LAND USE APPEAL APPLICATION

1. **GENERAL DATA REQUIRED** *[to be completed by the appellant]*

UGA-SPR-ADJ-DAP-DR-PLA24-03 — Case # Being Appealed

February 29, 2024 — Decision Date

4650 Hazelgreen Rd NE, Salem, OR 97305 — Address of Subject Property

4795 Apollo Ave NE, Salem, OR 97305 — Appellants Mailing Address with zip code

sdschulke@gmail.com — Appellant's E-mail Address

(503) 580-8597 — Day-time Phone / Cell Phone

Appellant's Representative or Professional to be contacted regarding matters on this application, if other than appellant listed above:

Yasha Renner, AAL — Name

429 N. Water St. Ste B, Silverton, OR 97381 — Mailing Address with ZIP Code

yasha@rennerlawfirm.com — E-Mail Address

(503) 770-4040 — Day-time Phone / Cell Phone

2. **SIGNATURES OF ALL APPELLANTS**

Signature: _____ Date: 3/13/24

Printed Name: Steven Schulke

Signature: _____ Date: _____

Printed Name: _____

3. **REASON FOR APPEAL** Attach a letter, briefly summarizing the reason for the Appeal. Describe how the proposal does not meet the applicable criteria as well as verification establishing the appellants standing to appeal the decision as provided under SRC 300.1010

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FOR STAFF USE ONLY

Received By: Aaron Panko Date: 3-14-2024 Receipt No: 24-106369-GP

Appeal Deadline: 3-15-2024, 5:00 PM Case Manager: Aaron Panko

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Mr. Yasha Renner
ATTORNEY AT LAW

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March 14, 2024

BY FIRST CLASS MAIL AND EMAIL
Planning Division
555 Liberty Street SE
Salem, OR 97301
Email: planning@cityofsalem.net

Re: NOTICE OF REPRESENTATION AND APPEAL (SRC 300.1010 et seq.)
Case No: UGA-SPR-ADJ-DAP-DR-PLA24-03
Subject Property: Tax Lot 400 (Tax Map 06 2W 32C)

To: Hearings Officer

Please be advised that this law firm represents Steven Shulke ("Appellant"), an aggrieved party with standing to appeal the following land-use decisions in the above-referenced case. This letter specifies my client's reasons for appeal pursuant to Salem Revised Code (SRC) 300.1020.

I. DECISION(S) APPEALED

The following decision of the Planning Administrator is appealed:

Class 2 Adjustment to adjust the fencing and tree planting requirements of SRC 702.020(b)(2) along the southern boundary where the subject property abuts a BPA (Bonneville Power Administration) easement.

II. STANDING

Appellant is the owner of record of the real property located at 4795 Apollo Ave NE, Salem, OR 97305, which is zoned RS (single family residential) and abuts the proposed development of the subject property located at 4650 Hazelgreen Road NE, Salem, OR 97305 (the "Subject Property"). Appellant submitted comments during the public comment period and received a notice of decision dated February 29, 2024. Accordingly, Appellant has standing to appeal under SRC 300.520(f)(2).

III. REASONS FOR APPEAL

(A) Applicable Criteria for Granting a Class 2 Adjustment.

The foregoing decision on appeal was requested and granted as a Class 2 adjustment, which is defined as "an adjustment to any development standard in the UDC other than a Class 1 adjustment, including an adjustment to any numerical development standard in the UDC that increases or decreases the standard by more than 20 percent." SRC 250.005(a)(1)(B).

The criteria for granting a Class 2 adjustment are set forth in SRC 250.005(d)(2), which requires the proposed adjustment to satisfy all of the following elements:

> (A) The purpose underlying the specific development standard proposed for adjustment is:
> (i) Clearly inapplicable to the proposed development; or
> (ii) *Equally or better met by the proposed development.*
>
> (B) If located within a residential zone, the proposed development will not detract from the livability or appearance of the residential area.
>
> (C) If more than one adjustment has been requested, the cumulative effect of all the adjustments result in a project which is still consistent with the overall purpose of the zone.

SRC 250.005(d)(2) (emphasis added).

(B) Analysis of Land-Use Decision on Appeal

SRC 702.020(b)(2) provides, in pertinent part:

> Where a development site abuts property that is zoned . . . Single Family Residential (RS), *a combination of landscaping and screening* shall be provided to *buffer* between the multiple family development and the abutting . . . RS zoned property. The landscaping and screening shall include the following:
>
> (A) A minimum of one tree, not less than 1.5 inches in caliper, for every 30 linear feet of abutting property width; and
>
> (B) a minimum six-foot tall, decorative, sight-obscuring fence or wall. The fence or wall shall be constructed of materials commonly used in the construction of fences and walls, such as wood, stone, rock, brick, or other durable materials. Chainlink fencing with slats shall be not allowed to satisfy this standard.

SRC 702.020(b)(2).

For purposes of applying this standard, the term *abutting* means "touching along a boundary or point." SRC 111.001.

As a preliminary matter, it must be noted that the specific design review standard at issue contemplates the installation of landscaping and screening *on the Subject Property* that is owned by the applicant, not on the abutting property owned by Appellant. Logically, because a tree cannot be planted along the same line where a fence or wall is installed, one must be situated behind the other. Thus, for example, trees may be planted either behind or in front of the required screening, but SRC 702.020(b)(2) is silent regarding the distance between these design features. In any case, it goes without saying that the term *abutting* is not to be strictly construed for purposes of this design standard, but rather embraces some degree of reasonable discretion in planning the physical location of these design elements upon the Subject Property.

Moreover, SRC 702.020(b)(2) requires a "combination" of both (1) landscaping with living trees and (2) screening with a sight-obscuring fence or wall. These are separate and complementary requirements under SRC 702.020(b)(2), which specifies intrinsically different materials: a natural landscaping feature, on the one hand, together with a man-made structure on the other. The structural design feature must also be "decorative" according to the design review standard. Accordingly, any proposed adjustment that does not include *both* design elements—that is, natural landscaping and non-natural decorative screening—cannot fulfill the underlying purposes of the standard because it is not "equally or better met" by the proposed development.

As stated in SRC 702.020(b)(2), that underlying purpose is to provide a "buffer" between the multiple family development and the abutting RS zoned property. Further, the underlying purpose of all landscaping and screening standards applicable under the Unified Development Code (UDC) is to "improve the appearance and visual character of the community, promote compatibility between land uses . . . and preserve and enhance the livability of the City." SRC 807.001 (stating purpose of landscaping and screening standards under SRC chapter 807).

Nonetheless, the Planning Administrator granted the proposed adjustment for the following reasons stated in the notice of decision (pages 34–35, emphasis added):

> The applicant indicates that the reason for the request to reduce the tree planting and fencing is because of the existing 125-foot-wide easement for a BPA (Bonneville Power administration) transmission line. The easement extends across the entire southern boundary of the property with a width of approximately 16 feet on the subject property and 109 feet on the abutting RS (Single Family Residential) zoned properties to the south. No buildings or structures can occur within the easement, including fencing. ***Trees and vegetation exceeding a height of five feet are also not permitted in the easement area; therefore, it is not possible to provide the required buffering along the southern property line in the easement area.*** The applicant proposes to landscape the southern boundary with dense shrubs that will provide a physical and visual barrier and will be maintained in compliance with the requirements of the BPA easement. The proposal equally or better meets the intent of this provision and is therefore in compliance with this criterion.

As noted, the BPA power-line easement constitutes a nonpossessory interest in private lands. As such, it is a private easement and restriction on the use of land. But the UDC expressly provides that it "shall be applied independently of, *and without regard to*, any private easement, covenant, condition, restriction, or other legally enforceable interest in, or obligation imposed on, the use or development of land." SRC 110.060(a) (emphasis added). "In those instances where the UDC imposes a greater restriction or higher standards than required by an easement, covenant, condition, restriction, or other agreement between private parties, *or where the UDC otherwise conflicts with those private party agreements, the UDC shall control*." SRC 110.060(b) (emphasis added).

Therefore, the land-use restrictions and rights incident to the BPA power-line easement are immaterial for purposes of the application of SRC 702.020(b)(2). The Planning Administrator erred by considering and granting an adjustment on this basis, and the decision constitutes a modification of the *applicability* of a requirement that is expressly prohibited by SRC 250.005(a)(2)(E).

Further, with respect to the purported building restrictions due to BPA's easement, it should be noted that the applicant proposes to build a 6-foot perimeter fence along the eastern boundary of the Subject Property in compliance with the requirements of SRC 702.020(b)(2). As shown on the preliminary site plan (P5.1), the fence will, in fact, extend into the BPA easement area a distance of approximately 16 feet. This undermines the applicant's purported rationale for seeking an adjustment in the first place. Even if it is true that the terms of the easement prohibit construction of a fence or wall within the easement area, then the adjustment that should have been requested (and granted) is to relocate both the fence and trees, by moving both design features backward a distance of about 16 feet from the abutting property line in order to clear the easement area.

Notwithstanding SRC 110.060, which is dispositive, the proposed development, as adjusted, does not satisfy the criteria set forth in SRC 250.005(d). The applicant "proposes to landscape the southern boundary with dense shrubs that will provide a physical and visual barrier." *Notice of Decision* 34–35. The species of shrubs are identified on the applicant's plant schedule as *Mahonia Repens* (Creeping Mahonia) and *Prunus Laurocerasus* (Otto Luyken English Laurel), with *Rubus Calycinoides* (Creeping Bramble) as ground cover.

A dwarf form of the larger English Laurel, Otto Luyken English (or Cherry) Laurel is an evergreen shrub that typically grows 3 feet tall and spreads 6 to 8 feet. The plant's fruit, leaves, and stems are poisonous to humans. As shown on the preliminary site plan (P10.1), this species will be planted along the southernmost boundary for the Subject Property. Just behind these, the applicant intends to plant Creeping Mahona (also known as Creeping Oregon Grape), which is an extremely short, sprawling shrub that commonly grows no more than 8 to 12 inches and occasionally up to 2 feet. Suffice it to say, these two plant species, even when fully mature, cannot and will not provide an equal measure of privacy, nor visual character, nor buffer between the Subject Property and Appellant's property than trees (one tree for every 30 linear feet of abutting property width) and the 6-foot decorative fence or wall that is required by SRC 702.020(b)(2). Therefore, the proposed development does not *equally* meet the underlying purposes of this specific development standard.

As explained above, the underlying purpose of SRC 702.020(b)(2) is not merely to create a physical and visual obstruction, however dense, between the proposed multi-family development and RS zoned properties. Rather, the development standard uses the term *buffer*, which has a much wider connotation than the word *obstruction*, and embraces not only the privacy of the abutting RS-zoned property owners—specifically by means of a 6-foot tall decorative fence or wall. Additionally, the term *buffer* includes a protective element due to the incompatibility of land uses and the "nuisances" that will result from having a large multi-family apartment complex 125 feet from Appellant's back yard. A sight-obscuring fence or wall is designed to contain and buffer these nuisance activities, such as vehicle headlights from the nearby parking lot, trash and litter carried by wind, or even potential foot traffic. By contrast, a hedge of low- (and slow-)growing shrubs is not sufficient to provide an equally effective barrier. The hedgerow will take time to grow and spread, several years perhaps, but in the mean time there will be 4-foot gaps between each laurel.

Finally, as discussed above, SRC 702.020(b)(2) requires a combination of natural and non-natural design elements, the purpose of which is to "improve the appearance and visual character of the community, promote compatibility between land uses . . . and preserve and enhance the livability

of the City." SRC 807.001. Absent a decorative wall or fencing, a hedgerow cannot equally meet any of these purposes. Indeed, as landscaping design features, the tree and screening requirements under SRC 702.020(b)(2) are therefore intended to preserve the livability of the City, as well as to *enhance* that livability. At a minimum, these underlying purposes must be equally met by the proposed development. Appellant has grown up and worked in the City of Salem for most of his life. For him, the livability of the City will undoubtedly be adversely impacted by the lack of adequate screening between the proposed development and his home.

For the foregoing reasons, this appeal is respectfully submitted for a final decision.

Sincerely,

Yasha Renner