

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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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
64	1416	PUBLIC COMMENT, CSA PLANNING, DATED 6/30/20
65	1418	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 6/30/20
66	1420	PUBLIC COMMENT, LAUPHEIMER, DATED 6/30/20
67	1422	PUBLIC COMMENT, CSA PLANNING, DATED 7/2/20
68	1423	PUBLIC COMMENT, HICKMAN, DATED 7/1/20
69	1426	PUBLIC COMMENT, CSA PLANNING, DATED 7/7/20
70	1427	PUBLIC COMMENT, DAVIS, DATED 7/7/2020
71	1436	PUBLIC COMMENT, LAUPHEIMER, DATED 7/7/20
72	1443	PUBLIC COMMENT, TSUI, DATED 7/7/20
73	1444	PUBLIC COMMENT, DAVIS, HEARN, ANDERSON, TURNER, DATED 7/7/20
74	1456	PUBLIC COMMENT, RUBIO, DATED 7/7/20
75	1459	APPLICANT'S FINAL LEGAL ARGUMENT, DATED 7/14/20

July 14, 2020

VIA EMAIL

Talent Planning Commission
c/o Zac Moody
Community Development Department
110 East Main Street
Talent, OR 97540
zmoody@cityoftalent.org

RE: Planning File SUB 2018-001 – Applicant’s Final Legal Argument

Dear Planning Commissioners:

This letter comprises the Applicant’s final legal argument in this matter and should be included in the record.

Introduction and Background

The decision before the Planning Commission is the first time the substance of the proposal in the application will be acted on. The City’s initial consideration of the application as part of an Expedited Land Division (“ELD”) never reached the merits of the application. Instead, the City’s prior review determined that the ELD process was not available. The Hearings Referee agreed with City staff and expressly remanded the application back to the City to process it as a Limited Land Use decision.¹

This context is important, because the Planning Commission received inaccurate testimony stating that this application has already been denied. The letter from Mr. Hearn, for example, cites approval criteria on which, he claims, the City previously denied the application.² What is missing from that testimony, however, is any acknowledgment of how those criteria were actually used in the prior proceeding. Specifically, the City’s entire legal argument during that proceeding was a request that the “Hearings Referee find that the proposed subdivision application does not qualify for treatment under ORS 197.360 [the ELD statute] and remand the

¹ Rec. 773.

² Rec. 603.

application to the City to review under more appropriate procedures.³ The Hearings Referee expressly declined to address whether the application satisfied specific development approval criteria.⁴

Now that the “more appropriate” limited land use process is being used, the only criteria relevant to the decision are those set forth in the Staff Report.⁵ In that report, Staff goes through each of the approval criteria in detail, and Staff has determined that each of the criteria are satisfied, some through the imposition of conditions of approval. Much of the testimony the Planning Commission received did not focus on whether the actual approval criteria are satisfied. Rather, that testimony addressed broad concerns over whether the City had properly planned this area, or whether the plans, once implemented, would exacerbate safety concerns. These concerns may be relevant to the Planning Commission when it is considering or recommending code changes or other legislative updates to the City’s adopted plans. In the quasi-judicial context of a specific application, however, only those criteria that already exist may be considered, along with any requirements of state law.

Because the approval criteria applicable to this application are limited, and because there is no persuasive evidence in the record that those criteria have not been, or cannot be, met, the Planning Commission should approve the preliminary plat for the subdivision as set forth in the Staff Report, and as further refined in this letter.

Needed Housing

During Applicant’s rebuttal presentation in June, we reminded the Planning Commission that this application must be viewed in the context of the Needed Housing statute – ORS 197.307. There is no legitimate dispute that the Needed Housing statute applies to this application, as it applies to “all housing on land zoned for residential use.”⁶

Rather than re-state all of Applicant’s arguments relating to Needed Housing, we refer the Planning Commission to the Applicant’s prior discussion beginning on Page 270 of the record. There, the Applicant describes in detail the legal requirements of the Needed Housing statute, which include that cities may apply only “clear and objective” standards to a preliminary subdivision plat. Standards that are not clear and objective are those that “involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development.”⁷

Since the date this Application was reviewed in the ELD process, LUBA has issued additional opinions confirming how rigid the Needed Housing statute is to be applied. In a more

³ Rec. 787 (emphasis added).

⁴ Rec. 772. As explained below, the Hearings Referee did, however, make a legal finding that the City could not apply the two-access standard in Policy 10.2.1 of the Comprehensive Plan on remand as part of a limited land use review. Rec. 760.

⁵ Rec. 522.

⁶ ORS 197.303.

⁷ *Rogue Valley Ass’n of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998).

recent case involving the City of Silverton,⁸ LUBA applied the Needed Housing statute to an application for tentative plat approval to subdivide the property into 40 lots. Silverton had denied the application based on the applicant's failure to include improvements to failing intersections to satisfy certain traffic performance standards. Finding that such standards were not clear and objective, LUBA not only reversed the city's decision, it instructed the city to approve the application because that standard could not be applied at all.

The Applicant in the present matter has maintained from the outset that many of the City's standards are not clear and objective and, therefore, cannot be applied as a basis for denial.⁹ Beginning on Page 282 of the record, the Applicant walks through all of the approval criteria that are not clear and objective. Even so, the Application addresses all of the approval criteria as though they are applicable. The Applicant chose to do so in order for the proposed subdivision to track the City's plans to the maximum extent practicable.

Of note, the Planning Commission did not receive any persuasive testimony either that the Application does not involve Needed Housing or that all of City's criteria are clear and objective. On this basis alone, the Planning Commission must adopt the Applicant's position and could refuse to even apply the criteria that are not clear and objective. But in no case can the Planning Commission deny the Application based on one of those criteria.

Conditions of Approval

The Staff Report recommends approval of the Application with conditions. As previously noted by the Applicant, it supports all of those conditions with two exceptions.

First, Condition 7(g) would require the developer to fully fund the entirety of street improvements on Belmont between Talent Avenue and the Belmont rail crossing. This requirement is not grounded in the City's code, cannot be applied as a clear and objective standard under the Needed Housing statute, and is unconstitutional. For those reasons, it should be removed.

Staff recommends Condition 7(g) based on TCC 8-2.250.B.1, which states that no development should occur without frontage or approved access to a public street and that "streets within or adjacent to a development shall be improved." Based on the plain language of that code provision, the City can require public improvements only to streets that are within or adjacent to the development. This portion of Belmont is neither within nor adjacent to the development. The boundary of the development stops on the south side of the railroad tracks. While the developer has proposed to pay for the improvements to the rail crossing itself, which will connect the development to the existing portion of Belmont, those improvements, too, are off-site improvements and constitute the only portion of Belmont that is adjacent to the development. The City cannot define "adjacent" as any street that is connected to the development, otherwise all streets would satisfy that definition.

⁸ See also, *Oster v. City of Silverton*, -- Or LUBA -- (2019) (LUBA No. 2018-103).

⁹ Rec. 46, note 8.

Further, the very act of interpreting the Code to determine the meaning of “adjacent” violates the Needed Housing statute. LUBA has concluded that a standard is not clear and objective if the local government has to interpret the standard in the first instance.”¹⁰ Although the word “adjacent” seems objective, the Staff Report’s treatment of that word as deeming anything connected to the development as adjacent shows the subjectivity that is involved.

Notwithstanding the foregoing, the Applicant has agreed to fund a majority of the Belmont improvements to account for the fact that they are needed to serve the development. Anything beyond that, however, requires the City to determine that required public improvements are roughly proportional to the impact of the development. The Staff Report disagrees and states that the mere existence of the requirement is enough to avoid the need for rough proportionality findings. Staff’s position, however, is contrary to section 8-2.220.D of the City’s code. That code provision requires all conditions for public improvements to be roughly proportional and expressly requires findings to establish rough proportionality for any such condition the applicant has not agreed to.

This is a matter of constitutional law and involves a taking, in the form of an exaction, that is governed by the Fifth Amendment. As such, if the Planning Commission intends to apply this condition of approval, and if it does so without demonstrating that the required improvements are warranted, the Applicant can nevertheless accept the condition and challenge it either at LUBA or in the Circuit Court.¹¹ Unlike other appeals of land use decisions, an applicant is automatically entitled to attorney fees if it prevails in a challenge to an unconstitutional condition. The City, not the opponents defending the condition, would be on the hook for those fees.

The Applicant also objects to the imposition of Condition 16, which would require the Applicant to convey Tract A and B to a homeowners’ association and to dedicate those tracts for public access. This condition, according to the Staff Report, helps satisfy the open space standards in Section 8-2.210. That code provision, however, does not allow the condition as drafted. Instead, it allows the establishment of open space either through dedication to the City as publicly-owned open space, or through an agreement that allows the City to retain development rights on the property. Condition 16 does neither of these, instead keeping the land in private ownership and without any ability of the City to develop it.

The only clear and objective portion of Section 8-2.210 is the safe harbor requirement that significant wetland and riparian areas be protected with a buffer. The Applicant has met that requirement. Any additional exactions by the City must be grounded in the code and supported by findings that establish the appropriateness of the exaction. As with Condition 7(g), and other approach is in violation of the Needed Housing statute and is unconstitutional. The Applicant therefore continues to retain its right to challenge this condition if the Planning Commission proceeds without removing it.

¹⁰ See *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

¹¹ ORS 197.796.

Access to the Development

The Planning Commission received testimony relating to site access, neither of which can serve as the basis for denial of the Application.

First, many comments addressed a requirement to have two accesses to the site pursuant to Comprehensive Plan Element F, policy 10.2.1. What every single one of those comments ignored, however, is that this provision cannot apply to the Application in its current posture. The Applicant has fully addressed the applicability of this Plan provision and the fact that it cannot be treated as a mandatory requirement.¹² In addition to the Applicant's arguments, the Hearings Referee expressly determined that this policy cannot be applied in a Limited Land Use decision.¹³ The basis for that decision is that the legislature has demanded that all approval criteria intended to apply to a Limited Land Use decision must be incorporated into a city's land use regulations.¹⁴ As a result, the Hearings Referee expressly ruled that policies like 10.2.1 "would not be applicable criteria for a limited land use decision should this Application be remanded."¹⁵ Because the Application was remanded and is being processed as a Limited Land Use decision, policy 10.2.1 is not an applicable criterion. The Staff Report correctly acknowledges this aspect of the case and does not attempt to apply the policy.

Second, other comments the Planning Commission received addressed an alleged lack of access to the site across the railroad at Belmont. The Applicant recognizes that the access at Belmont is not currently sufficient to accommodate the subdivision. However, sufficient access will occur through a different process – the ODOT rail crossing permit. It is that process, which will be based on an approved development, that will determine to what extent the crossing will need to be upgraded.

The Planning Commission received comments asserting that the Belmont rail crossing is not feasible. These comments, however, are based solely on the initial "diagnostic" ODOT performed. According to the ODOT manual, a diagnostic is just a starting point. The actual approval or denial of the crossing will occur when ODOT acts on a specific request. The initial diagnostic reflected the City's plans for the Railroad District Master Plan which, eventually, contemplates the closure of other crossings. There is nothing in the record, however, that mandates any other crossings will be closed simultaneously with the upgrades at Belmont. As ODOT later acknowledged, the actual crossing and related modifications will be determined later by ODOT, the City, and the railroad.¹⁶

ODOT's communications, and the fact that ODOT has already issued a crossing order once for the Belmont crossing to accommodate 3,000 daily vehicle trips, demonstrate that it is feasible to obtain a crossing permit to accommodate the subdivision. The fact that ODOT may

¹² Please refer to Record Page 282 for a full discussion on the non-mandatory nature of this policy.

¹³ Rec. 759-760.

¹⁴ ORS 197.195(1).

¹⁵ Rec. 760.

¹⁶ Rec. 445.

not approve a crossing is, of course, a risk that the Applicant must bear. But as long as the City acts in good faith to implement its plan for this area, it is at least feasible to apply, and the Applicant is not precluded as a matter of law from implementing Project #47 in the City's Transportation System Plan. Indeed, a contrary finding that the crossing is not feasible would be directly counter to the City's TSP project list and serves as an improper collateral attack on that planning document.

Safety Considerations

As noted above, the Planning Commission received many comments expressing a generic concern over safety if the subdivision is approved. With few exceptions, these comments do not address specific criteria, nor do they assert that the approval criteria are not met.

The Applicant reiterates its argument from its rebuttal presentation that this application cannot be used as a vehicle for debating whether the adopted plans for this property are appropriate. While the Planning Commission is often charged with helping the City develop new code language or long-range plans, that is not the role it serves when reviewing a subdivision application. Only the approval criteria can be considered, and broad questions of public policy, including safety, have already been addressed in the adoption of the existing code.

With respect to fire safety and traffic safety, the best evidence in the record is that the Application satisfies the code criteria. This determination has been made by the City Engineer with respect to traffic, and by the Jackson County Fire District #5 with respect to fire.

Conclusion

The Applicant appreciates most of the comments provided by the participants in this proceeding, and has attempted to put forth a reasonable proposal that will allow the development of 49 lots that are already zoned for residential use. This includes making a considerable investment in public facilities that will seed other development in the City as the City has long contemplated.

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The sole task for the Planning Commission is to determine if the applicable approval standards have been met. Pursuant to the Needed Housing statute, the Planning Commission's role in this proceeding is to ensure that land zoned for housing actually get developed with housing. Contrary to what those who oppose the development have urged the Planning Commission to do, any consideration of factors beyond clear and objective criteria is improper, and it risks causing unreasonable cost and delay, which the Needed Housing statute prohibits. The Staff Report recognizes this well, and presents a recommendation of approval that is grounded in the applicable criteria.

Sincerely,



Tommy A. Brooks