EXHIBIT SCHEDULE

FILE NO:	**SUB 2020-001**	**APPLICANT:**	**TONY & TORY NIETO**
HEARING DATE:	**6/23/2020**	**HEARING BODY:**	**PLANNING COMMISSION**
TIME:	**6:30 PM**	**LOCATION:**	**ELECTRONIC VIA ZOOM**

EXHIBIT NO	EXHIBIT PAGE	NATURE OF EXHIBIT
1	1	REQUEST FOR REMAND
2	3	APPLICANT'S SUBMITTAL
3	391	APPLICANT'S SUPPLEMENTAL SUBMITTAL
4	421	NOTICE OF PUBLIC HEARING AND PHOTO
5	425	NOTICE OF PUBLIC HEARING MAILING LABELS
6	426	NOTICE OF PUBLIC HEARING MAILTRIBUNE
7	429	AGENCY COMMENT, THROUGH 3/16/20
8	453	PUBLIC COMMENT, LAUPHEIMER, DATED 3/4/20
9	455	PUBLIC COMMENT, WALLACE, DATED 3/16/20
10	456	PUBLIC COMMENT, DAVIS, VANAKEN, DATED 3/16/20
11	461	PUBLIC COMMENT, DAVIS, TSUI, CUDDY, DATED 3/17/20
12	468	PUBLIC COMMENT, LAUPHEIMER, DATED 3/16/20
13	497	PUBLIC COMMENT, MATSUURA, RUBIO, DATED 3/16/20
14	501	PUBLIC COMMENT, ZUKIS, MCCOY, DATED 3/17/20
15	504	120 DAY WAIVER, DATED 3/19/20
16	506	PUBLIC COMMENT, HELLER, DATED 3/25/20
17	508	PUBLIC COMMENT, RUGG, DATED 3/25/20
18	509	NOTICE OF PUBLIC HEARING MAILING LABELS
19	510	NOTICE OF PUBLIC HEARING AND PHOTO
20	512	NOTICE OF PUBLIC HEARING MAIL TRIBUNE
21	513	AGENCY COMMENT, 3/17/20 - 6/15/20
22	515	PUBLIC COMMENT, BIZEAU, DATED 6/8/20
23	517	PUBLIC COMMENT, KREISMAN, DATED 6/4/20
24	518	PUBLIC COMMENT, LAUPHEIMER, DATED 6/8/20
25	520	120 DAY WAIVER, DATED 6/15/20
26	522	STAFF REPORT, DATED 6/16/20
27	531	PLANNING COMMISSION PROPOSED FINAL ORDER
28	594	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/15/20
29	598	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/15/20
30	700	PUBLIC COMMENT, KREISMAN, DATED 6/17/20
31	701	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/16/20
32	706	PUBLIC COMMENT, ZUKIS, DATED 6/15/20
33	707	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/17/20
34	713	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/18/20
35	717	PUBLIC COMMENT, MIXSON, DATED 6/19/2020
36	718	MEMO TO PLANNING COMMISSION, DATED 6/19/20
37	720	APPLICANT COMMENT, CSA PLANNING, DATED 6/19/20
38	721	APPLICANT COMMENT, CABLE HUSTON, DATED 6/19/20
39	722	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/21/20

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EXHIBIT NO	EXHIBIT PAGE	NATURE OF EXHIBIT
40	1215	PUBLIC COMMENT, SKY, DATED 6/22/20
41	1216	PUBLIC COMMENT, MORRISON, DATED 6/22/20
42	1218	PUBLIC COMMENT, DAVIS, DATED 6/22/20
43	1238	PUBLIC COMMENT, ARDNT, DATED 6/22/20
44	1241	PUBLIC COMMENT, HADELLA, DATED 6/22/20
45	1242	PUBLIC COMMENT, ENDERS, DATED 6/22/20
46	1244	PUBLIC COMMENT, QUILLIAN, DATED 6/20/20
47	1249	PUBLIC COMMENT, BREWER, DATED 6/17/20
48	1250	PUBLIC COMMENT, MOORE, DATED 6/21/20
49	1251	PUBLIC COMMENT, MILLS-CANNON, DATED 6/23/20
50	1253	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/23/20
51	1255	ORAL TESTIMONY/PRESENTATION, CABLE HUSTON, DATED 6/23/20
52	1256	ORAL TESTIMONY/PRESENTATION, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/23/20
53	1285	ORAL TESTIMONY/PRESENTATION, DAVIS, DATED 6/23/20
54	1298	ORAL TESTIMONY/PRESENTATION, MATSURRA, DATED 6/23/20
55	1317	ORAL TESTIMONY/PRESENTATION, DAVIS, DATED 6/23/20
56	1347	ORAL TESTIMONY/PRESENTATION, MARY TSUI, DATED 6/23/20
57	1363	ORAL TESTIMONY/PRESENTATION, LAURIE CUDDY, DATED 6/23/20
58	1376	ORAL TESTIMONY/PRESENTATION, VANAKEN, DATED 6/23/20
59	1387	ORAL TESTIMONY/PRESENTATION, RUBIO, DATED 6/23/20
60	1402	ORAL TESTIMONY/PRESENTATION, LAUPHEIMER, DATED 6/23/20
61	1404	PUBLIC COMMENT, KREISMAN, DATED 6/28/20
62	1406	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/29/20
63	1414	PUBLIC COMMENT, SCHOLOM/ARZNER, DATED 6/29/20

DAVIS HEARN ANDERSON & TURNER
ATTORNEYS AT LAW

M E M O R A N D UM

TO: **City of Talent Planning Commission (publictestimony@cityoftalent.org)**

FROM: **Chris Hearn | chearn@davishearn.com**
DAVIS HEARN ANDERSON & TURNER PC | www.davishearn.com
515 E. Main St. | Ashland, Oregon 97520 | 541.482.3111
Attorneys for Vern Davis, Mary Tsui, Laurie Cuddy, Forest Davis

DATE: **June 29, 2020**

RE: **Subdivision Application | SUB 2020-001 | 201 Belmont Road**
A. Conditions of Approval Generally ("Feasibility Standard");
B. Deferral of Commission's Discretionary Review to City Staff;
C. Statutory Development Agreements (ORS 94.504 - ORS 94.528);
D. The Railroad District Master Plan

Dear Planning Commission:

The Commission's role is to apply City's substantive review standards and criteria reflected in (1) City's Talent Subdivision Ordinance (TSO); (2) Talent Zoning Ordinance (TZO); and (3) City's adopted Comprehensive Plan to the Application submitted. In proceeding to review a subdivision application under City's Type III quasi-judicial process, the Commission's important role is to exercise its discretion and make those determinations demanding the exercise of policy or legal judgment concerning the Application's compliance with all the relevant standards. The Commission's decisions requiring the exercise of legal or policy judgment are not appropriately deferred to a later date for determination by City staff in the context of conditions of approval or a non-statutory "development agreement".

A. Conditions of Approval and the "Feasibility Standard".

Conditions of approval are not findings and they cannot substitute for, or be used to avoid, an applicant demonstrating compliance with the substantive approval criteria and review standards found in City's TSO, TZO, and City's duly-adopted Comprehensive Plan.

The Commission cannot appropriately defer any decisions to City staff as a condition of approval unless, at a minimum, the Commission finds the Application demonstrates that compliance with all City's discretionary approval standards is

"feasible." [1] In order for a condition of approval to be adopted by the Commission, the Commission must determine that "substantial evidence supports findings that solutions to certain problems . . . are possible, likely and reasonably certain to succeed." [2] Only then may Conditions of approval be imposed for the limited purpose of determining the specific technical details of how compliance will be achieved, and to select the precise solution. Conditions cannot be applied as a substitute for the Commission's exercise of legal and policy-making determinations concerning whether all substantive review criteria are satisfied.

If compliance with any approval standards is "uncertain," then the development application must be denied, postponed, or made more certain by a condition of approval requiring a further public hearing. [3]

It is improper to use conditions as a substitute for compliance with City's approval standards if an application cannot meet those standards. Similarly, a condition cannot inappropriately delegate or defer Applicant's demonstrating compliance with any discretionary review standard to an administrative or ministerial decision-maker (City staff). [4]

B. The "Development Agreement" suggested in the Staff Report inappropriately defers to City staff discretionary review to establish compliance with substantive City review standards and criteria – which is under the exclusive purview of the Planning Commission.

The Staff Report, Draft Findings, and Proposed Order suggest the Commission delegate to City staff, and defer to a later date, compliance with several substantive City review standards and criteria firmly within the exclusive purview of the Commission's decision-making authority (e.g., Rec: 522-593; and specifically 531-533, 541-546, 552-560)

These include, the following examples:

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[1] *Meyer v. City of Portland*, LUBA Nos. 82-077, 82-078, 7 Or LUBA 184 (1983), aff'd, 67 Or App 274 (1984)

[2] *Meyer v. Portland*, 67 Or App 274, 280 n 5, 678 P2d 741 (1984), (affirming LUBA's decision in 7 Or LUBA 184.*)* (underlining added).

[3] *Gould v. Deschutes County*, 216 Or App 150, 161–163, 171 P3d 1017 (2007); *Neighbors For Livability v. City of Beaverton*, 178 Or App 185, 35 P3d 1122 (2001).

[4] See: e.g., *Hodge Or. Props. v. Lincoln County*, 194 Or App 50, 93 P3d 93 (2004) (conditions of approval were actually approval criteria that had to be satisfied before approval of the development application); *Township 13 Homeowners Association, Inc. v. City of Waldport*, LUBA Nos. 2006-171, 2006-172, 53 Or LUBA 250 (2007).

1. **TSO 8-2.250(B)(1):** "*Streets within or adjacent to the development shall be improved in accordance with the Transportation System Plan Standards.*" Rec: 543. City's Transportation System Plan ("TSP") requires a minimum right-of-way width of 70 feet for Belmont Road, a designated residential collector street (and up to 80 feet to accommodate parking). While the TSP does provide the Commission with some "flexibility" to consider permitting the subdivision to be served by a residential collector street with less than the minimum required 70 feet of right-of-way width, that is a discretionary decision requiring the Commission's exercise of policy judgment. It cannot be deferred to a "development agreement" negotiated between Applicant and City's staff in a back room at City Hall. That proposed process deprives the public of its right to participate in the quasi-judicial public process.

The Staff Report states, "*TMC 17.10.050 also provides that street location, width and grade shall be approved by the Public Works Director or designee …*" Rec: 543-544. But TMC 17.10.050(G) says:

"TMC 17.10.050 (*G*): *Minimum Rights-of-Way and Street Sections*. *Street rights-of-way and improvements shall be within the range of appropriate widths adopted in the Transportation System Plan. A variance shall be required to vary the standards in the transportation system plan. Where a range of width is indicated, the width shall be determined by the decision-making authority based upon the following factors: (1) Street classification in the transportation system plan; (2) Anticipated traffic generation; … (13) Access needs for emergency vehicles; …"* (underlining added.)

Further, **TMC 17.10.050** states:

"***TMC 17.10.050 (C): Variances***. *A variance to the transportation design standards in this section may be granted pursuant to Chapter 18.160 TMC.*"

In turn, Chapter **18.160 TMC** states:

"***TMC 18.160.010. Authorization to grant or deny variances***.
A. *The planning commission is delegated the authority to approve, approve with conditions, or disapprove any proposed variance from the provisions of this title. Where practical difficulties, unnecessary hardships, and results inconsistent with the general purposes of this title and the Talent Comprehensive Plan would result from the strict and literal interpretation and enforcement of the provisions of this title, variances may be granted as provided in this chapter.*"

Conclusion: The Planning Commission must decide whether the non-conforming residential collector Belmont Road right-of-way width (60 feet) is adequate under the circumstances, and in light of the access issues associated with the Application (particularly the "*access needs of emergency vehicles*" and anticipated traffic generation). TMC 17.10.050(G). While final approval of street design may be a function of the City Engineer, it is the function of the Planning

Commission to determine whether to allow a variance or other deviation from the designated Belmont Road residential collector minimum right-of-way width of 70 feet (80 feet if additional parking is permitted), as established by the TSP and TSO.

The above is one example of how deferring substantive review criteria for later decision by City staff constitutes an abrogation of the Commission's duty to render a decision addressing all City's substantive standards and criteria refected in City's TSO, TZO, and Comprehensive Plan.

2. **TZO 8-3L.920(A) Traffic Impact Study**.
"*8-3L.920. Applicability.*
A. A transportation impact study (TIS) shall be required if any of the following exist: ... (2) A development proposal is projected to generate 50 or more peak hour trips on any arterial or collector segment or intersection." Rec: 592.

A two-page letter from Applicant's traffic engineer submitted with the original Application estimated a total of 49 net vehicle trips during the P.M. Peak Hour. The two-page traffic engineer's letter submitted by Applicant is expressly based on two flawed assumptions:

First, that the Application proposes Belmont Road to serve only 48 new lots. This assumption is flawed because the Application clearly proposes that Belmont Road will also serve the five lots owned by the farmers to the southeast (which currently include three additional single family homes not considered in the two-page letter from Applicant's traffic engineer). Therefore, the Application expressly proposes Belmont Road as the single means of ingress and egress for a total of 55 lots – which, as proposed, include a minimum of 53 homes.

Second, the conclusion in the two-page letter submitted by Applicant's traffic engineer is based on the flawed assumption that Applicant's 48 new lots will not be developed with any Accessory Residential Units (ARUs), which would greatly increase, and perhaps double, the number of net PM Peak Hour trips from 49 to well over the threshold of 50, mandating submission of a Transportation Impact Study.

Conclusion: Applicant's development proposal, as submitted, will generate more than 50 net PM Peak Hour vehicle trips on Belmont Road and Talent Avenue, thereby mandating that a TIS "shall" be required to support the Application. TZO 8-3L.920(A)(2).

C. Statutory Development Agreements (ORS 94.504 - ORS 94.528).

While the Oregon Court of Appeals and LUBA have held that not all "development agreements" between a city and a developer must be statutory "Development Agreements" under ORS 94.504 through ORS 94.528, the purpose of statutory Development Agreements is to provide a "safe harbor" for Oregon cities and applicants entering into agreements requiring a number of diverse approvals.

The statutory Development Agreement mechanism is designed, in part, to avoid a city being tempted to defer substantive standards and criteria to a later date, without providing the public with its due process opportunity for notice and quasi-judicial hearings. (The requirements for statutory Development Agreements are provided as an Addendum at end of this memo.)

D. The Railroad District Master Plan.

The Staff Report and the Applicant's opening comments to the Commission suggest that City's approval of the 2005 Railroad District Master Plan in 2007, somehow obviates the need for Applicant to comply with City's more detailed adopted provisions of City's TSO, City's TZO, and the adopted Elements of City's Comprehensive Plan (e.g. City's Comprehensive Plan, Element F, Policy 10: Public Facilities Strategy). The Railroad District Master Plan is not listed as an Element of City's current adopted Comprehensive Plan and, as such, is not entitled to any Comprehensive Plan deference or recognition as substantive review criteria. "*The Master Plan should be adopted through legislative amendments to the City of Talent Comprehensive Plan and Transportation System Plan.*" Railroad District Master Plan, Pg. 1 (underlining added.)

Respectfully submitted,

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Attorneys for Vern Davis, Mary Tsui, Laurie Cuddy, Forest Davis

Addendum: Statutory Development Agreements:

ORS 94.504 Development Agreements (contents, duration, effect on affordable housing covenants)

(1) A city or county may enter into a development agreement as provided in ORS 94.504 *(Development agreements)* to 94.528 *(Recording)* with any person having a legal or equitable interest in real property for the development of that property.

(2) A development agreement shall specify:

(a) The duration of the agreement;

(b) The permitted uses of the property;

(c) The density or intensity of use;

(d) The maximum height and size of proposed structures;

(e) Provisions for reservation or dedication of land for public purposes;

(f) A schedule of fees and charges;

(g) A schedule and procedure for compliance review;

(h) Responsibility for providing infrastructure and services;

(I) The effect on the agreement when changes in regional policy or federal or state law or rules render compliance with the agreement impossible, unlawful or inconsistent with such laws, rules or policy;

(j) Remedies available to the parties upon a breach of the agreement;

(k) The extent to which the agreement is assignable; and

(L) The effect on the applicability or implementation of the agreement when a city annexes all or part of the property subject to a development agreement.

(3) A development agreement shall set forth all future discretionary approvals required for the development specified in the agreement and shall specify the conditions, terms, restrictions and requirements for those discretionary approvals.

(4) A development agreement shall also provide that construction shall be commenced within a specified period of time and that the entire project or any phase of the project be completed by a specified time.

(5) A development agreement shall contain a provision that makes all city or county obligations to expend moneys under the development agreement contingent upon future appropriations as part of the local budget process. The development agreement shall further provide that nothing in the agreement requires a city or county to appropriate any such moneys.

(6) A development agreement must state the assumptions underlying the agreement that relate to the ability of the city or county to serve the development. The development agreement must also specify the procedures to be followed when there is a change in circumstances that affects compliance with the agreement.

(7) A development agreement is binding upon a city or county pursuant to its terms and for the duration specified in the agreement.

(8) The maximum duration of a development agreement entered into with:

(a) A city is 15 years; and

(b) A county is seven years.

(9) ORS 94.504 *(Development agreements)* to 94.528 *(Recording)* do not limit the authority of a city or county to take action pursuant to ORS 456.270 *(Definitions for ORS 456.270 to 456.295)* to 456.295 *(Action affecting covenant)*. [1993 c.780 §1; 2005 c.315 §1; 2007 c.691 §7]

ORS 94.508 Approval by governing body (findings; adoption)

(1) A development agreement shall not be approved by the governing body of a city or county unless the governing body finds that the agreement is consistent with local regulations then in place for the city or county.

(2) The governing body of a city or county shall approve a development agreement or amend a development agreement by adoption of an ordinance declaring approval or setting forth the amendments to the agreement. Notwithstanding ORS 197.015 *(Definitions for ORS chapters 195, 196, 197 and ORS 197A.300 to 197A.325)* (10)(b), the approval or amendment of a development agreement is a land use decision under ORS chapter 197.

ORS 94.513 Procedures on consideration and approval

(1) A city or county may, by ordinance, establish procedures and requirements for the consideration of development agreements upon application by, or on behalf of, the owner of property on which development is sought or another person having a legal or equitable interest in that property.

(2) Approval of a development agreement requires compliance with local regulations and the approval of the city or county governing body after notice and hearing. The notice of the hearing shall, in addition to any other requirements, state the time and place of the public hearing and contain a brief statement of the major terms of the proposed development agreement, including a description of the area within the city or county that will be affected by the proposed development agreement. [1993 c.780 §3]

ORS 94.518 Application of local government law and policies to agreement

Unless otherwise provided by the development agreement, the comprehensive plan, zoning ordinances and other rules and policies of the jurisdiction governing permitted uses of land, density and design applicable to the development of the property subject to a development agreement shall be the comprehensive plan and those ordinances, rules and policies of the jurisdiction in effect at the time of approval of the development agreement. [1993 c.780 §4]

ORS 94.522 Amendment or cancellation of agreement (enforceability)

(1) A development agreement may be amended or canceled by mutual consent of the parties to the agreement or their successors in interest. The governing body of a city or county shall amend or cancel a development agreement by adoption of an ordinance declaring cancellation of the agreement or setting forth the amendments to the agreement.

(2) Until a development agreement is canceled under this section, the terms of the development agreement are enforceable by any party to the agreement. [1993 c.780 §5]

ORS 94.528 Recording

Not later than 10 days after the execution of a development agreement under ORS 94.504 *(Development agreements)* to 94.528 *(Recording)*, the governing body of the city or county shall cause the development agreement to be presented for recording in the office of the county clerk of the county in which the property subject to the agreement is situated. In addition to other provisions required by ORS 94.504 *(Development agreements)* to 94.528 *(Recording)*, the development agreement shall contain a legal description of the property subject to the agreement. [1993 c.780 §6]

Helen Scholom, and family, 1713 and 1715 Talent Avenue, Talent, OR 97540

June 29, 2020

To: City of Talent Planning Commission
Re: Belmont Subdivision Application – Talent View Estates – written testimony

Talent is a beautiful small city built with care and thoughtful development. The quality of life within our city would be highly affected by an approval of the Belmont Subdivision. It is not without reason that the application for this subdivision has been denied many times in the past. The mistake has been made years ago when these lands have been added to single home development zoning. It represents an urbanized development in the middle of a rural farming area, adjacent to wild lands and forests.

I am concurring with many testimonies by my neighbors that address the following:

 # 1: TRAFFIC
High volume traffic impact, loss of pedestrian & bicycle access and safety on Talent Avenue North and South – no traffic study, no sidewalks or bicycle lanes between Creel Road and South Talent. For many years, there is a lot of foot and bicycle traffic on Talent Avenue.
If Creel Road is the future main connector to Hwy 99 it will need another traffic signal at the intersection. It was Rapp Road that was designed to serve for additional developments.

#2: ACCESS
Former applications have been denied due to lack of access. The railroad track access at Belmont was considered not suitable or sufficient to serve a high number of traffic, nor the fire department. Installing sprinklers in new homes would not prevent a wildfire taking over many homes creating a similar situation as we have seen in Paradise, California. Uncontrolled fires could easily affect homes on Talent Avenue. The city should not want to be responsible for such an outcome.
It is not acceptable to close "public road" railroad crossings on Talent Avenue which have a long standing right to access their property over these crossings.
The Talent water reservoirs pose a flooding risk to many proposed homes.
Train traffic could potentially block the single crossing in an emergency.

It comes down to "Need for Housing" as the main factor that this subdivision should be granted. It is not right that twisting certain regulations would force the city to agree with a detrimental development. The city should try to find a responsible solution for all parties involved.

I strongly urge the City Planning Commission to reject this proposal once again.

Sincerely,

Helen Scholom and Rudolf Arzner
Talent Avenue 1713
Talent, OR 97540

Deborah Scholom
Talent Avenue 1715
Talent, OR 97540

June 29, 2020