Oregon Department of State Lands and a concurrence for all wetland boundaries in the project area was approved on March 17, 2022 (WD#2022-0005). The preferred site plan will result in sensitive area and CWS VC encroachment and these impacts require a Tier 2 Alternatives Analysis under district standards (CWS 3.07.4). Clean Water Services reviewed the Tier II site assessment prepared for the project in 2022 and issued a Service Provider Letter approving the proposed CWS VC encroachment and on-site mitigation for this project in April 20, 2022 (CWS SPL. 21-002919).

The only wetland (sensitive area) impacts are for City approved trails, access roads to storm facilities, a required public street connection to neighboring property, and frontage improvements to SW Brookman Road. No new impacts are proposed for the Cedar Creek wetlands or floodplain. All wetland impacts will be evaluated and permitted through the Joint Permit Application review process with Corps of Engineers and Oregon DSL.

5. Width of Northeastern Flagpole Portion of Tax Lot 3S1060000107

Based on the testimony provided, the key issue identified is the discrepancy between the documents prepared for the Annexation of the Brookman Road Area into the City of Sherwood, and recorded surveys of the area. In his written rebuttal, Addendum to Sweeney Argument #8” (Exhibit C18), Mr. Sweeney states that “As I pointed out in my Argument #8, there is a *major discrepancy* here and the AKS surveys, the official annexation surveys, need to be considered and not ignored”. As the Applicant has previously stated, the fundamental distinction here is that the applicant has submitted into the record three (3) boundary surveys of real property. As shown on Sheet 1 of the preliminary Record of Survey (RoS) (Exhibit A34, Exhibit 1), the north-south width of the flagpole is 59.87 feet where it abuts SW Brookman Road. This distance is reported on the preliminary RoS as both the actual measured distance, and the distance noted on RoS 23,506 (Exhibit A34, Exhibit 2). RoS 23,506 was accepted for filing by the County Surveyor on

11/15/1989. As described in the survey narrative, *The purpose of this survey was to establish and monument the north and west lines of T.L. '107' Recorded as Fee No. 89-39880.* Since that time, the County Surveyor has also filed a RoS showing the flagpole portion where it abuts SW Brookman Road. When measured using the supplied scale, RoS 33,327 (Exhibit A34, Exhibit 3), prepared by County Surveyor Scott Young and recorded on April 27, 2018, shows the flagpole with a north-south width of approximately 60 feet. Accordingly, the width of the northeastern flagpole portion of Tax Lot 3S1060000107 has been formally documented by recorded surveys as 59.87 feet since at least November 1989 and up to April 2018 (approximately 29 years).

The exhibit referenced in testimony as showing a 50-foot width for the flagpole portion is Exhibit B of Metro proposal number: WA2917. Exhibit B, which is a legal exhibit prepared to provide a visual supplement for other documentation, and was not part of a site survey or an accepted and recorded RoS, includes a reference to a bearing and distance of 50 feet in the vicinity of SW Brookman Road. Unlike RoS 23,506, the purpose of Exhibit B is not to provide a boundary for Tax Lot 107, but rather to establish a perimeter boundary for the wider annexation of property inside the corporate limits of the City of Sherwood. As described by Ted Foster, Senior Cartographer, Washington County Assessment and Taxation, in an email dated October 13, 2021 (Exhibit 4) *....the second course of the description includes the point of call reference "to the easterly extension of the north line of Deed Book 1182 Page 951; thence along said easterly extension and the north line of said Deed....". The reference to the point of call controls over the distance given. In this case due to the point of call, the entirety of tax lot 107 is within the districts.*

As stated previously by the applicant, based on the reference to the point of call, and as confirmed by RoS 23,506, 33,327, and the preliminary RoS prepared for the site, the Hearings Officer can find that the width of Tax Lot 107 abutting SW Brookman Road is correct at 59.87 feet.

6. Access to Lots 40 and 41 from SW Brookman Road

The Hearings Officer has been asked whether he has authority over access to SW Brookman Road. The Applicant has submitted Design Exception requests for access to SW Brookman Road to the County Engineer for review and approval, based on professional studies by Lancaster Mobley, Oregon's longest-standing independent transportation engineering and planning firm, with over 35 years of industry experience. These requests include access and sight distance design exceptions for the proposed access to Lots 40 and 41. Exhibit B10, prepared by Naomi Vogel, Associate Planner, and dated August 8, 2022, confirms that the approval authority is Washington County, and specifically the County Engineer. Further, under Chapter 220.020.4 of the Washington County Road Design and Construction Standards, only the Applicant may appeal the County Engineer's decision to deny an exception, with the Director [Washington County Land Use and Transportation] as the appeal authority. No appeal procedure is permitted for design exception approvals. As provided in Exhibit C19 (Memorandum from Naomi Vogel dated June 30, 2022), "The Design Exception requests for access to SW Brookman Road have been approved by the County Engineer (subject to Final Signature)".

Accordingly, the Hearings Officer can find that the Design Exceptions have been properly submitted to the County and authorized, and no further action is necessary.

In addition to the above, testimony has been submitted questioning the designation and design of the access to Lots 40 and 41, and whether sidewalks should be required on both sides of the proposed public streets. In response, the applicant notes that SZDC Section 16.106.40.N.2 - Private Streets states:

*The construction of new private streets, serving single-family residential developments shall be prohibited unless it provides principal access to two or fewer residential lots or parcels i.e. flag lots. Provisions shall be made to assure private responsibility for future access and maintenance through recorded easements. **Unless otherwise specifically authorized**, a private street shall comply with the same standards as a public street identified in the Community Development Code and the Transportation System Plan. A private street shall be distinguished from public streets and reservations or restrictions relating to the private street shall be described in land division documents and deed records. A private street shall also be signed differently from public streets and include the words "Private Street". [Emphasis added]*

Section 16.118.050 - Private Streets includes the same *Unless otherwise specifically authorized*, provision as Section 16.106.40.N.2. In response to Section 16.106.10.A. – Creation, the Hearings Officer Staff Report states:

.....The following private streets are also proposed as part of the development:

- *Tract G Private street*
- *Easement on Lots 2-3 Private shared driveway*
- *Easement on Lot 41 Private shared driveway*

...

.....With the exceptions noted above [Design Modifications (City of Sherwood) and Design Exceptions (Washington County)], all public and private streets are proposed to comply with the applicable standards of the City code and TSP.

It is also noted that staff testified during the hearing on August 3, 2022, that it is not City practice to require full development of private streets serving 1 – 2 lots to public street standards. Further, staff testified that it is the City’s position that the proposed private streets are otherwise specifically authorized as proposed. These remarks are further discussed in detail in testimony submitted as “An Addendum to Sweeney Argument #2” (ExhibitC18).

It is also noted that pursuant to SZEC Section 16.106.060, sidewalks are required on both sides of a public street, except as otherwise provided. Following the above, Staff similarly testified that it is not City practice to require sidewalks for private streets serving 1 -2 lots. As the proposed private streets are otherwise specifically authorized as proposed, sidewalks are not otherwise required.

It is noted that the SZDC is silent on the difference between private driveways and private streets. However, in considering the City’s interpretation of the private street standards here, Section 16.118.050 - Private Streets states:

The construction of new private streets, serving single-family residential developments shall be prohibited unless it provides principal access to two or fewer residential lots or parcels i.e. flag lots.

As defined in Section 16.10.020 of the SZDC, a Flag Lot, which is used as an example of where private streets are considered appropriate, is:

A building lot which is provided access to a public street by means of a narrow strip of land with minimal frontage.

The City's interpretation and approval of the proposed private streets as designed is considered entirely consistent with the definition of Flag Lot. A requirement to construct the proposed private streets using the same standards as public streets, however, is wholly inconsistent with the flag pole definition of including "minimal frontage". The minimum required right-of-way width of a 28' Standard Residential Street in the City of Sherwood Transportation System Plan is 52 feet, which exceeds the required 25-foot minimum lot width of the district by greater than 2x. Accordingly, such a private street would not in itself be considered to be located in or serving a flag-lot.

For the reasons outlined above, the Hearings Officer can approve the private streets within the development as proposed.

7. Open Space and 10% Reduction in Lot size

It is noted that in the Hearings Officer Staff Report and several public testimony submittals, the amount of open space provided within the development has been questioned, which is reasonable given the size of the site, and the overall amount and types of open space provided.

In the Hearings Officer Staff Report (page 46), staff found the following:

The applicant's narrative states that a total of 54,453 SF of open space is provided within Tracts B, D, H, and I which equates to 18.7% of the net buildable area. Tract H cannot count as open space as it is required sensitive area by CWS. The Conceptual Open Space Plan also indicates Tracts E and F (visual corridors) are active open space areas. Per the standard above, sensitive areas and visual corridors cannot be counted towards the 5% open space requirement. The applicant is conditioned to provide a corrected open space percentage prior to final plat approval.

It is noted that between initial submittal and the application being deemed complete, several changes to the overall site plan were required, and altered the calculations provided within the application. The following analysis is consistent with the proposed preliminary plat as submitted within Exhibit A 34.

Net developable site area is defined as the remaining area of a parent parcel after excluding present and future rights-of-way, environmentally constrained areas, public parks and other public uses. Accordingly, the net developable site area equals the 234,328 square feet of future lot areas plus 56,938 square feet of other developable areas/open space (outside of VC areas) for

a total of 291,266 square feet, or 6.69 Acres. Section 16.142.30.A. of the SZDC therefore requires the creation of 14,563 square feet (0.33 acres) of open space, which is 5% of the net developable area of the site.

The development includes approximately 56,938 square feet (24% of net buildable area) of open space outside of required yards/setbacks, Sensitive Areas, Vegetated Corridor, Visual Corridor, and 100-Year Flood Plain, and prior to application of Section 16.144.030.B.1. While some of this area may be located within Tracts B, D, H, and I, only those areas not otherwise required to be preserved have been included in the 5% calculation. Tracts E and F were not included within these calculations.

The applicant has also requested approval to reduce the minimum lot size by up to 10%, and therefore a portion of the open space area calculated above is required to be set aside to accommodate the requirements of Section 16.144.030.B.1., being a minimum of 2,485 square feet. Accordingly, a total additional open space allocation of 54,453 square feet (56,938 square feet - 2,485 square feet = 54,453 square feet) (18.7% of net buildable area = 1.25 acres) is provided.

As conditioned, the applicant will provide additional confirmation of these open space calculations prior to final plat approval. However, given the significant amount of open space provided over and above that required, the Hearings Officer can find that the applicable standards are met.

8. Conclusion.

The Applicant appreciates everyone's participation in this hearing. For the reasons explained by City Staff and the Applicant, the Hearings Officer should Approve the Application with Conditions as recommended by staff.

Sincerely,
Pioneer Design Group, Inc.



Wayne Hayson
Planning Manager

CC Westwood Homes, LLC (via email)
David Allen, Attorney at Law (via email)
Matthew Sprague (via email)