City of Sherwood Oregon
Home of the Tualatin River National Wildlife Refuge

SHERWOOD CITY COUNCIL MEETING MINUTES
22560 SW Pine St., Sherwood, Or
July 14, 2022

SPECIAL SESSION

1. **CALL TO ORDER:** Mayor Mays called the meeting to order at 7:00 pm.

2. **COUNCIL PRESENT:** Mayor Keith Mays, Councilors Kim Young, Taylor Giles, and Doug Scott. Councilor Sean Garland participated remotely. Councilor Renee Brouse and Council President Tim Rosener were absent.

3. **STAFF PRESENT:** City Manager Keith D. Campbell, Interim City Attorney Carrie Richter, Public Works Director Craig Sheldon, City Engineer Bob Galati, Associate Planner Eric Rutledge, and Planning Technician Colleen Resch.

4. **APPROVAL OF AGENDA:**

   MOTION: FROM COUNCILOR YOUNG TO APPROVE THE AGENDA. SECONDED BY COUNCILOR SCOTT. MOTION PASSED 5:0, ALL PRESENT MEMBERS VOTED IN FAVOR (COUNCILOR BROUSE AND COUNCIL PRESIDENT ROSENER WERE ABSENT).

   Mayor Mays addressed the next agenda item.

5. **PUBLIC HEARINGS:**

   A. Resolution 2022-053, Establishing the Brookman Area Public Sanitary Sewer Reimbursement District and directing staff to enter into a Reimbursement District Agreement with the developer (Brookman Development, LLC)

   City Engineer Bob Galati presented the "Brookman Development LLC Request to Establish a Reimbursement District" PowerPoint presentation (see record, Exhibit A) and explained that Brookman District LLC had requested to form a reimbursement district. He provided an overview of the map of the area on page 2 of the presentation. Mr. Galati reported that Brookman District LLC had submitted an application letter with attachments on April 22, 2022 in which the establishment of a reimbursement district was requested and explained that the application would follow the process requirements for the City of Sherwood Municipal Code (SMC) Sections 13.24.010-13.24.150, with the final determination being made by the City Council with adoption of a resolution and the recording of the resolution with the Washington County Clerk, if applicable. He stated that a Public Works Director's Report had been created to fulfill the SMC 13.30. He

provided an overview of the seven requirements of a Public Works Director's Report and the history of reimbursement districts in Sherwood on pages 4-5 of the presentation. He recapped that the Area 59 Reimbursement District was the last reimbursement district the city had formed, and it covered the public infrastructure costs associated with the development of the Laurel Ridge Middle School and the Edy Ridge Elementary School. He continued that the Area 59 Reimbursement District was formed by City Council Resolution 2008-001, on March 4th, 2008 and Council had extended the reimbursement district an additional five years via Resolution 2014-073. He reported that the extension also eliminated the interest amount required to be paid for administration and explained that the initial interest clause stated a 4% per year compounding rate, which amounted to over $140,000 in interest payments being owed over the 10-year cycle. He continued that the clause was determined to be written incorrectly and was eliminated from the reimbursement district extension resolution. City Engineer Galati outlined that the Middlebrook Reimbursement District resolution language was corrected to a 4% simple interest rate on the initial reimbursement district value for a one-time fee of $20,000 to cover administration expenses of the reimbursement district. Mr. Galati explained that the construction cost of the Middlebrook sanitary sewer trunk line extension was broken into three parts. He stated that trunk lines up to 8-inch in diameter were the responsibility of the developer and were paid for by the developer. Trunk lines between 8-12-inches (inclusive) were the responsibility of the city and the amount was why the reimbursement district was being established. Trunk lines over 12 inches in size were the responsibility of CWS under its regional sanitary sewer trunk line program, and CWS had already repaid the developer for the CWS share. Mr. Galati provided an overview of the public sanitary sewer trunk line that was constructed as a part of the Middlebrook Subdivision Site Development project map on page 6 of the presentation. He reported that the applicant had submitted a reimbursement area boundary and provided an overview of the proposed area on page 7 of the presentation. He explained that he was able to determine the potential future impacts and the subdivision developments that were missed by the applicant's boundary and should be included in the district, per the city's municipal code. He outlined that city staff had created a separate boundary definition that included Middlebrook, Riverside at Cedar Creek, Reserve at Cedar Creek, Cedar Creek Gardens, Brookman Place, and a potential future development site within city limits. Mr. Galati outlined that the Cedar Creek Gardens subdivision would be approved, and city staff were aware that the boundary for the Cedar Creek Gardens boundary was not established with the southern portion of the area being accessed. He continued that the subdivision development had extended an 8-inch service line to provide service to the development area, so city staff had adjusted the boundary to include that area of the subdivision. He continued that the city had also reduced the area from the tax lot count because that area would go to a different section of the sanitary line and was not a part of the reimbursement district. Mayor Mays asked if that was also the case with the rest of the corner that was not in the proposed boundary? Mr. Galati replied that it was not in the proposed boundary because the area would take service off of a different section and would require an extended trunk line separate from this particular trunk line. He explained that that particular trunk line was a part of the Brookman Area extension which took and provided service to the Sherwood High School area and Sherwood West. He stated that it was an extension that the city was working with Clean Water Services on and was a much bigger project than the smaller segment they were discussing at this meeting. He recapped the number of lots that were assigned to be serviced by the Brookman trunk line on page 9 of the presentation and the table of recommended tax lots and related areas by development on page 10 of the presentation. He recapped the Sanitary Sewer Oversizing Construction Cost table on page 11 of the presentation and reported that a Contractor Construction Cost for a 12-inch line was $511,868 and a Contractor Construction Cost for less Sanitary Sewer SDC Creditable Amount for Oversizing (from 8-inch to 12-inch) was $10,456.71. He explained that the developers were asking for a reimbursement district to cover their construction cost because the adjacent property developers would be tapping into the 8-inch line and would not have to pay for the extension, so the developers were trying to recover the costs of that extension through the 8-inch line.

He stated that the total Reimbursement District Valuation came to $500,964.29. Mr. Galati addressed the Reimbursement District Cost Allocation Based on Lot Count calculations and said that staff had reviewed the proposed cost allocation methodology and had found that the methodology did not assign costs in a just and reasonable manner based on the known and projected usage of the system by the properties within the district. He explained that it appeared that the applicant's methodology undersized its own usage and thus its share of the cost of the system. He continued that city staff did their own calculations based on the known number of lots that would be in the area and were able to determine a per-lot cost which would then be applied to the subdivision and was the subdivision's reimbursement requirement for their subdivision. He explained that frontage length was an appropriate and typical unit of allocation for street construction costs, but it was not appropriate for a sanitary system where the benefit a property derived was not connected to its frontage. He continued that the justification for the 30/70 percent split in valuations were not present. Mr. Galati stated that he recommended that the cost allocation method be based on the total number of lots in each development within the district which would, or were expected to, take service from the sanitary trunk line. The total reimbursement cost was divided by the total number of actual or expected lots within the district to arrive at a per lot unit cost of $1,585.33. He explained that that figure was then multiplied by the number of actual or expected lots on each current parcel to arrive at a per parcel cost. He recapped next steps and reported that they had received one email comment that questioned how the Brookman Area Sanitary Sewer SDCs impacted the calculations for the Reimbursement District. He stated that staff had concluded that the SDC methodology for the Brookman Area did not reflect current project intent and was severely undervalued and the SDC methodology for the area would need to be reevaluated along with the Sanitary Sewer Master Plan. He stated that it was staff's opinion that the Reimbursement District valuation was not impacted to any significant degree. He explained that the Master Plan called out a 10-inch line as well as a 5,500 foot length of a 10-inch line, and what staff was looking at was significantly more than that for the Brookman area. He explained that the cost valuation in the Master Plan was $1.8 million for the 10-inch line installation and currently, the line they were seeking reimbursement costs for was for 4 inches of oversizing costs at $500,000. He explained that the valuation of the per lineal foot cost for that SDC was miniscule, so a change in the values of how much credit the city should give them for the SDC to take away from this reimbursement value did not balance out. He stated that staff agreed that it did balance out and the city should be okay with that. Mr. Galati continued to recap the next steps in the process and explained that the Building Department had issued final approvals on 10 homes/lots, which made those homes available for sale and explained that lots may be sold in the interim between the first and second reading of the proposed resolution. He continued to explain that if any lots were sold between the two hearings, then the owner information on the current lots would need to be updated and a new public hearing notice would be needed. Mayor Mays clarified that second hearings on proposed legislation was for ordinances, not resolutions. Discussion occurred and Mayor Mays asked Interim City Attorney Carrie Richter to confirm what the City Charter stated. Ms. Richter recapped that prior to this meeting, Interim City Attorney Alan Rappleyea had advised that a second reading on the resolution could not occur at this meeting. Discussion occurred and Mayor Mays asked Ms. Richter to confirm that recommendation by reviewing the City Charter. City Engineer Galati recapped that what staff recommended was different than what was submitted as far as methodology used, and what staff recommended had the benefit of being easier to manage, easier to assign, and overall worked into the city's system of building permits very easily and staff would like to keep it as simple as possible. Councilor Giles recapped the issue for his understanding and discussion occurred. Mr. Galati clarified that the city gave the developers SDC credit for off-site installation of sanitary and the reimbursement district was strictly for the oversizing cost.

Mayor Mays opened the public hearing and asked for public comment on the proposed resolution. Sherwood resident Neil Shannon came forward to address Council and stated that he opposed the proposed resolution.

He stated he understood that a PID (Public Improvement District) could have appropriate uses and referred to Area 59's PID that distributed the costs of water, storm, and sewer improvements to an area that included large public infrastructure for a new school. He stated that the proposed resolution had few similarities to the Area 59 PID as there were no public facilities, only private residences under construction. He referred to an email he had sent the City Recorder prior to the meeting that contained links to two papers (see record, Exhibit B). He recapped the paper and explained that the paper noted that PIDs were a beneficial mechanism to fund projects that were otherwise not feasible due to constraints on city budgets and recommended that local elected officials should closely monitor their PIDs and only use them under proper circumstances. Mr. Shannon continued that he could better understand the use of a PID if growth was being hampered by environmental conditions requiring remediation or if there were challenges to developments due to geographical limitations. He stated that none of those conditions applied to the Brookman Road area, "demonstrated by the fact that the subdivision has already been approved and construction is proceeding." He stated he was concerned that a PID would provide little benefit to the city, but instead "significant financial benefits to the developers of the Brookman properties." Mr. Shannon read from an additional paper regarding PIDs that stated that PIDs could result in negative outcomes for homeowners in PID areas. Mr. Shannon read from a third paper regarding PIDs that asserted that PIDs were currently "being used by developers and cities as a way not to pay for development costs for new subdivisions and then burden the homeowners with development costs." Mr. Shannon stated that the proposed resolution was a "lose-lose" situation for the city. Mayor Mays clarified that the proposed reimbursement district was not a PID and that the expenses would be paid on new lots as a part of construction. City Engineer Bob Galati clarified that the reason for the oversizing was in order to serve the high school, as the high school was the primary driver for the extension and size of the line. He added that the city had an IGA with the high school to provide the line in a certain timeframe and currently, the high school was on a temporary sanitary pumping system.

Applicant representative Joe Schiewe with Holt Homes came forward to address Council and stated that "no one's taxes are going up" and clarified that there would only be a charge if they connect to new sewer line, which would only be new houses. He stated that other jurisdictions charged their fee when the plat was recorded and recommended the city use that approach instead. He stated that Holt was paying for 46% of the $500,000 cost, and it was the remaining portion of that cost that they were seeking reimbursement for.

Max Bondar, a land developer with David Weekly Homes, came forward to address Council and stated that he supported the proposed resolution and supported Mr. Schiewe trying to get the reimbursements back. He stated that he knew how difficult it was and that he was happy to support Mr. Schiewe getting the costs reimbursed.

Mayor Mays closed the public hearing and asked for discussion or a motion from Council. Interim City Attorney Richter stated that Council could take action on the proposed resolution at this meeting through administrative determination as long as the City Recorder took a roll call vote. Councilor Young asked City Engineer Galati if the city required the developer to complete the upsizing? Mr. Galati replied that was correct. Councilor Giles referred to the recommendation from Mr. Schiewe of charging the fee when the plat was recorded and asked what the drawbacks of that approach were? Mr. Galati replied that it was a matter of timing with staff. Mayor Mays clarified that the city was not able to charge at the time of the recording of the plat because some plats had already been recorded. Discussion occurred regarding changing the city's methodology. Mayor Mays clarified that any change in the methodology would delay the adoption of the resolution. Discussion occurred. Mr. Galati clarified that if the methodology was completed on a lot-by-lot basis, staff could tie it into building permits, whereas if it was done by platting, it would fall on the Engineering Department to control everything. Councilor Garland asked if the proposed resolution would impact other

areas too? Mr. Galati replied that it would not impact other areas. Mayor Mays asked for further discussion or a motion from Council.

MOTION: FROM COUNCILOR YOUNG TO ADOPT RESOLUTION 2022-053, ESTABLISHING THE BROOKMAN AREA PUBLIC SANITARY SEWER REIMBURSEMENT DISTRICT AND DIRECTING STAFF TO ENTER INTO A REIMBURSEMENT DISTRICT AGREEMENT WITH THE DEVELOPER (BROOKMAN DEVELOPMENT, LLC). SECONDED BY COUNCILOR GILES. MOTION PASSED 5:0, ALL PRESENT MEMBERS VOTED IN FAVOR (COUNCILOR BROUSE AND COUNCIL PRESIDENT ROSENER WERE ABSENT).

Mayor Mays addressed the next agenda.

B. Appeal Hearing for LU 2021-009 MM Cedar Creek Plaza Multifamily

Interim City Attorney Carrie Richter read aloud the public hearing statement. She asked if Council was able to be unbiased? She asked if Council had any conflicts of interest? She asked if Council had any ex parte contacts? Mayor Mays replied that he could be unbiased, and he stated he had driven by the site on his way to do other things. He addressed ex parte contact and stated that when the original application was submitted, the applicant had emailed him, and he had replied that the applicant should attend the Planning Commission meetings and contact city staff if the applicant wished to weigh in on the process. He stated he had no conflicts of interest. Councilor Young stated she could be unbiased and stated she had visited the site many times because of the other businesses located in that area. She addressed ex parte contact and stated that she believed she received the same email from the applicant that Mayor Mays had received and stated she had not replied to the email. Councilor Scott stated he could be unbiased, and he had no conflicts of interest. He stated he had not visited the specific lot, but he had visited the areas surrounding the lot many times. He addressed ex parte contact and stated he had had no ex parte contact. He stated he was previously the Council liaison for the Planning Commission and stated he believed that he was the Council liaison for the first public hearing for LU 2021-009, but he was not the liaison through the end of the Planning Commission hearings or when it was voted on. Mayor Mays stated that he had spoken to former City Manager Joe Gall and City Manager Keith Campbell about the site in general terms. Councilor Giles stated he could be unbiased, and he did not have any conflicts of interest. He stated he had previously served on the Planning Commission when the initial hearings were happening, and he was the Planning Commission City Council liaison when the voting occurred. He stated he did not participate in any of the deliberation or voting in the Planning Commission public hearings for LU 2021-009. Councilor Garland stated he had no conflicts of interest or financial interests. He stated he was vaguely familiar with the location and that he was able to be unbiased. Interim City Attorney Richter addressed the audience and asked if anyone in attendance wished to question any of the disclosures from Council? Hearing none, she stated the presentation of the staff report could occur.

Associate Planner Eric Rutledge presented the "LU 2021-009 MM Cedar Creek Plaza Multifamily Land Use Appeal Hearing" PowerPoint presentation (see record, Exhibit C) and provided an overview of the appeal summary. He explained that both the applicant and appellant were Deacon Development, LLC and they had proposed a 67-unit apartment building and associated site improvements. He stated the zoning was Retail Commercial and the procedure was a Site Plan Major Modification Type IV land use action. He stated staff had received three pieces of testimony and said that Council was provided copies of the additional testimonies shortly before this meeting (see record, Exhibit D and Exhibit E). He explained that the testimonies were received after the release of the staff report which was why Council was provided the

testimonies after the packet had been published. Mr. Rutledge provided an overview of details of the site and the land use history. He reported that the Cedar Creek Plaza commercial center had received original Site Plan and CUP (Conditional Use Permit) approval in 2017. He stated that the area had undergone major development through the 2017 Site Plan approval and the CUP, and the site included the Ackerly Assisted Living facility, six retail buildings at the south end of the site, and a modification to the Providence parking lot. He stated that it did not include any land use approval or use for Lot 2. He stated that in 2017, after the Site Plan approval, Deacon, the owner of the retail portion of the site, had applied for a subdivision to divide their single lot into seven distinct lots. He added that three different owners, Providence, Rembold/Ackerly, and Deacon were involved in the original Site Plan approval. Associate Planner Rutledge stated that after the subdivision was approved, the applicant sold four of the seven lots and retained Lots 2, 3, and 7, but later the applicant sold Lot 3. He reported that in May 2021, the applicant applied for a major modification to develop an 84-unit apartment building on Lot 2, which the applicant owned at the time along with Lots 3 and 7. He addressed the existing conditions at the time of the application submittal and stated that Lot 2 was a vacant pad, Lot 3 was developed with a commercial building and parking, and Lot 7 was developed with a commercial building and parking. Mr. Rutledge added that the applicant was relying on the lot area from Lots 3 and 7 to get to the 84 apartment units on Lot 2. He continued that the applicant had sold Lot 3 to a new owner after they had applied for the development. As a part of the land use process, the new owner of Lot 3 came forward and objected to their lot being included as a part of the lot area calculations in the application. He stated that the applicant then removed Lot 3 from the application and reduced the unit count from 84 to 67 units, relying on Lots 2 and 7 to get to the 67-unit figure. He explained that the Planning Commission had made their decision off what was in the revised proposal for the 67-units using Lots 2 and 7. He provided an overview of the site and stated that it was surrounded by Edy Road and Highway 99W and the surrounding land uses were mostly Commercial with the exception of High Density townhomes to the east of the development. He provided an overview of the proposed Site Plan of Lot 2 and proposed building design on pages 5-6 of the presentation.

Interim City Attorney Carrie Richter stated that the site was zoned as Retail Commercial and was surrounded by Commercial zoning to the north, east, and south and the site abutted a High Density Residential zone to the west, which had been developed with townhomes. She explained that under the Sherwood Zoning and Development Code (SZCDC) Section 16.22.020, it specified the uses that were allowed in Commercial zones when multifamily housing was provided. She read from the table and stated that, "Multi-family housing, subject to the dimensional requirements of the High Density Residential (HDR) zone in 16.12.030" and explained that it was the cross-reference to the HDR zone dimensional standards that was the subject being discussed. She clarified that the review was subject to the dimensional requirements she had just stated. She explained that the table on page 8 of the presentation was taken from SZCDC 16.12.030 and showed that the first two multifamily units must be located on a lot that was at least 8,000 square feet and the lot must increase in size by an additional 1,500 square feet for every unit after that and stated that that was the lot area that was at issue in this case. Ms. Richter addressed page 9 of the presentation and provided an overview of the applicant's evaluation of minimum lot area. She explained that in order to get to the proposed 84-units, the applicant relied on lot areas from Lots 2, 3, and 7 to reach 145,490 square feet. She recapped that at the first Planning Commission hearing, the owner of Lot 3 objected to their lot area being used in the applicant's proposal. She continued that the applicant then revised their proposal in March 2022 to 67-units which would require 105,500 square feet, with the applicant relying on the lot areas from Lots 2 and 7. She reported that in the revised application from March 2022, the applicant maintained that "each of the applicable development standards addressed below are satisfied to at least the minimum stipulated requirements." She reported that at the Planning Commission hearings, a number of Commissioners raised their concerns about the applicant borrowing lot area from another lot. The applicant argued that the transfer of lot area complied

because the definition of "lot" in the code was, "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" which would allow the applicant to borrow lot area from another lot. Interim City Attorney Richter explained that the Planning Commission determined that the lot area standards were "dimensional requirements" applicable to multifamily housing within the Retail Commercial zone. She outlined that the list of multifamily uses cited "dimensional requirements" and the table in subsection C of the High Density Zone cited "development standards" not "dimensional requirements." She explained that the Planning Commission then had to determine whether lot area was a dimensional requirement and had concluded that lot area was a dimensional requirement. She explained the Planning Commission's reasoning was that determining lot area required inquiry into the dimensional requirements, and all of the dimensional requirements in the table were directed to a singular lot. She outlined that the Planning Commission also reasoned that if you could borrow area from a non-contiguous lot, that same borrowing would also be needed in order to calculate the lot width, lot depth, and lot setback which would be impossible if they were non-contiguous lots. She reported that the Planning Commission also noted that the term "lot area" was defined in the code which cited a measurement of total horizontal area "within the lines of a lot" and noted that such a measurement was not possible when the lots were not contiguous. She clarified that the Planning Commission had reasoned that one should be able to draw a line around the outside without lifting your pencil. She explained that the definition of "lot area" was that the outside boundaries of either one lot, or two adjacent lots, to be referred to as a "parcel," and parcels had contiguity between lots and the Planning Commission had determined that lots must touch in order to qualify for shared lot area. She reported that the Planning Commission had also noted that Lot 7 had already been developed and its lot area was no longer available for borrowing. She outlined that the Planning Commission's decision was now before Council on appeal and the city had received a petition for review along with written testimony from the applicant. She addressed "Appeal Issue #1 – Violation of the Needed Housing Statute" and stated that the Appellant argued that the "dimensional requirements" were not the same as the "development standards" because the table in SDC 16.12.030.B referred to "required minimum lot areas, dimensions and setbacks shall be provided in the following table" and the Appellant argued that "lot area" was not a dimension. She continued that the Appellant argued that there was ambiguity in the question of whether or not lot area was a dimensional requirement. Ms. Richter stated that there was a state law that stipulated that when cities were reviewing applications for housing, cities were constrained to consider only clear and objective standards and stated that the Appellant was arguing that determining whether or not lot area was a dimensional standard was not clear and objective. She continued that the Planning Commission had concluded that determining whether or not a lot included enough square footage to support a number of units was not a subjective determination as the actual calculation itself was not subjective. She outlined that context was often used when determining the definition of a term and stated that SDC 16.12.030.A stated that "No lot area...or other site dimension...shall be reduced below the minimum required by ...code" and stated that this suggested that lot area was a "site dimension." She continued that it was understood that lot depth and width were dimensional requirements, then it stood to reason that lot area was also a dimensional requirement. Interim City Attorney Richter addressed "Appeal Issue #2 – The Definition of "Lot" Allows for Aggregation" and stated the Appellant argued that the definition of "lot" included "complete lots of record" and since the word "lot area" included the term "lot," the "area" must also include the outside dimensions of multiple "lots" and should not be considered clear and objective. Ms. Richter reported that the Planning Commission had determined that when considered in a context, a "lot" was a "parcel of land" which may contain two connected lots of record, but they must be contiguous, and the Planning Commission felt that there was no ambiguity in the term "lot area." She addressed "Appeal Issue #3 – Modification of an Approved Site Plan Allows for Shared Lot Area" and stated the Appellant argued that as a modification of an existing site plan, the applicant was allowed to share lot area between lots that were previously approved. She reported that the Planning Commission's discussion had focused on the code language itself and had

determined that the focus of the "lot area" definition was on "lot," which was created by a subdivision approval and not a site plan and conditional use application. She reported that Lots 2 and 7 were created by a separate land use approval in 2017 and could not be undone through a site plan modification. Ms. Richter stated that in applications where needed housing was proposed, and an applicant offered conditions to make the application comply with the regulations, Council must approve the application with conditions. She continued that in other types of applications, Council could deny or approve with conditions, but that was not the case with needed housing. She outlined that the Appellant had identified two additional conditions for approval and stated the first additional condition was "Reducing the proposal to 65 units to acknowledge the reduction in lot area resulting from an existing easement." Ms. Richter clarified that easement area did not count as a part of the lot area, and if Council decided that aggregation of lot area was permitted, then condition #1 would be appropriate. She stated that the second additional condition was "Recording a restrictive covenant prohibiting the construction of any additional dwelling units on Lots 2 and 7" and explained that this would resolve the issue of borrowing multiple times. Interim City Attorney Richter reminded Council that their role in the consideration of the appeal was to review the Planning Commission's decision for error pursuant to the issues raised on appeal, and not to consider new issues or new evidence. She outlined that in Fall 2021, the HDR dimensional standards in SDC 16.010.030 were amended and it was unlikely that these concerns would come up again in future cases. She added that the "lot area" definition was not addressed in those amendments, so the question of borrowing lot area from non-contiguous lots may come up again in the future. She explained that because it was "one basket of issues" that was the basis for denial by the Planning Commission, and if Council decided to affirm the Planning Commission's decision and the matter was appealed to LUBA, LUBA could agree with the Appellant which would likely result in LUBA reversing the city's decision. She explained that in cases where LUBA reversed decisions, LUBA had the obligation to grant attorney fees to the challenger if they determine that a city acted outside of its range of discretion. Ms. Richter outlined the Council alternatives as: A.) Tentatively affirm the Planning Commission's decision and deny the application based on the Planning Commission Findings Report dated May 24, 2022 and the City Council's deliberation, B.) Tentatively amend the Planning Commission's decision and deny the application with additional/amended findings of non-compliance, or C.) Tentatively reverse the Planning Commission's decision and adopt findings of compliance for SZCDC subsection 16.12.030, 16.22.020, and 16.90.020(D)(1) including any additional conditions of approval. She stated that in either option, Council should authorize Mayor Mays to sign a Notice of Decision including written findings consistent with the Council's tentative decision on or before July 22nd. Councilor Scott asked why the word "tentatively" was used in all of the City Council Alternatives? Interim City Attorney Richter replied that it was because the city had not written their findings explaining how the Council was going to respond to the appeal issues because the city had not heard from the parties yet. She added that Council could choose to authorize Mayor Mays to sign the Notice of Decision with the written findings…Councilor Scott interrupted and summarized that staff would write up the finings based on the option Council chose and then those would be executed by the mayor. Ms. Richter added that if Council did not want to do that, then a special meeting would be needed in order to execute the decision. Councilor Giles asked if the area of Lot 7 was used when it was developed? Associate Planner Rutledge replied that yes, 100% of the lot area for Lot 7 was applied to meet the requirements of the Retail Commercial zone. Councilor Giles asked what the methodology was to determine lot area? Mr. Rutledge replied that they had used the definition of lot area to determine Lot 7's lot area. Councilor Scott asked if the reasoning behind "borrowing" was that, had Lot 7 been developed differently, the applicant would have been able to build mixed use housing, but because it was not developed into mixed use housing, that allotment could now be used on a different lot? Mr. Rutledge replied that staff had clarified during the Planning Commission hearings that the residential entitlements on Lot 7 were not lost and they could decide to redevelop the lot into mixed use if they wanted to.

Garrett Stephenson came forward as an attorney for the Appellant along with Brad Kilby, Planning Manager with HHPR. Mr. Stephenson stated that the application was for a 65-unit multifamily development within the existing Cedar Creek Plaza and outlined that the unit count was the only issue being disputed. He provided background and explained that Lots 2 and 7 were originally a part of the Deacon tract and showed a map of the project location (see record, Exhibit F). He explained that there were initially three tracts that were part of the Cedar Creek Plaza and the Deacon tract was then developed. He stated the developers of the Deacon parcels wished to own their parcel, so the tract was subdivided and sold. He stated that the whole area remained under the original 2017 Site Plan entitlement and that was why the applicant had gone through the major modification process instead of submitting a new application. Mr. Stephenson stated that from their standpoint, they did not believe that there was a density transfer occurring because it was all originally approved as a part of the same project and remained so today. He voiced that staff had never taken the position that if the site was bare ground, the developer could not do what they were proposing to do today. He read aloud from the January 14, 2022 staff report finding stating "while the city code does not have a process for transferring residential law area entitlement, staff supports the approach because the proposed building is within the same commercial center/subdivision as the other lots being borrowed" and added that he did not agree that the Appellant was engaging in borrowing. Mr. Stephenson stated that they were not aware that there was an issue with density until seven days prior to the Planning Commission meeting. He voiced that this was not a density transfer but was a utilization of ownership of two lots that were in the same site plan development area. He addressed the question of if the lot area of Lot 7 had been used and stated that the lot area of Lot 7 had not been used. He stated that you could "double count" the area of a lot if you were doing mixed use, which the Appellant was doing. He stated he agreed with Associate Planner Eric Rutledge's statement that Lot 7 had not used up its development entitlement for residential. Mr. Stephenson outlined that their objection to the Planning Commission's decision was twofold. He stated that this was a needed housing application, and there was no clear and objective link between the development standard requirements in the Commercial Retail zone and the standards of the HDR zone. He argued that that was because the definition of "dimension" was not defined in the code and instead instructed you to look at the dimensional standards of the HDR when trying to develop housing in Commercial Retail zones. He continued that section 16.10.010 of the city's code explained that in cases where there was not a specific definition of a word in the code, a dictionary definition was to be used. Interim City Attorney Carrie Richter interjected that the dictionary definition of "dimension" was a new fact that was not in the record and could not be included. Mr. Stephenson replied that he did not think it was a new fact since the city's code directly referred to that dictionary. Associate Planner Eric Rutledge clarified that the city's code stated that if the definition was not listed in the code, then the Webster's dictionary definition of the term was used. Mr. Stephenson continued that the dictionary definition of "dimension" was a measure in a single line such as length, breadth, depth, or thickness; one of three coordinates of a position specifically the physical characteristics of length, breadth, or thickness. He commented that the dictionary definition of "dimension" did not mention "area." He referred to the development standard table on page 8 of Exhibit C and stated that the table did not list area as a dimensional standard. He stated that there was not a specific density standard that applied under this version of the code. Mr. Stephenson stated that the city had since amended its code to include the missing information. Mayor Mays asked Interim City Attorney Richter if that was a part of the record? Ms. Richter replied that it was, and that the code was amended in August 2021 to eliminate the dimensional requirement confusion. Mr. Stephenson stated that the second legal issue was what was considered a "lot," and could Lots 2 and 7 together be considered a lot? He explained that to answer that, you would use the city's code which stated that a "single lot of record was a combination of complete lots of record and portions of other lots of record." He argued that that definition suggested that Lots 2 and 7 could be viewed as a single lot when talking about the same areas that were originally approved. He continued that the idea that the lots needed to be contiguous was not supported in the code, and that when discussing needed housing the code

needed to be clear and objective on its face. He expressed that he did not believe the code was clear and objective when it came to lot area or when it came to the link between CR zone development standards and HDR zone development standards. He addressed the stipulation of horizontal area within the lines of a lot in the definition of "lot area" and stated that it made sense to use horizontal area because height was not being discussed and the definition referred to "lot." He stated he understood the policy concerns, but he did not believe they were relevant in this instance. He explained that being concerned that approving this application would allow other similar types of applications to also be approved was not a valid reason to deny an application for the development of housing and that the code had since been amended to close any potential loopholes that future developers may use. Councilor Scott asked Mr. Stephenson if the idea of allowing non-contiguous lots to be defined as one lot were to happen, would he include the area of a lot that was located on the other side of the city to be in the lot area calculation? Mr. Stephenson replied no, but the area in question was once one lot and when the original approvals for the uses on each site were made, the Deacon tract was a singular lot. He continued that he believed that the circumstances that were being discussed at this meeting would not come up again except in this type of scenario. Mr. Stephenson stated that the way density was handled in the CR zone did not apply under the old code, but they clearly did apply under the new code. Councilor Scott asked if the idea of borrowing the area of one lot to build housing on a different lot was in the original application or did the idea of borrowing occur after the lots had been subdivided? Mr. Stephenson replied that the original application did not include the development of housing. Councilor Scott clarified that the idea of borrowing unit allowance from Lot 7 to build on Lot 2 did not happen until after the subdivision had occurred, and asked if that was correct? Mr. Stephenson replied that he assumed that was correct because at the time, there was no discussion of residential density. Councilor Scott stated that in his opinion, that changed the application from the original application since the area was now subdivided. Councilor Scott asked if it was correct that the applicant was arguing that because of the definition of "dimensional requirements," that there was essentially no limit to the amount of density or the number of units that could be built because those standards did not apply? Mr. Stephenson replied that their argument was that the minimum lot area requirements for HDR areas did not apply to the development in the CR zone. Councilor Scott asked if that was the case, then why did the original application and the amended application all conform to that section of code if they did not believe that that section of code applied? Mr. Stephenson replied that city staff had been inconsistent in their review of the application and the permitted number of units. He continued that it was his responsibility to bring up every argument that they believed was correct on why the Planning Commission's decision was wrong. Councilor Scott remarked that the applicant had not done that when the applicant had voluntarily removed Lot 3 from their application and reduced the number of units accordingly. He asked why had the applicant not argued that the lot area did not apply at that time? Mr. Stephenson replied that the owner of Lot 3 had stated that they did not want their lot to be included in the application, so the applicant voluntarily removed them. Councilor Scott asked, "why throughout the process have you agreed that this limit matters, and only now on appeal are you saying it doesn't matter?" Mr. Stephenson replied that it was because he believed that his interpretation of the code was correct and justified the reversal of the Planning Commission's decision, and also whether or not the applicant chose to voluntarily cooperate with staff and neighbors was a separate question. Councilor Giles referred to the definition of a dimension and asked what their basis was for saying the definition of "lot area" was unclear in the code? Mr. Stephenson replied that it was the code that was vague on whether or not the math applied the way the Planning Commission determined it applied. He continued that area was not precisely defined as a dimensional standard. Councilor Young asked when Lot 3 stated they did not want to be included in the application, did they demand that the applicant reduce the number of units in the application? Mr. Kilby replied that no, the owner of Lot 3 did not demand a reduction in the number of units.

Brad Kilby, Planning Manager with HHPR, addressed Councilor Scott's comments and stated it was a good faith neighborhood and stated the developers tried to make their applications approvable. He stated that this application was the first multifamily development in a mixed use commercial development in Sherwood. Mr. Kilby explained that it was very common within a commercial development to have a commercial developer divide and sell their lots. He stated that by amending the code to clarify something, it insinuated that something was ambiguous and was not clear and objective. He provided an overview of the application's proposal on page 4 of Exhibit F and explained that the applicant had reduced the number of units down to 67 units to "be good neighbors" after it was clear that the owner of Lot 3 did not want to be included. He recapped the site amenities as: walkable; on-site dog park,; access to services, restaurants, gym, and retail; and was professionally managed. He recapped the building amenities as: lobby with sitting room and fireplace, interior courtyard, covered patio, mail room, interior bike storage, rooftop patio and community room, and on-site parking for all units and visitors provided on Lot 2. He recapped the apartment amenities as: quality construction, wood plank flooring, granite countertops, wood cabinets, stainless steel appliances, and in-unit washer and dryers. Associate Planner Eric Rutledge clarified that the apartment amenities were not a part of the original application and therefore could not be discussed at this meeting. Mr. Kilby summarized that the project should be approved and stated that there was a demonstrated need for multi-family housing, it provided a place that allowed existing residents to age in place, it was an affordable option for people who work in Sherwood to live, it was a good location for multi-family housing, it was near downtown, it had nearby access to transit, it had nearby access to services and retail, and stated that mixed-use was a good thing. Mr. Kilby asked that Council affirm their appeal and overturn the Planning Commission's decision because the standards that were being applied were not clear and objective.

Mayor Mays opened the public hearing and asked for public comment on the applicant's appeal.

Mark Light, 17117 SW Robinwood Place Sherwood, Oregon 97140, came forward and stated he opposed the application. He stated he and his wife had been opposed to the development from the beginning because they utilized the plaza on a daily basis and understood how bad the development would be for the plaza, the neighborhood, and for Sherwood. He stated that he had provided evidence at every stage of the process and had provided two code-related reasons why the development was correctly denied at the last hearing. He commented on the planning density calculation and said Lot 2 could only support 46 units and the developer was trying to bypass the calculations by using Lot 7 and density transfer in their calculations. He stated that density transfer was not permitted under the Sherwood planning process, therefore the application was correctly denied. He stated he disagreed with the argument that the previous code was ambiguous. He referred to 16.12.030 which stated that multifamily housing was subject to dimension requirements of the HDR zone when located on upper floors, in the rear of, or otherwise clearly secondary to commercial buildings. He stated that the development was not located on upper floors, it was located on all floors. He stated that the development used the entire lot, and therefore the development could not be in the rear of everything. He stated the development would extend past the end of Lot 3, and therefore would be in front of the IHOP, the opticians, and the Hops n Drops. He stated the development would not be a secondary part of the plaza, it would be the primary part of the plaza. Mr. Light stated that there were numerous other commonsense reasons why the development would have a negative effect on their neighborhood, the plaza, and Sherwood. He stated there would be traffic congestion at the intersection and parking conflicts amongst other issues if the development were to occur. He stated that this was the, "wrong development, in the wrong place, and was correctly denied by the Commission."

Christopher Koback, 1125 NW Couch, Suite 550, Portland, OR 97209, came forward to testify. Associate Planner Eric Rutledge clarified that Mr. Koback was representing three individuals so he was able to provide

16 minutes of testimony if Council agreed to it. Council stated they agreed to allow Mr. Koback additional time to speak. Mr. Koback stated that he represented three individual owners within Cedar Park and had participated throughout the process. He stated that it was probably a good development with good amenities if it was built to only have 46 units. He added that if it was changed to be 46 units, the application would meet the clear standards of the city's code. He stated that the needed housing statute did not need to be invoked because they believed that the City Council, as the governing body, retained the right to interpret the code, per ORS 197.829.1. Mr. Koback stated that it was clear that multifamily housing was allowed subject to dimensional standards, but the question was what was a dimensional standard in that zone under the city's code? He continued that he believed that City Council had the right to interpret the city's code to determine what dimensional standards were in that zone. He referred to SZCDC 16.12.030 and read, "no lot area, setback, yard, landscape area, open space, off street parking or loading area, or other site dimension or requirement may be reduced below the minimum." Mr. Koback stated that there were two subsets in that general provision: dimensional site dimensions and requirements. He continued that when looking at the development standards table, every item listed was a dimensional standard and was something that one could measure. He stated that he believed that it was plausible to conclude and interpret the code that those items listed in the table were the dimensional standards. He stated that the items that were missing from the table, like landscaping, parking, and lighting, were those other requirements. He remarked that the applicant had agreed that lot width and lot depth were dimensional standards and Mr. Koback believed that one could not conclude that lot area was not a dimensional standard if you accepted that it was a product of two dimensional standards. He commented that under the applicant's interpretation, setbacks would not be considered a dimensional standard, but their application did not make that argument and they were inconsistent in their interpretation. He addressed the clear and objective argument and stated that this was where the needed housing statute applied. He read from the statute that said, "only standards, conditions, and requirements that are clear and objective can be applied" and explained that the interpretation of what applied was not subject to the statute, but the standard was subject to the statute. He stated that determining the lot area was clear and objective because it was a measurement and explained that LUBA had said that just because you have to do some mathematical analysis, such as the averaging of a setback, that did not make it less clear and objective. Mr. Koback stated that LUBA had said that even when applying the needed housing statute, it had to be applied in context. He stated that the lot of record may be a legal lot sufficient for development, but that was not always the case. He explained that it was possible to have a lot of record that had met the standards at the time and was lawful, but that lot may not meet the standards now. He continued that the city's code definition of "lot" gave an applicant who owned more than one lot of record and were contiguous the ability to join the lots together as one development site because the standards, setbacks, front yard standards, lot area standards, etc. could be applied. He stated that that did not give the applicant the right to borrow area from non-contiguous lots and say they were the same lot when it was beneficial to the applicant as a development standard but also treat the lots as separate units when the applicant decided to sell them or treat the lots separately. He stated that a more plausible interpretation, and the interpretation he was advocating for, was that a lot must be a single parcel of land sufficient to meet development standards. He addressed the argument that because this was once a single development the subdivision lines could be ignored and cited ORS 92.017 and stated that once lines were created, they remained until eliminated by some legal process. He stated that those lines meant something, and the applicant benefitted from having those individual lots to make money from their sale. He remarked that instead of sticking with the code and proceeding with the 46 units, the applicant was angling to get more money and Mr. Koback and his clients did not believe that was proper. He addressed the comment that the applicant was acting as a good neighbor and stated that his clients had explained to the applicant that Lot 2 was not appropriate for the scope of their development and it would have significant negative impacts on their businesses and the applicant had refused to change their plans.

David Pedersen, 888 SW 5th Avenue Ste 1600 Portland, Oregon 97204, came forward and stated he represented the owner of Lot 3, Lake Bowman, LLC. He remarked that he agreed with Mr. Koback's testimony and added that he felt that the applicant was overextending the applicability of the clear and objective rules with respect to needed housing. He stated that the standards that were applied needed to be clear and objective and he felt that "lot area" was clear and objective. He continued that the way in which Council concluded that lot area standards applied was not a question of clarity and objectivity but of code interpretation, which was Council's ultimate obligation as the enactors of the code. He referred to Interim City Attorney Richter's staff report and stated he agreed with her assertion that the applicant's interpretation of the code resulted in a "nonsensical conclusion" and explained that he believed that Council could follow staff and Mr. Koback's advice and plausibly conclude that lot area was a dimensional requirement and applied to the proposal. Mr. Pedersen voiced that he wished to point out that the applicant was advocating for different interpretations of "lot" as it suited them. He explained that there was a maxim of construction that said that a single term should be given the same definition throughout unless the code indicated that it should be given a different meaning for a different purpose, and that in this instance, "lot" and "lot area" meant the same thing through the entire application. He stated that it was Council's responsibility to determine a plausible definition that would be entitled to deference at LUBA.

Garrett Stephenson came forward as an attorney for the Appellant for his rebuttal. He stated that the proposal was "not the product of an applicant trying to maximize something that it wasn't told it could otherwise do" and the applicant had developed the project based on the advice of staff. He stated staff's advice changed just prior to the Planning Commission hearing and that the applicant had been very consistent with their interpretation of the code. He addressed Councilor Scott's question and explained that the applicant had submitted a memo as early as March 2021 or March 2022 that spoke on the dynamic with the code. He stated their goal was to only build what was in the application. He stated that he disagreed with Mr. Koback's assertion that it "must be a dimension if it can be measured" as the city would have said that had they meant to. He stated he disagreed with Mr. Koback and Mr. Pedersen's assertions regarding clear and objective standards. He argued that it should immediately be apparent what a dimensional standard was when it directed you to the table of development standards. He referred to the inviolability of lot lines and stated that that was not at issue here because they were not changing any lot lines. He referred to Mr. Pedersen's statement regarding LUBA's criteria that the entire code need not be clear and objective and stated that that might be so, but the city was obligated to only apply clear and objective standards and procedures. He referred to the question of context and cited 16.60.040 of the city's code as an example of the code using lot area and lot dimension separately. He cited 16.68.020 of the city's code and stated that the code's own context was equivocal. He stated that he did not disagree with the math, but that the textual piece of the code that sent someone to that math did not do what staff and the Planning Commission thought it did.

Mayor Mays closed the public hearing on the appeal and recessed the meeting from 9:30 pm – 9:35 pm.

Mayor Mays asked for discussion or questions from Council. Councilor Scott referred to Mr. Koback's testimony that cited the city's definition of "lot" and asked Interim City Attorney Richter to reread the section of code aloud. Ms. Richter read the section of the code aloud. Associate Planner Rutledge provided his final comments and stated that the Appellant repeatedly referred to a memo that they had submitted early on in the process that stated that the lot area standards and dimensional standards were not clear and objective. Mr. Rutledge stated he wished to clarify that that memo had been submitted prior to the applicant submitting their application. He explained that the applicant had completed a pre-application and staff had indicated in the pre-application notes that the maximum lot area would be able to contain 46 units and the applicant had

responded with the above referenced memo. He continued that staff then responded to the memo stating that the lot area did apply but there was a possibility that the applicant could use other lots as well. He reported that the applicant then acknowledged and agreed that the lot area applied and then submitted their application without the memo that recognized that lot area applied and that they would utilize Lots 3 and 7 to get to the number of units in the application. Mr. Rutledge reported that staff had been consistent in their assertion that lot area applied, and that the applicant had reintroduced the memo either after the release of the denial staff report or much later in the process. He continued that staff's recommendation of the possible option to use Lots 3 and 7 in their calculations had changed after the Planning Commission's hearings on the topic and Interim City Attorney Richter's review of the code. He spoke on the code update and stated that the update addressed the question about dimensional requirements and made it clear that everything in the HDR zone applied to multifamily housing in the RC zone. He clarified that the code did not address what constituted a "lot" and there were many situations that could become problematic for the city if the city agreed to the Appellant's interpretation of the code. He stated that the site plan allowed for shared parking, landscaping, etc., but the code was very clear that there was a mechanism to allow for that, but it did not provide the opportunity to share lot sizes and commented that it was very clear in the code when sharing could occur. Mr. Rutledge stated that the applicant's argument about the code not being clear and objective was based on one sentence in the HDR zone code that touched on the differentiation between lot area and dimensions. Mayor Mays asked why the Planning Commission denied the application instead of approving it with modifications? Mr. Rutledge replied that the staff report contained a clear path forward for the applicant to get approval with 46 units by removing Lot 7 and staff had added extra time to the process to allow the applicant to revise their plans and submit their modified plan to the Planning Commission for approval. He explained that the Planning Commission did not "condition them down" because the design changes that would have been required to the building would have required staff to re-review the building. He added that the unit reduction was too great, and it would have had to come back to the Planning Commission for review and there was not enough time for that. Councilor Young asked if the applicant had agreed to reduce the unit number, would they still have had to have brought it back to staff? Mr. Rutledge replied that the staff report recommended a denial but noted that the applicant could choose to revise the plan to reduce the number of units to 46 and have the plan be reviewed by the Planning Commission if they chose to. He reported that the applicant had said that 46 units did not work for them. Councilor Scott suggested that Council discuss each reason for appeal one at a time. Mayor Mays stated that he supported the findings of staff and the Planning Commission and he would defer to staff to craft the language for the final decision. Mayor Mays asked that Interim City Attorney Richter include in the finding that Council supported housing, multifamily housing, and projects that met the code. He commented that the applicant had not submitted an application that met the clear and objective standards and staff had suggested that the applicant modify their application to meet those standards, but they chose not to. Councilor Giles commented that he supported middle housing, but it was important to do it in the right way so that it fit within the community and neighborhood. He commented that he felt that staff had made a good faith effort to work with the applicant to get their project approved and he agreed with Mayor Mays's comments. Mayor Mays commented that had the applicant not subdivided the project and if the owner still owned all of the parcels, then he might have come to a different conclusion. Councilor Scott referred to "Appeal Issue #1" on page 11 of Exhibit C and stated he agreed with the Planning Commission. He referred to "Appeal Issue #2" on page 12 of Exhibit C and stated that the code's intent and language both implied contiguity even if it was not stated explicitly and stated he agreed with the Planning Commission. He referred to "Appeal Issue #3" on page 13 of Exhibit C and stated he agreed with Mayor Mays's comments regarding how this was not a single lot but were non-contiguous lots instead. Mayor Mays commented he would be supportive of an application that modified the building space on Lot 7 and was made into a multi-purpose building with housing. Councilor Young stated she agreed with the other Councilor's comments and agreed with the Planning Commission's decision. Councilor Giles encouraged the applicants

to reapply. Councilor Garland stated he agreed with Councilor Scott and the Planning Commission and staff had done their work and he had not found any flaws in their judgments or reasoning. With no further comments, the following motion was stated.

MOTION: FROM COUNCILOR SCOTT THAT THE CITY COUNCIL TENTATIVELY AFFIRM THE PLANNING COMMISSION DECISION AND DENY THE APPLICATION BASED ON THE PLANNING COMMISSION FINDINGS REPORT DATED MAY 24, 2022 AS WELL AS THIS DELIBERATION. ADDITIONALLY, MOVE THAT THE CITY COUNCIL AUTHORIZES THE MAYOR TO SIGN A NOTICE OF DECISION INCLUDING WRITTEN FINDINGS CONSISTENT WITH THE COUNCIL'S TENTATIVE DECISION ON OR BEFORE JULY 22, 2022. SECONDED BY COUNCILOR YOUNG. MOTION PASSED 5:0, ALL PRESENT MEMBERS VOTED IN FAVOR (COUNCILOR BROUSE AND COUNCIL PRESIDENT ROSENER WERE ABSENT).

6. ADJOURN:

Mayor Mays adjourned the meeting at 9:57 pm.

Attest:

Sylvia Murphy, MMC, City Recorder

Keith Mays, Mayor