



Home of the Tualatin River National Wildlife Refuge

Case No. \_\_\_\_\_  
Fee \_\_\_\_\_  
Receipt # \_\_\_\_\_  
Date \_\_\_\_\_  
TYPE \_\_\_\_\_

### City of Sherwood Application for Land Use Action

Type of Land Use Action Requested: (check all that apply)

- Annexation
- Plan Amendment (Proposed Zone \_\_\_\_\_)
- Planned Unit Development
- Site Plan (square footage of building and parking area)
- Variance (list standards to be varied in description)
- Conditional Use
- Partition (# of lots \_\_\_\_\_)
- Subdivision (# of lots \_\_\_\_\_)
- Other: Major Modification of Prior Approval

*By submitting this form the Owner, or Owner's authorized agent/ representative, acknowledges and agrees that City of Sherwood employees, and appointed or elected City Officials, have authority to enter the project site at all reasonable times for the purpose of inspecting project site conditions and gathering information related specifically to the project site.*

Note: See City of Sherwood current Fee Schedule, which includes the "Publication/Distribution of Notice" fee, at [www.sherwoodoregon.gov](http://www.sherwoodoregon.gov). Click on Government/Finance/Fee Schedule.

#### Owner/Applicant Information:

Applicant: Jordan Ramis PC Attn: Jamie Howsley Phone: (503) 598-7070  
 Applicant Address: 2 Centerpointe Dr, 6th Floor, Lake Oswego, OR 97035 Email: jamie.howsley@jordanramis.com  
 Owner: Sherwood Commerce Center, LLC Phone: 503 973-0270  
 Owner Address: 1121 SW Salmon St Suite 500 Email: robm@schnitzerproperties.com  
 Contact for Additional Information: James Howsley 503 598-7070

#### Property Information:

Street Location: 21800 SW Oregon St.  
 Tax Lot and Map No: T2S R1W S28C Tax Lot 600  
 Existing Structures/Use: Industrial  
 Existing Plan/Zone Designation: Employment Industrial  
 Size of Property(ies) 38.74 acres

#### Proposed Action:

Purpose and Description of Proposed Action:

Modify two conditions of the prior Planning Commission approval.

Proposed Use: Industrial

Proposed No. of Phases (one year each): One

LAND USE APPLICATION FORM

Authorizing Signatures:

I am the owner/authorized agent of the owner empowered to submit this application and affirm that the information submitted with this application is correct to the best of my knowledge.

I further acknowledge that I have read the applicable standards for review of the land use action I am requesting and understand that I must demonstrate to the City review authorities compliance with these standards prior to approval of my request.

Dec 1, 2022

Applicant's Signature



Date

12/7/22

Owner's Signature

Ryan Schera  
Sherwood Commerce Center, LLC

Date

**The following materials must be submitted with your application or it will not be accepted at the counter.** Once taken at the counter, the City has up to 30 days to review the materials submitted to determine if we have everything we need to complete the review. Applicant can verify submittal includes specific materials necessary for the application per checklist.

- 3 Copies of Application Form\*** completely filled out and signed by the property owner (or person with authority to make decisions on the property).
- Copy of Deed** to verify ownership, easements, etc.
- At least 3 folded** sets of plans\*
- At least 3 copies** of narrative addressing application criteria\*
- Fee** (along with calculations utilized to determine fee if applicable)
- Neighborhood Meeting Verification** including affidavit, sign-in sheet and meeting summary (required for Type III, IV and V projects)

\* **Note** that the required numbers of copies identified on the checklist are required for completeness; however, upon initial submittal applicants are encouraged to submit only 3 copies for completeness review. Prior to completeness, the required number of copies identified on the checklist and one full electronic copy will be required to be submitted.

## Introduction

The Sherwood Commerce Center was approved by the Planning Commission in February, 2022. Additional engineering work on the future Ice Age Dr. has raised some concerns by city staff regarding the two existing utility easements located in the area of that future right-of-way. The Planning Commission decision includes this conclusion on the future ROW:

“The applicant’s Future Road Connectivity Diagram (Exhibit A — Appendix J) identifies all three future street intersections along SW Oregon St. referenced in the Concept Plan. The final location of SW Ice Age Dr. and SW Tonquin Ct. are being reviewed and approved as part of the land use decision.”

The location of Ice Age Dr. has been decided, and is not subject to further review.

The two utility easement areas were described in Conditions of Approval B3, for the Kinder Morgan easement, and B4, for the BPA easement. The final site design for the Sherwood Commerce Center buildings and site improvements confirms they are located outside the two easements; only landscaping is proposed in the easement areas. Now that the final design confirms the two easement areas are not directly impacted by this development, this application is to modify the prior approval to eliminate Conditions B3 and B4, and thereby eliminate the requirement that the applicant obtain permission from third parties, BPA and Kinder Morgan, to construct the approved development. Those conditions provide:

“B3: Prior to Final Site Plan Approval, and Approval of the Engineering Public Improvement Plans, the applicant shall obtain written approval from Kinder Morgan for the final horizontal alignment of SW Ice Age Dr. and any on-site improvements within the easement.

B4: Prior to Final Site Plan Approval, and Approval of the Engineering Public Improvement Plans, the applicant shall obtain BPA approval for the final horizontal alignment of SW Ice Age Dr. and any on-site improvements within the easement.”

Again, the proposed development is outside the easement areas. Requiring the applicant to obtain third party consents for the approval of a final site plan is unreasonable because the approval of the final site plan is a city responsibility which cannot be delegated to a third party.

Moreover, the conditions are unlawful delegation under Oregon law. LUBA precedents confirm unlawful delegation occurred. The conditions violate Article I, section 21 of the Oregon constitution because they authorize an entity other than the City to select the final street alignment. *Cosner v. Umatilla County*, 65 Or LUBA 9, 15 (2012). Second, the conditions prospectively gave the easement holders the authority to determine the future right-of-way design, and as interpreted by staff, the authority to take more of the applicant’s real property for new easement areas. *Barnes v. City of Hillsboro*, 61 Or LUBA 375, 392, *aff’d* 239 Or 73, 243 P3d 139 (2010). Third, the conditions unlawfully give the easement holders veto power over the applicant’s site plan, but provided no standards for the easement holders’ decisions, and no

standards or procedure for an appeal thereof. *Iberdrola Renewables, LLC v. Umatilla County*, 67 Or LUBA 149, 154 (2013).

The city staff apparently interprets these conditions to require the applicant to relocate the existing utilities from their easements to new locations on the site, and thus convey a real property interest to the easement holders. These conditions do not require the applicant to convey new easement areas to BPA or Kinder Morgan. Nor does any code provision authorize the staff to demand conveyance of new easement areas to third parties following a land use approval in which no such conveyances were required. And of course the existing easements themselves do not grant the easement holders a veto right over development of the Sherwood Commerce Center site, the alignment of Ice Age Dr., or a right to relocate their utilities elsewhere on the site.

The applicable criteria are addressed below, and demonstrate that the proposed modification to eliminate Conditions B3 and B4 is consistent with the original approval, and consistent with the terms of the easements, and therefore should be approved by the Planning Commission.

#### 16.90.030 - Site Plan Modifications and Revocation

##### A. Modifications to Approved Site Plans

##### 1. Major Modifications to Approved Site Plans

a. Defined. A major modification review is required if one or more of the changes listed below are proposed: (7) Change to a condition of approval that was specifically applied to this approval (i.e. not a "standard condition"), or a change similar to items identified in Section 16.90.030.A.1.a.(1)—(2) as determined by the Review Authority.

b. Approval Criteria. An applicant may request a major modification as follows:

(1) Upon the review authority determining that the proposed modification is a major modification, the applicant must submit an application form, filing fee and narrative, and a site plan using the same plan format as in the original approval. The review authority may require other relevant information, as necessary, to evaluate the request.

Applicant Response: The application form, filing fee, and site plan are provide along with this narrative to describe compliance with the application criteria.

(2) The application is subject to the same review procedure (Type II, III or IV), decision making body, and approval criteria used for the initial project approval, except that adding a Conditional Use to an approved Type II project is reviewed using a Type III procedure.

Applicant Response: This major modification is subject to a Type 3 procedure consistent with the original conditional use approval. The Planning Commission will decide the application according to the conditional use and site plan criteria, which are reviewed below.

(3) The scope of review is limited to the modification request and does not open the entire site up for additional review unless impacted by the proposed modification. For example, a request to modify a parking lot requires site design review only for the proposed parking lot and any changes to associated access, circulation, pathways, lighting, trees, and landscaping.

Applicant Response: The scope of this modification is limited to two conditions that affect the northeast portion of the site, where the new Ice Age Dr. right-of-way is being dedicated. The conditions regard consent from the owners of two existing private utility easements, but do not affect the compliance of the proposed development with city code development standards, such as setbacks, height, or lot coverage. The proposed development is consistent with the terms of those two easements, and the modification request is to confirm that nothing more is required.

(4) Notice must be provided in accordance with Chapter 16.72.020.

Applicant Response: The planning staff will publish the requisite notice.

(5) The decision maker approves, denies, or approves with conditions an application for major modification based on written findings of the criteria.

Applicant Response: The Planning Commission will publish the requisite final land use decision.

#### 16.82.020 – Conditional Use Criteria

C. Use Criteria. No conditional use shall be granted unless each of the following is found:

1. All public facilities and services to the proposed use, including but not limited to sanitary sewers, water, transportation facilities, and services, storm drains, electrical distribution, park and open space and public safety are adequate; or that the construction of improvements needed to provide adequate services and facilities is guaranteed by binding agreement between the applicant and the City.

Applicant Response: The public facilities to serve the approved industrial use are adequate. The issue with these conditions is future public facilities that are primarily intended to serve future developments to the east and south.

To facilitate development of those properties and alternate vehicle access to this site, the applicant is dedicating a 76-foot right-of-way for Ice Age Drive. That new right-of-way is not necessary to serve this site, because the site has a lengthy frontage on SW Oregon Street where safe vehicle access is being provided. However, there is no existing street network toward the east and south. To accommodate future expansion of the city in that direction, the applicant is dedicating the Ice Age Drive right-of-way to allow that future street to pass through the

northeast corner of this site and extend to the southeast to serve other properties owned by third parties.

There are two existing easements for utilities in the northeast portion of the site where Ice Age Drive will be located. The BPA easement crosses the northeast corner of the site and is not affected by the dedication and development of Ice Age Drive. Correspondence from the BPA to that effect is attached.

As noted in the Planning Commission decision:

“The applicant’s Future Road Connectivity Diagram (Exhibit A — Appendix J) identifies all three future street intersections along SW Oregon St. referenced in the Concept Plan. The final location of SW Ice Age Dr. and SW Tonquin Ct. are being reviewed and approved as part of the land use decision.”

“The Ice Age Drive right-of-way section shall be 76-feet minimum meeting the City’s standard for a 3-lane collector road without on-street parking. The Ice Age Drive section shall be centered relative to the north property line of the subject site.

Where the Ice Age Drive alignment deviates from the subject site north and east property line (i.e., along the BPA/PGE overhead power line easements), the Ice Age Drive road section right-of-way in its entirety shall be located parallel to the BPA/PGE overhead power line easements.

It is anticipated that Ice Age Drive full design and construction shall be performed as a City capital improvement project. Hence, a fee-in-lieu of construction shall be paid to the City for the Ice Age Drive section which resides within the subject site”

The land use decision—including the applicant’s Future Road Connectivity Diagram—was approved without any requirement to relocate the Kinder Morgan easement. The staff’s belated request to relocate that easement is a collateral attack on the prior land use approval.

More specifically, the applicant has designed the Ice Age Dr. right-of-way alignment consistent with this text in the decision. The staff does not argue otherwise. At some future point, the City will construct Ice Age Dr. as a capital improvement project. The removal of Conditions B3 and B4 is consistent with the Planning Commission’s conclusion that the applicant will dedicate the right-of-way, and the City will construct the street later.

2. Proposed use conforms to other standards of the applicable zone and is compatible with abutting land uses in regard to noise generation and public safety.

Applicant Response: As the Planning Commission found:

“Property to the south is currently developed with single-family homes associated with a farm, forestry, or business use and a development setback of approximately 350 ft. from the southern property line is proposed. The City has received an annexation

application for the properties currently containing single-family residences and it is anticipated all of the properties to the south will be redeveloped with employment industrial uses in the near future.

The property to the west has submitted a land use application for an industrial development identified as LU 2021-015 SP Oregon St. Business Park. The property to the north is zoned General Industrial and the property to the east is zoned FD-20 (Future Development 20) under Washington County. Properties currently zoned FD-20 are automatically zoned EI upon annexation to the City of Sherwood.

The existing and future land uses in all directions is General Industrial or Employment Industrial and no adverse impacts related to noise and public safety are anticipated to result from the proposed industrial development.”

The removal of Conditions B3 and B4 is consistent with these findings.

3. The granting of the proposal will provide for a facility or use that meets the overall needs of the community and achievement of the goals and/or policies of the Comprehensive Plan, the adopted City of Sherwood Transportation System Plan and this Code.

Applicant Response: As noted in the prior staff report:

“The subject property is zoned Employment Industrial and is located in the City’s Tonquin Employment Area. The TEA Concept Plan was adopted by City Council via Ordinance 2010-014 and is incorporated into Chapter 8 of the City’s Comprehensive Plan. In addition to standalone distribution and warehousing, the applicant is proposing uses consistent with the EI zone. Granting the proposal will provide for a facility that meets the goals and policies of the TEA Concept Plan and Chapter 8 of the Comprehensive Plan.

The TEA Concept Plan, TEA Implementation Plan, and City Transportation System Plan (TSP) identify a new east-west collector street along the north boundary of the subject property. The new collector is named “SW Ice Age Drive” and is shown on the applicant’s plan set. The City of Sherwood Engineering Comments require dedication of the necessary right-of-way for the future street.”

4. Surrounding property will not be adversely affected by the use, or that the adverse effects of the use on the surrounding uses, the neighborhood, or the City as a whole are sufficiently mitigated by the conditions proposed.

Applicant Response: Surrounding property is not adversely affected by removal of the conditions because the final site plan demonstrates the Ice Age Dr. right-of-way alignment is adequate to serve the neighboring properties as intended by the Transportation System Plan. There is no evidence in the record that the easement holders are adversely affected by the approved site plan, or the proposed final site plan.

5. The impacts of the proposed use of the site can be accommodated considering size, shape, location, topography and natural features.

Applicant Response: The proposed uses are indoor industrial and warehousing. The impacts can be accommodated because the site has adequate space for the buildings, parking, and ancillary uses. Because the final site plan is consistent with the approved plan, and outside of the Kinder Morgan and BPA easements, the proposed uses can be accommodated as currently designed, without the need for third party approvals from Kinder Morgan and the BPA.

6. The use as proposed does not pose likely significant adverse impacts to sensitive wildlife species or the natural environment.

Applicant Response: There are no inventoried Goal 5 resources on the site. Therefore, the proposed use does not pose a significant risk to sensitive species or the natural environment.

#### 16.90.020 - Site Plan Review

D. Required Findings No site plan approval will be granted unless each of the following is found:

1. The proposed development meets applicable zoning district standards and design standards in Division II, and all provisions of Divisions V, VI, VIII and IX.

Applicant Response: Conditions B3 and B4 are unrelated to the applicable zoning district standards and design standards in Division II, and all provisions of Divisions V, VI, VIII and IX, because the conditions grant third parties approval authority which is not authorized by these sections of the code. This criterion does not apply.

2. The proposed development can be adequately served by services conforming to the Community Development Plan, including but not limited to water, sanitary facilities, storm water, solid waste, parks and open space, public safety, electric power, and communications.

Applicant Response: Conditions B3 and B4 are unrelated to the services described in the Community Development Plan, because that plan does not grant third parties approval authority for further review of an approved site plan. This criterion does not apply.

3. Covenants, agreements, and other specific documents are adequate, in the City's determination, to assure an acceptable method of ownership, management, and maintenance of structures, landscaping, and other on-site features.

Applicant Response: Conditions B3 and B4 relate to the existing Kinder Morgan and BPA easements in the northeast portion of the site. The site plan, including the alignment of Ice Age Dr., was approved in the Planning Commission decision. The site plan is consistent with those existing easements. Conditions B3 and B4 do not require any changes to the existing easements. The City lacks authority in the zoning code to change the terms of those easements. And it lacks authority to reinterpret Conditions B3 and B4 to require changes to the terms of the easements to require additional property conveyances.

If the city believes that changes to the easements are appropriate, it should proceed with a resolution of necessity pursuant to ORS 35.235(1) in order to acquire additional easement rights. However, the approved site plan does not alter the ownership of the site, including the



boundaries of the easement areas or the easement terms. Therefore, the proposed modification satisfies this criterion.

4. The proposed development preserves significant natural features to the maximum extent feasible, including but not limited to natural drainage ways, wetlands, trees, vegetation (including but not limited to environmentally sensitive lands), scenic views, and topographical features, and conforms to the applicable provisions of Division VIII of this Code and Chapter 5 of the Community Development Code.

Applicant Response: There are no inventoried natural features in the northeast portion of this site, and Conditions B3 and B4 do not regard natural features. This criterion is not applicable

5. For developments that are likely to generate more than 400 average daily trips (ADTs), or at the discretion of the City Engineer, the applicant must provide adequate information, such as a traffic impact analysis (TIA) or traffic counts, to demonstrate the level of impact to the surrounding transportation system. The developer is required to mitigate for impacts attributable to the project, pursuant to TIA requirements in Section 16.106.080 and rough proportionality requirements in Section 16.106.090. The determination of impact or effect and the scope of the impact study must be coordinated with the provider of the affected transportation facility.

Applicant Response: As a result of the traffic study and the Transportation System Plan, the applicant agreed to dedicate right-of-way for Ice Age Dr. as traffic mitigation. As the Planning Commission found,

“The final location of SW Ice Age Dr. and SW Tonquin Ct. are being reviewed and approved as part of the land use decision.”

Conditions B3 and B4 unlawfully delegate to two third parties the ability to change the Planning Commission decision which approved the alignment of Ice Age Dr. as mitigation for traffic. The staff’s interpretation of these conditions to require relocation of a natural gas pipeline is inconsistent with the text of the conditions, and with the text of this code section. the traffic mitigation is fully provided, and does not require third party approval of the alignment of Ice Age Dr. Thus removal of the conditions is consistent with this criterion.

6. The proposed commercial, Multi-Family dwelling, institutional or mixed-use development is oriented to the pedestrian and bicycle, and to existing and planned transit facilities. Urban design standards include the following:

Applicant Response: This project is industrial development, so this code section does not apply.

7. Industrial developments provide employment opportunities for citizens of Sherwood and the region as a whole. The proposed industrial development is designed to enhance areas visible from arterial and collector streets by reducing the "bulk" appearance of large buildings. Industrial design standards include the following:

Applicant Response: Conditions B3 and B4 do not regard the appearance of large buildings. This criterion does not apply.