

February 17, 2016

Hearings Officer for the City of Salem

c/o City of Salem

Aaron Panko, Planner III

555 Liberty Street SE, Rm 305

Salem, OR 97301

RECEIVED

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COMMUNITY DEVELOPMENT



RE: APPLICANT'S RESPONSE TO STAFF REPORT FOR CONDITIONAL USE PERMIT
16-01

Hearings Officer,

Thank you for the opportunity to provide comments regarding City staff's opposition toward the application noted above. This letter will address issues raised in the staff report prepared for the public hearing on February 10, 2016 related to Case No. CU16-01. This letter is also intended to provide additional information following the February 10, 2016 hearing.

First I would like to start by addressing the original 2012 Conditional Use Case No. 12-05, which was recommended for approval by staff and approved by the Hearings Officer. The Salem City Council called up the case after approval and contemplated rescinding the Hearings Officer approval due to several issues with the proposed development; these concerns are outlined below. The application materials provided at that time remain substantially unchanged from what has been provided with Conditional Use Case No. CU16-01. However, this time staff has decided to recommend denial of the application due to the 2012 Council action. It seems to go against public process for staff to render a decision based on previous Council opinion from four years ago rather than base a new decision on the conditional use approval criteria. Additionally, the Council makeup is substantially different now than in 2012. This letter provides evidence that the approval criteria have been met, and should result in approval by the Hearings Officer.

There are three approval criteria for a conditional use permit application. In general, City staff has made findings indicating the application meets the first two criteria. With regard to the third criteria, staff has used the City Council's comments from August 27, 2012 to formulate their evaluation of Criteria No. 3. The criteria is presented in the staff report as follows:

The proposed use will be reasonably compatible with and have minimal impact on the livability or appropriate development of surrounding property.

In making their evaluation, staff has used the City Council comments from their public hearing on August 27, 2012 to evaluate this criteria. It is the applicant's opinion this is not appropriate as it reverses the meaning of the stated criteria. In lieu of evaluating the impact of the proposed development on the surrounding property, they have evaluated the impact of the surrounding property on the proposed development. It is the applicant's opinion that in taking this approach, staff has changed the evaluation criteria. With that being said, the following is the applicant's response to the information presented by staff.

Item No. 2 - Pedestrian Accessibility

While staff has indicated there are no notable changes since 2012 with regard to this issue, they indicated in their staff report, "... there are nearby shopping services and employment opportunities to the subject property and there are public parks within walking distance." In addition, Salem-Keizer Schools indicated there is bus transportation being provided with the existing development.

The City has approved and/or made approval recommendations to other multi-family projects with similar levels of pedestrian service. A proposed mixed-use development located in South Salem at Wiltsey and Commercial is one example. Another example includes the Willamette Park and Aspen Grove Apartments located at the intersection of Harritt Drive NW and Wallace Road NW.

Also, in the staff report, a comment is made that there is no signalized crosswalk of 23rd Street SE. This is because the intersection does not meet signal warrants. Additionally, 23rd Street is a collector street, and there are many collector street crosswalks without signals. An example of this is Davis Road South where many multifamily developments have been approved and there are no signalized crosswalks to access Crossler Middle School.

Item No. 3 – Lack of schools and parks in the immediate area.

There is not a lack of schools and parks in the area. While staff notes there has been no notable change in this situation in the last four years, they do not note any shortcomings regarding schools and parks. In fact they do state that there are parks and schools within the area, and the proximity of these schools and parks are similar to those of a mixed-use development (Case No. CU15-10) that was just recently approved by staff. Also recall, this was not an issue in 2012 when Conditional Use Case 12-01 was previously approved.

Item No. 5 – Concerns regarding noise impacts from the Salem Municipal Airport and City of Salem Shops Facility.

This issue is stated to be about noise, but also includes information from the Airport Manager regarding his understanding of the FAA's perspective regarding development adjacent to airports. With regard to the noise from the Public Works Shops, the staff report sites night time operation as a result of a community need such as snow or flooding events. These are sporadically occurring, and as a comparison the noise experienced by multi-family housing in areas like I-5 and Lancaster Drive NE is greater and far more frequent.

With regard to the airport issues pertaining to noise and land use compatibility, the applicant appreciates the opportunity to provide factual information in response to Mr. Paskell's remarks regarding this conditional use permit application. To present this information in the most clear and concise manner, Mr. Paskell's memo is presented below. When applicable, responses to various statements and representations are presented in italicized text.

Paskell Letter:

It is noted by the airport that the applicant references a determination from the FAA of "no hazard" as it relates to the *height* of the proposed development, and the airport concurs with that finding.

It is also noted that the applicant references FAA guidance and the Oregon Department of Aviation (ODA) Land Use Guidebook's determination that the 65 DNL sound level is an appropriate threshold for measuring noise that is incompatible with residential development, and the proposed development would be outside the 65 DNL noise contour as identified in the Airport's 2012 Master Plan. The airport concurs with that assessment, but would also note that the proposed development is immediately outside the 65 DNL noise contour, well within the 55-64 DNL noise range, and will subject residents to "moderate" noise exposure from landing and departing aircraft. OAR 340-035-0045 contains the State of Oregon criteria for airport noise, and is used to identify noise-sensitive properties near the airport that may experience regular noise exposure. Noise-sensitive properties are defined as "real property normally used for sleeping or normally used for schools, churches, hospitals or public libraries." This proposal places noise-sensitive residential properties immediately under the departure and final approach to the airport's primary instrument runway, subjecting residents to significant noise impacts."

Applicant Response:

First, let's understand what the noise intensity is of some common noises, and which of these are in a range of 50 dB to 70 dB. The following information is available from the National Institute on Deafness and Other Communication Disorders:

SOUND	NOISE LEVEL (dB)
<i>Lawnmower and Food Blender</i>	<i>85 to 90</i>
<i>Average City Traffic</i>	<i>80 to 84</i>
<i>Garbage Disposal</i>	<i>80</i>
<i>Washing Machine</i>	<i>78</i>
<i>Dishwasher</i>	<i>75</i>
<i>Vacuum Cleaner and Hair Dryer</i>	<i>70</i>
<i>Normal Conversation</i>	<i>50 to 65</i>
<i>Quiet Office</i>	<i>50 to 60</i>
<i>Refrigerator Humming</i>	<i>40</i>
<i>Whisper</i>	<i>30</i>

Now, we need to understand some of the basics of noise and how it is measured. The ear has the remarkable ability to handle an enormous range of sound levels. In order to express levels of sound meaningfully in numbers which are more manageable, a logarithmic scale is used, rather than a linear one. This scale is the decibel scale (dB).

Sound Intensity and Loudness – Zero decibels (0 dB) is the quietest sound audible to a healthy human ear. From there, every increase of 3 dB represents a doubling of sound intensity, or acoustic power (not loudness). Sound loudness is a subjective term describing the strength of the ear's perception of a sound. Most of us perceive one sound to be twice as loud as another when they are about 10 dB apart. For example, an 80 dB garbage disposal will sound twice as loud as a 70 dB vacuum cleaner. Yet that 10 dB difference in loudness represents a tenfold increase in

intensity. An 80 dB garbage disposal will sound about four times as loud as a 60 dB conversation, but in terms of acoustic intensity, the sound it makes is 100 times as intense or powerful.

Applying this to the noise level contours on the 2012 Airport Master Plan results in an intensity of 65 dB being 10 times more intense than 55 dB. This means 65 dB is perceived as being approximately twice as loud as 55 dB.

Now, let's add some precision regarding the location of the site relative to the noise contours from the 2012 Airport Master Plan, and the noise level forecast at the site. When measured through the site, there is approximately 3,360-feet between the 55 decibel day-night average sound level (DNL) and the 65 DNL noise contours indicated to represent the noise intensities forecast for the airport in 2028. Measuring along the same line, the distance between the 65 DNL contour and the center of the site is approximately 700-feet. Applying linear interpolation, this indicates a 20% reduction in noise level or 2 dB. Therefore, the noise level at the site is 63 DNL.

Remember, an increase of 3 dB represents a doubling of sound intensity. As a result, a reduction of 3 dB represents a halving of the sound intensity. Based on this, the 2 dB reduction of the sound intensity at the site represents an intensity reduction of 37% compared to the 65 DNL. Also, please keep in mind, this is a noise that typically lasts a relatively short time and the airport is not exceptionally busy.

This shows Mr. Paskell's representation of the noise at the site to be misrepresented. His description of the site as being "immediately outside the 65 DNL noise contour" does not accurately represent the reduction in noise intensity, or the impact this noise may have on the residents. Furthermore, it is also noteworthy that these values are representative of the noise level forecast through 2028.

In 2012, a conditional use permit was recommended for approval by City staff subject to the following conditions regarding noise:

- At the time of building permit review, the applicant shall provide an acoustical analysis, by a qualified acoustical engineer, of the proposed development, and incorporate into the design of the site and buildings, methods outlined in the analysis for reducing sound levels from surrounding uses.*
- The applicant shall incorporate a disclaimer into their tenant lease agreements that excessive noise is possible based on surrounding uses.*

Based on the ODA Guidebook, Table 6-3 indicating residential uses are compatible when the sound level is below 65 DNL, we do not believe a noise study is required. However, if the City requires it, the applicant will perform such a study, and will implement acoustical improvements if needed.

Paskell Letter:

It is further noted that the applicant recognizes that the residential development in the vicinity of an airport is **NOT** considered a compatible land use by the FAA, and the airport concurs with that assessment. The FAA considers residential development adjacent to, or in the immediate vicinity of, an airport as an incompatible land use. A copy of the airport's Grant Assurance #21 is attached and which requires the City to "take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operation, including landing and takeoff of aircraft." Also attached is a letter from FAA dated August 16, 2012 reminding the City to be aware of residential land use around airports. Permitting a residential development in a zone that does not currently allow residential development is the exact opposite action that Grant Assurance #21 requires. This development proposal places 96 residential dwelling units approximately ½ mile from the airport's primary runway, within 450' of the Runway Protection Zone, and immediately beneath the approach path of the airport's primary runway (see attached Distance Diagram). The FAA would likely consider this development an inappropriate use, and the City's specific permitting of it an inappropriate action in violation of Grant Assurance #21, potentially subjecting the City to civil penalties, repayment of past grants, and/or loss of future grant opportunities.

Applicant Response:

Again, Mr. Paskell is overstating the facts. With regard to the referenced letter from the Federal Aviation Administration dated August 16, 2012, this letter was not sent as a reminder to the City regarding residential land uses adjacent to the airport, as implied. The letter is however a notification of the approval of the Airport Layout Plan dated August, 2012 and submitted by Mead & Hunt, Inc. It does reference Grant Assurance #21 and encourages (not requires) the adoption of land use and height restrictive zoning. Furthermore, it states the FAA recognizes residential development adjacent to an airport property as an incompatible land use. Mr. Paskell goes on to state that the FAA would "likely" consider the development an inappropriate use. In our research we have not been able to find any evidence of what constitutes airport incompatibility besides noise and safety hazards. The noise issue has been addressed above. Regarding the safety hazard, our client received a "Determination of No Hazard to Air Navigation" (Aeronautical Study No. 2012-ANM-2907-OE) from the FAA, issued on 3/19/2013 (copy enclosed).

In the April, 2012 edition of the Legal Research Digest, an article appeared entitled, "Achieving Airport-Compatible Land Uses and Minimizing Hazardous Obstructions In Navigable Airspace", authored by Jocelyn K. Waite of Waite & Associates, Reno, NV. The article addresses compatible-land-use legal issues and provides airport lawyers with a starting point for research on the law regarding this topic. In summary, the article makes the following points:

- 1. Incompatible land use adjacent to airports presents two primary issues. First is that related to noise impacts, and second is the issue of the safety of adjacent users and airline passengers in the event of an air carrier accident.*

2. *The federal government is responsible for regulating airspace. Their responsibility does not extend to regulation of ground facilities not affecting inflight safety. FAA findings about airport development are merely advisory. The FAA imposes regulatory requirements that affect land use on airport sponsors, but does not (and cannot) provide the legal authority to sponsors to enforce those requirements. Their regulatory and guidance documents emphasize that land use is a state and local, not federal, issue.*
3. *While violation of Grant Assurance #21 may jeopardize eligibility to receive Airport Improvement Program (AIP) grant funding, LUBA (LUBA Case No. 2008-114) has held that Grant Assurance #21 cannot be relied upon to deny a land use decision.*

No mention is made in the Waite article regarding repayment of previous grants or civil penalties as being available to the FAA in the event of a violation of Grant Assurance #21. These are clearly baseless threats being offered by Mr. Paskell.

The Airport staff and City staff has had ample opportunity to limit the land use at this site. There have been several land use decisions implemented without steps taken to eliminate residential land use. However, multi-family uses continue to be allowed through a conditional use process.

Chapter 629 of the Salem Revised Code is the McNary Field Overlay Zone. It establishes the boundary of the overlay zone as the limits of the land owned by the Airport. Furthermore, it includes as permitted uses non-profit membership assembly and religious assembly. This seems to contradict Table 6-1, ODA Guidebook Land Use Compatibility Matrix. It is difficult to understand how an assembly use can be permitted outright within the airport grounds, but a residential use with potentially fewer inhabitants located approximately 2,500-feet northerly from the end of the runway along the centerline of the runway, approximately 1,000-feet northerly of the Runway Protection Zone, and approximately 630-feet westerly of the centerline of the approach is not.

The site of the proposed development falls within the Airport Overlay Zone. As Chapter 602, (section 602.020 for Development Standards) states, "Development within the Airport Overlay Zone must comply with the development standards applicable in the underlying zone and the development standards set forth in this section." The applicant has addressed each one of these standards in this letter.

Paskell Letter:

The applicant references Table 6-1, the Land Use Compatibility Matrix (attached) of the ODA Land Use Guidebook and correctly points out that there is very few land uses considered compatible on and around airports. Table 6-1 identifies Residential Development in an Approach Surface as "not clearly compatible or incompatible, and requires further study."

Applicant Response:

In this section of his letter, Mr. Paskell contradicts his previous statements by agreeing that Table 6-1 indicates Residential Development within an Approach Surface is "not clearly compatible or incompatible, and requires further study." The proposed development is on the

fringe of the Approach Surface, according to the Distance Diagram provided by Mr. Paskell. As the matrix indicates, evaluation and judgement should be appropriately applied.

The fact the site is located approximately 1,000-feet northerly of the Runway Protection Zone, approximately 2,500-feet northerly from the end of the runway along the centerline of the runway, and approximately 630-feet westerly of the centerline of the approach provides reasonable evidence there is minimal likelihood this use will be incompatible with the airport.

Paskell Letter:

Further study leads one to Chapter 7 of the ODA Land Use Guidebook Matrix of Limitation and Restrictions on Allowed Uses, Table 7-1 (attached). The development would be located under the airport's Approach Surface footnote L¹⁰ states that "Residential densities within 500-1,000 feet of the outer edge of the Runway Projection Zone (RPZ) not exceed 2 units per acre. The proposed development is 440' from the outer edge of the RPZ, and as the development site is approximately 3 acres and the proposed number of units is 96, the calculated density of 32 (+/-) units per acre greatly exceeds ODA guidelines of 2 units per acre, which should be considered an incompatible use.

Applicant Response:

The following is an excerpt from the Airport Master Plan:

SACP Sections J.25, J.26, and J.27 pertain to SLE. Goals include "land use around the Airport shall be required to provide an environment compatible with the airport and its operations and which will not be adversely affected by noise and safety problems." Water impoundments are not permitted within 10,000-feet of the runway ends, commercial land uses and other land uses that involve high concentrations of people are "prohibited within the clear zones of the runways at [SLE], to avoid danger to the public safety by potential aircraft accidents."

The term "clear zone" is synonymous with "runway protection zone" (RPZ). As the proposed development is outside the RPZ, the prohibition in the Salem Area Comprehensive Plan is not applicable. In addition, based on a combination of actions including adoption of the Salem Area Comprehensive Plan, the McNary Field Overlay Zone (with its limited boundaries), and the City's failure to restrict the residential land use opportunity on this site as part of previous land use decisions, the applicant has a reasonable expectation that this option is available.

Regarding the limitations and restrictions in the ODA Land Use Guidebook, Note L¹⁰ is a recommended limitation on residential densities. In fact, the entire ODA Guidebook is simply that, "guidance". If the FAA was intent on restricting residential uses, why have they not offered up strict land use rules instead of relying on guidance documents and questionable grant assurance language?

Paskell Letter:

Given the above, it is the position of the Airport that the proposed project is not a compatible land use near an airport and does not conform to state and federal guidance on land use around airports. As such, the airport recommends against issuing the Conditional Use Permit.

Applicant Response:

As a result of the information provided above, there is no evidence the Airport Manager's recommendation should be solely relied upon and use as the basis for denying the applicant's conditional use application.

In closing, we would like to remind the City that the FAA does not undertake to enact or enforce local land use controls, and leaves those issues to local government to decide what is best for each individual situation. By Federal Statute and case law, the FAA does not have a direct hand in zoning and regulating development around airports. The charge of the FAA is however to regulate navigable airspace and airports, not airport-neighbor uses.

PDG staff has been communicating with the FAA staff in the Seattle office to obtain clarity regarding some of these issues. We asked the following prudent and pointed questions to the FAA staff and have not received any response back.

1. Please provide information specifically related to the FAA's interests regarding land use in the Airport Approach Zone. We understand the issues related to noise and height restrictions. What other issues, if any exist related to the FAA's scope of responsibility?
2. How do the requirements of Grant Assurance #21 relate to a proposed multi-family development in the Airport Approach Zone, assuming the proposed development complies with the applicable noise issues and height restrictions?
3. A residential development in the Airport Approach Zone is identified in Table 6-1 of the ODA Land Use Guidebook as being "not clearly compatible or incompatible", and a specific study is recommended to make this determination. From the FAA perspective, what is an appropriate scope and evaluation criteria for this study?


During a phone call with the Seattle FAA staff on 2/2/2016 it was stated, by Benjamin Dahle, the FAA does not get involved with land use issues for property located outside the airport. They also indicated that it would be very unlikely that the FAA would impose civil penalties or require repayment of grant monies for allowing this particular multi-family residential development. We can only infer that the lack of willingness of the FAA to answer the questions noted above can only mean one thing; *while the FAA would like residential uses to be restricted in and around airport property, they do not have a legal right to require such land use restrictions.*

Furthermore, if residential development within the Approach Zone is a serious issue, the FAA and the Salem Airport would have taken specific actions to restrict uses within this area. This is supported by Chapter 6, Section 2.2 of the 2012 Salem Airport Master Plan. Section 2.2 states, "While these statutes do not establish criteria for land use guidelines for land near airports, they do grant local governments the authority to create zoning ordinances tailored to local

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conditions.” Primarily, Oregon Statutes have more to deal with establishing criteria for land uses within airport property. With all of the information submitted herein, the applicant believes it is clear the proposed development meets the approval criteria for a conditional use in the Salem Revised Code.

Sincerely,
PROJECT DELIVERY GROUP, LLC



Brian Vinson, PE



Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
2601 Meacham Boulevard
Fort Worth, TX 76137

Aeronautical Study No.
2012-ANM-2907-OE

Issued Date: 03/19/2013

Bo Rushing
Rushing Mission Street, LLC
3110 25th Street SE
Salem, OR 97302

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Building construct apartment buildings
Location:	Salem, OR
Latitude:	44-55-17.21N NAD 83
Longitude:	123-00-53.88W
Heights:	183 feet site elevation (SE)
	40 feet above ground level (AGL)
	223 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

- ☐ At least 10 days prior to start of construction (7460-2, Part I)
☒ Within 5 days after the construction reaches its greatest height (7460-2, Part II)

Based on this evaluation, marking and lighting are not necessary for aviation safety. However, if marking/lighting are accomplished on a voluntary basis, we recommend it be installed and maintained in accordance with FAA Advisory circular 70/7460-1 K Change 2.

This determination expires on 09/19/2014 unless:

- (a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.
- (b) extended, revised, or terminated by the issuing office.
- (c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates , heights, frequency(ies) and power . Any changes in coordinates , heights, and frequencies or use of greater power will void this determination. Any future construction or alteration , including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

If we can be of further assistance, please contact our office at (310) 725-6591. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2012-ANM-2907-OB.

Signature Control No: 176764559-185693689
Tamera Burch
Technician

(DNE)