

Angela Houck

From: Jennifer S. Marshall <jmarshall@sglaw.com>
Sent: Tuesday, May 22, 2018 1:59 PM
To: Pamela Cole
Cc: Alan M. Sorem; Margaret Gander-Vo; Mark Grenz P.E.; Brandie Dalton; Angela Houck
Subject: Appeal Memo - City of Salem Case No. UGA 17-06, 17-121850-LD (6719 Devon Avenue SE)
Attachments: Appeal Memo (5-22-18), 4816-5817-1494, 7.pdf
Follow Up Flag: Follow up
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Good afternoon, Pamela:

Please see the attached memo to be entered into the record on behalf of HSF Development, LLC for the above-referenced case.

Thank you!

Jenny Marshall

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1 **Applicant's Proposed Findings of Fact and Conclusions of Law**

2 **I. Nature of Decision and Relief Sought**

3 HSF Development, LLC ("***Applicant***") applied for an Urban Growth Area
4 Preliminary Declaration ("***UGA***") to determine the public facilities and
5 infrastructure required to develop 19.89 acres located at 6719 Devon Avenue SE and
6 designated as Marion County Assessor map and tax lot number 083W22C00300 (the
7 "***Subject Property***"). The Subject Property is designated Developing Residential
8 (DR) under the City of Salem Comprehensive Plan and is zoned Urban Transition –
9 10 Acres (UT-10) under the Marion County Zoning Code. Applicant has submitted
10 an application to annex the Subject Property into the City of Salem (the "***City***") with
11 a proposed zoning of either Residential Agriculture (RA) or Single Family
12 Residential (RS) upon annexation.

13 The City issued a written land use decision concerning the Applicant's request
14 on March 12, 2018, which the City identifies as Case No. UGA 17-06, 17-121850-
15 LD (collectively the "***Decision***"). Staff has summarized the Decision as an "Urban
16 Growth Preliminary Declaration request to determine the public facilities and
17 infrastructure to develop 19.89 acres" located at the Subject Property. The Decision
18 is subject to the following ten (10) conditions of approval:

19 **Condition No. 1:** Acquire and convey land for dedication of right-of-way to
20 equal a width of 60 feet in an alignment approved by the Public Works
21 Director as specified for the future Collector street in the Salem
22 Transportation System Plan from the existing terminus of Lone Oak Road SE
at Sahalee Drive SE to Rees Hill Road SE.

23 **Condition No. 2:** Construct Lone Oak Road SE with a minimum 34- foot
24 wide full Collector street improvement within the subject property and from
25 the north line of the subject property to Sahalee Drive SE.

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1 **Condition No. 3:** Construct Lone Oak Road SE with a minimum 34-foot-
2 wide linking street improvement from the south line of the subject property to
3 Rees Hill Road SE.

4 **Condition No. 4:** Pay the applicable reimbursement fee as established in the
5 Lone Oak Road Reimbursement District pursuant to Resolution 2018-08 to
6 contribute the development's proportional share of the costs of the full
7 Collector street improvement of Lone Oak Road SE from Muirfield Avenue
8 SE to Rees Hill Road SE (in the event the Reimbursement District is
9 terminated prior to final plat approval, no reimbursement fee shall be due).
10 The reimbursement fee shall be credited toward the performance guarantee
11 amount required in SRC 110.100(c) for Lone Oak Road SE construction.

12 **Condition 5:** Convey land for dedication along the entire frontage of Devon
13 Avenue SE to equal 30 feet from centerline.

14 **Condition 6:** Construct a half-street improvement to local street standards
15 along the entire frontage of Devon Avenue SE.

16 **Condition 7:** Construct 8-inch Salem Wastewater Management Master Plan
17 sewer lines necessary to serve the development. The nearest available sewer
18 main appears to be located at the terminus of Lone Oak Road SE at Sahalee
19 Drive SE.

20 **Condition 8:** As a condition of development within the S-3 water service area,
21 the applicant shall construct the following facilities as specified in the Water
22 System Master Plan and approved by the Public Works Director:

- 23 a. A 12-inch S-3 main in the portion of Lone Oak Road SE within the
24 subject property.
- 25 b. A 12-inch S-3 main connecting east/west through the property from
26 Lone Oak Road SE to Devon Avenue SE.
- c. A 12-inch S-3 main along the entire frontage of Devon Avenue SE.
- d. A 12-inch S-3 main in Lone Oak Road SE from the north line of the
subject property to the existing main at the Lone Oak/Sahalee
intersection and/or from the south line of the subject property to the
existing main in Rees Hill Road SE.

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1 **Condition 9:** As a condition of development within the S-4 water service area,
2 the applicant shall construct the following facilities as specified in the Water
3 System Master Plan and approved by the Public Works Director:

- 4 a. An S-4 domestic pump station with sufficient capacity to serve [the
5 entire] S-4 water service area between Lone Oak Road SE and Devon
6 Avenue SE.
- 7 b. An 8-inch S-4 main from the pump station to the S-4 water service area
8 within the subject property.
- 9 c. One or more 8-inch S-4 mains to serve each lot within the S-4 service
10 area.
- 11 d. An 8-inch S-4 main extended to the south line of the subject property.
- 12 e. One or more S-3 mains that provide adequate fire flow to the entire
13 Urban Growth Preliminary Declaration Case No. UGA17-06 S-4 area.

14 **Condition 10:** The applicant has two options for providing parks facilities to
15 serve the subject property:

- 16 a. Convey or acquire 10 acres of property for dedication of neighborhood
17 park facility NP-28; or
- 18 b. Pay a temporary access fee of \$200,000 pursuant to SRC 200.080(a).

19 Applicant requests the City affirm the Decision and modify conditions of
20 approval deleting Condition No. 10 for the reasons provided in Sections III-V below.

21 **II. Standard of Review**

22 All appeals in the City are heard de novo. *See* UDC 300.1040(a) "Appeals
23 shall be de novo. In a de novo review, all issues of law and fact are heard anew, and
24 no issue of law or fact decided by the lower level Review Authority is binding on
25 the parties in the hearing. New parties may participate, and any party may present
26 new evidence and legal argument by written or oral testimony."

27 **III. Single Family Residential is "needed housing" under ORS 197.307(4) as 28 amended by SB 1051 and the Salem Housing Needs Analysis adopted by 29 the City of Salem and, therefore, conditions of approval may not impose 30 unreasonable cost or delay.**

31 **A. ORS 197.307(4)(SB 1051)**

32 **1. ORS 197.307 (4) Applies to Single Family Residential.**

Oregon Laws 2017, Chapter 745, Sections 4 and 5 amended ORS 197.303 and 197.307 in relevant part:

SECTION 4. ORS 197.303 is amended to read: 197.303. (1) As used in ORS 197.307, “needed housing” means all housing [types] **on land zoned for residential use or mixed residential and commercial use that is** determined to meet the need shown for housing within an urban growth boundary at [particular] price ranges and rent levels[, including] that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a. **“Needed housing” includes [at least] the following housing types:**

- (a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
- (b) Government assisted housing;
- (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
- (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
- (e) Housing for farmworkers.

SECTION 5. ORS 197.307 is amended to read: 197.307. (1) The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern.

(2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable, decent, safe and sanitary housing. ***

(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing [on buildable land described in subsection (3) of this section]. The standards, conditions and procedures:

(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

1 The cumulative impact of SB 1051 is that the restriction against application
2 of ambiguous “standards, conditions and procedures” applies to the development of
3 all housing, and “needed housing” expressly includes all housing on land zoned for
4 mixed use and commercial use that is determined to meet the need shown for housing
5 within the UGB. On February 8, 2016, the City adopted Resolution No. 2016-05,
6 which accepted the Salem Housing Needs Analysis (HNA) and directed staff to
7 implement the Salem Housing Needs Analysis Work Plan (Work Plan).¹ HNA’s
8 findings that describe the types of necessary housing as prescribed by ORS 197.303
9 expressly include single family detached housing noting this type of housing must
10 be considered under ORS 197.303 as needed housing. HNA, B-1-2. Additionally,
11 the Subject Property is identified within the HNA's maps of the buildable lands
12 inventories. See HNA, A-7 and A-8. Therefore, the City has demonstrated a need
13 for single family residential within the UGB, and the Decision is subject to the
14 restrictions and protections of ORS 197.307(4).

15 **2. ORS 197.307 (4) Prohibits the City’s Proposed**
16 **Condition of Approval No. 10.**

17 ORS 197.307(4)(b) prohibits the City's standards, conditions, and procedures
18 from having “the effect, either in themselves or cumulatively, of discouraging
19 needed housing through unreasonable cost or delay.” Condition No. 10 discourages
20 needed housing as an unreasonable cost, will create unreasonable delay, and is the
21 product of an ambiguous standard. For each of these three reasons, it is prohibited
22 by ORS 197.307(4).

23 UDC 200.075, Standards for parks sites, provides:

24 (a) "The applicant shall reserve for dedication prior to development

25 ¹ A copy of the final Housing Needs Analysis is available for download at:

26 <http://temp.cityofsalem.net/Departments/CommunityDevelopment/Planning/salem-eoahna/Documents/Final%20HNA.pdf>. Applicant requests the City incorporate Resolution No. 2016-05 and the

HNA in its entirety into the record by this reference.

Page 5 – Applicant’s Proposed Findings of Fact and Conclusions of Law (UGA 17-06, HSF Development, LLC)

1 approval that property within the development site that is necessary for
2 an adequate neighborhood park, access to such park, and recreation
3 routes, or similar uninterrupted linkages, based upon the Salem
Comprehensive Park System Master Plan.

4 (b) For purposes of this section, an adequate neighborhood park site is one
5 that meets the level of service (LOS) of 2.25 acres per 1,000 population,
6 utilizing an average service radius of one-half mile."

7 In response to this standard, the City adopted the following finding to justify
8 Condition No. 10:

9 "SRC 200.075 requires that the applicant shall reserve for dedication prior to
10 development approval that property within the development site that is
11 necessary for an adequate neighborhood park, access to such park, and
12 recreation routes, or similar uninterrupted linkages, based upon the Salem
Comprehensive Parks System Master Plan.

13 Limited parks facilities are available to serve the proposed development. The
14 Comprehensive Parks System Master Plan shows that a future Neighborhood
15 Park (NP 28) and Community Park (CP 6) are planned on or near the subject
16 property. The applicant shall reserve property for dedication of neighborhood
park facility NP-28 based on sizing criteria established in SRC 200.075(b).

17 The park sizing methodology is as follows:

- 18 • The park size shall be 2.25 acres per 1,000 population (SRC
200.075(b))
- 19 • The park service area is 300 acres based on the area of residentially
20 zoned property that can be served based on the proposed park spacing
in the Master Plan.
- 21 • Single-family residential development density is 6.3 dwelling units per
22 net acre (Table 5 of draft Salem Housing Needs Analysis dated
December 2014).
- 23 • According to the U.S. Census, the average household size in Salem in
24 2010 was 2.55 people (p16 of draft Salem Housing Needs Analysis
dated December 2014).
- 25 • The park size is 10 acres based on 2.55 people per dwelling multiplied
26 by 6.3 dwellings per acre multiplied by 300 acres of park service area
multiplied by 2.25 acres of park size per 1,000 population.

1 In lieu of acquiring or conveying park land pursuant to SRC 200.075, the applicant
2 has the option of paying a temporary access fee pursuant to SRC 200.080(a).^[2] The
3 temporary access fee is a reasonable alternative to conveyance of park land from
4 within the subject property because the topography and location of the subject
5 property is not desirable for a neighborhood park. The temporary access fee amount
6 is \$200,000 based on the following analysis:

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8 ² **Sec. 200.080. - Temporary facilities.**

9 **(a) Temporary facilities access agreement.**

10 (1) Where a development precedes construction of permanent facilities that are specified to ultimately
11 serve development, the Urban Growth Preliminary Declaration may allow an alternative to use temporary
12 facilities under conditions specified in a temporary facilities access agreement.

13 (2) The terms and conditions of the temporary facilities access agreement shall specify the temporary
14 facilities being constructed or used, the amount of the temporary facility access fee, the provisions for
15 transitioning the use of temporary facilities to permanent facilities once the permanent facilities are constructed,
16 and any other provisions pertinent to the use of temporary facilities.

17 (3) The temporary facility access fee shall be calculated by the Director and shall be a reasonable
18 contribution toward the construction of permanent facilities that will ultimately serve the development. The
19 temporary facility access fee shall be held by the City in a dedicated fund and used to pay the costs of
20 construction of the permanent facilities. The applicant shall not be entitled to receive, or have any claim to, any
21 temporary facility access fees collected by the City.

22 (4) The temporary facility access fee shall be due and payable by the person or persons seeking a
23 building permit at the time of the granting of a building permit, and payment of the temporary facility access
24 fee, in full, shall be a condition precedent for obtaining building permits within the property.

25 **(b) Temporary facilities expansion permit.**

26 (1) Any person who has been granted the use of a temporary sewer facility under SRC 200.060, a
temporary storm drainage facility under SRC 200.065, or a temporary water facility under SRC 200.070 may
apply for a temporary facilities expansion permit under this section, which may allow modifications to, or
expansion of, the temporary facility in order to better serve the development for which the Urban Growth
Preliminary Declaration was issued. The applicant for a temporary facilities expansion permit shall make
application therefor on forms promulgated by the Director. Fees for temporary facilities expansion permits shall
be established by resolution of the Council.

(2) The Director may issue a temporary facilities expansion permit if the Director finds that expansion
of the facility is not inconsistent with this chapter, the applicant's Urban Growth Preliminary Declaration, or
with any master plan, public facilities plan, or other similar plan that is applicable to the development for which
the Urban Growth Preliminary Declaration was issued. Any expansion of a temporary facility shall be at the
applicant's sole cost and expense, and at the applicant's sole risk. The Director may impose such conditions on a
temporary facilities expansion permit as the Director deems are in the public interest.

(c) **Permit revocation.** The Director may revoke a temporary facilities expansion permit upon a finding
that the permittee is not maintaining the temporary facility in a manner that is consistent with the permit, the
provisions of this chapter, or any other applicable federal, state or local law. Appeals of revocations of
Temporary Facilities Access permits are contested cases under SRC chapter 20J. Unless a stay is granted in the
case of an appeal, when a temporary facilities permit is revoked, use of the temporary facility shall immediately
cease until such time as the violation has been cured, and a new temporary facilities expansion permit has been
issued.

(Prior Code, § 200.080; Ord. No. 31-13)

- Acquisition and development of a 10-acre park is estimated to cost a total of \$3,000,000 according to Table E-1 of the Master Plan.
- The service area of NP-28 is estimated to be 300 acres, so the proportional cost for all property within the service area is \$10,000 per acre.
- For a 20-acre site at \$10,000 per acre, the proportional contribution to NP-28 is \$200,000.
- The temporary access fee will contribute to the permanent park facility by providing revenue for acquiring and developing the property being proposed for NP-28.
- The applicant shall reserve for dedication prior to development approval that property within the development site that is necessary for an adequate neighborhood park, as defined in SRC 200.075(b), as conditioned below:

Condition 10: The applicant has two options for providing parks facilities to serve the subject property:

- a. Convey or acquire 10 acres of property for dedication of neighborhood park facility NP-28; or
- b. Pay a temporary access fee of \$200,000 pursuant to SRC 200.080(a)."

(i) **Condition No. 10 is an unreasonable cost because it fails to consider the Applicant is already obligated to \$4,404.24 per residence Parks SDC fees for an anticipated total of \$378,764.64, which are already eligible for the acquisition and development of the proposed neighborhood park.**

\$378,764.64 is greater than \$200,000.00. Under the current SDC Fee schedule, which will likely increase in the near future, the Applicant must pay \$4,404.24 in parks SDC fees. The proposed land division is for 86 lots. Thus, the expected cost total Parks SDC Fees to be paid as result of the proposed land division is \$378,764.64. This amount is already greater than the amount that the City's staff estimate is proportionate to the Applicant's expected impact, and one hundred (100) percent of the Parks SDC Fees (\$378,764.64) are eligible for expenditure on the proposed park acquisition and development. See Parks Master Plan, Map 3:

1 Proposed Park System, NP 28, CP 6 (identifying the proposed park site), Table E-1
2 (identifying Park Improvement Costs – Proposed Facilities); ORS 223.307(4)
3 (requiring capital improvement expenditures of SDC's to be funded only on facilities
4 identified in the plan and list adopted pursuant to ORS 223.309); and ORS
5 223.309(1) (master plans that include a list of capital improvements to be funded
6 satisfy ORS 223.309(1)).

7 The City's calculation of an appropriate temporary access fee under SRC
8 200.075 completely ignores the fact that City's SDC Parks Methodology has already
9 calculated the Applicant's proportionate obligation to pay for new parks acquisition
10 and development caused by new residential development. The City's adopted Parks
11 System Development Charge Methodology, dated June 2, 1999 ("**Methodology**
12 **Report**") calculated the estimated cost of new parks acquisition and development per
13 capita for new dwelling occupants in determining the SDC rate for a new dwelling.
14 It then provided for an indexing of those fees to account for inflation, which is why
15 the original \$2,275 fee is now \$4,404.24. Methodology Report, 12. The City's Parks
16 SDC fee is entirely dedicated to paying for *new parks caused by new residential*
17 *development*. Methodology Report, 7 (explaining why there is no reimbursement
18 fee portion). City Council Resolution 99-199, which adopted the Methodology
19 Report, is attached hereto, together with the City's staff report, and a report
20 memorializing the City Council Questions SDC Public Hearing. The legislative
21 history demonstrates the intent that the Parks SDC would fund the acquisition and
22 development of new parks caused by new residential development. There is no basis
23 for a proportionate share fee based on the exact same impacts above and beyond the
24 SDC fee. Applicant is obligated under the Decision and the SDC ordinance to pay
25 a total of \$578,764.64 (SDC + TFAA Fee) for Applicant's impact on new parks³,
26

³ This amount assumes staff's analysis of the Applicant's impact on the proposed park is \$200,000.00, which Applicant challenges below and does not waive herein.

1 which is greater than the SDC methodology and Code requires as well as above and
2 beyond staff's impact analysis. In light of these already assessed fees, the total cost
3 is unreasonable.

4 (ii) **Condition No. 10 is an unreasonable cost because it includes the cost of**
5 **development of a park beyond the acquisition costs of real estate as**
6 **contemplated under SRC 200.075, at twice the size of a typical**
7 **neighborhood park, and based on a service area that is too small.**

8 Staff's calculation in the above finding explains how staff arrived at the
9 \$200,000.00 TFAA Fee. Staff's analysis of Applicant's impact is based on several
10 erroneous assumptions and interpretations under SRC 200.075, SRC 200.080 and
11 the Parks Master Plan. These findings grossly inflate the Applicant's estimated
12 contribution. Condition No. 10 is based on these erroneous assumptions and
13 interpretations, and therefore, it is unreasonable and prohibited under ORS
14 197.307(4).

15 Condition No. 10 requires the Applicant to contribute to both the cost of
16 acquiring real estate for parks land and the development thereof. SRC 200.075(a)
17 does not create a standard for the Applicant to *develop* or contribute to the
18 maintenance of existing parks. SRC 200.075(a) states that the Applicant "shall
19 reserve for dedication prior to development approval that property within the
20 development site that is necessary for" applicable parks. If SRC 200.075(a) is
21 applicable and enforceable standard under ORS 197.307(4), such applicability is
22 limited to the acquisition and dedication of real property – not the post-acquisition
23 development. Table E-1 of the Parks Master Plan estimates the acquisition and
24 development cost of new neighborhood parks at \$300,000.00 per acre. Under the
25 City's adopted SDC Methodology Report, land acquisition costs are assumed to
26 constitute 42.41 percent of the capital expenses. Pg. 6. Thus, the City's estimated
cost per acre warranted by SRC 200.075(a) should be limited to \$127,230 per acre.

Page 10 – Applicant's Proposed Findings of Fact and Conclusions of Law (UGA 17-06, HSF Development, LLC)

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1 Most neighborhood parks under Table E-1 are projected to be 5 acres in size.
2 The City made no findings regarding why it required a 10-acre park instead of the
3 typical 5-acre neighborhood park. Thus, the total real property cost contemplated
4 by the SRC 200.075(a) for the development of new parks associated with the Subject
5 Property should not exceed \$636,150, i.e., \$127,230 x 5 acres.

6 The City estimated the service area to equal only three-hundred (300) acres.
7 The area of a half (.5) mile circle is approximately point seven eight five (.785)
8 square miles or five hundred and two point four (502.4) acres. There is no park
9 within a half (.5) mile radius of the subject property. Therefore, the reasonable
10 estimated service area of new park is over five hundred (500) acres – not three
11 hundred (300) acres. The City provides no analysis and made no findings regarding
12 this disparity.

13 The City calculated that the Applicant's property constitutes approximately
14 six and two thirds (6.66) percent of the neighborhood park service area based on the
15 three hundred (300)-acre service area; however, the Applicant's twenty (20) acres is
16 actually only four (4) percent of the newly created half (.5)-mile radius service area.
17 Thus, if SRC 200.075 applies, Applicant's proportionate share should be only four
18 (4) percent of the cost of the real property acquisition and dedication, which equals
19 twenty-five thousand four hundred forty-six and no/100 Dollars (\$25,446.00). The
20 City's Condition No. 10 requires a payment of two-hundred thousand and no/100
21 dollars (\$200,000), which is approximately an eight hundred (800) percent increase,
22 and therefore, the City's Condition No. 10 is an unreasonable cost in violation of
23 ORS 197.307(4).

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1 (iii) **Condition No. 10 is an unreasonable cost because it fails to consider the**
2 **disparate treatment between large developers that can dedicate real**
3 **property and receive a full reimbursement and small developers that**
4 **cannot dedicate real property.**

5 SRC Chapter 41 governs SDC Charges and reimbursements. SRC 41.300(b)
6 provides that the "fair market value of real property within the development that is
7 reserved for dedication to the City for public park use" is eligible for SDC
8 reimbursements. Thus, if under SRC 200.075(a), an applicant dedicates a property
9 for a public park, in addition to satisfying that criterion, the applicant is entitled to a
10 reimbursement for the full fair market value of such land. The Applicant's proposal
11 is too small to dedicate the requested 10 acres and still justify the cost of
12 development. Therefore, City's application of the SRC and Condition No. 10 is
unreasonable and violates ORS 197.307(4).

13 (iv) **Condition No. 10 will lead to an unreasonable delay because it will cause**
14 **the Applicant to wait until the City acquires the adjoining 10-acre tract**
15 **of land.**

16 The City currently has plans to acquire an approximately ten (10)-acre tract
17 of real property located immediately adjacent to the Subject Property. Once the City
18 acquires the real property, the City will have no factual basis to require a condition
19 of approval to comply with SRC 200.075. Therefore, under the Decision the
20 Applicant will have no choice but to delay the needed housing project or pay the
21 unreasonable fee. Such a condition of approval is clearly in violation of ORS
22 197.307(4).

23 (v) **Condition No. 10 is the product of an ambiguous standard.**

24 The City's finding regarding Condition No. 10 and their proportionate share
25 calculations clearly demonstrate that Condition No. 10 is the product of ambiguous
26 standards. SRC 200.075 does not provide for a proportionate share fee. The City
does not cite SRC 200.080 directly; however, it is apparent the City is implementing

1 its temporary facilities access agreement standards under SRC 200.080(3). It
2 provides:

3 "The temporary facility access fee shall be calculated by the Director
4 and shall be a reasonable contribution toward the construction of permanent
5 facilities that will ultimately serve the development. The temporary facility
6 access fee shall be held by the City in a dedicated fund and used to pay the
7 costs of construction of the permanent facilities. The applicant shall not be
8 entitled to receive, or have any claim to, any temporary facility access fees
9 collected by the City."

10 Applicant asserts that the conditions precedent under SRC 200.080(a)(1) are
11 not satisfied, as there is no basis under the UGA to require construction of park
12 facilities prior to development. However, assuming arguendo that SRC 200.080 can
13 apply to parks facilities, it clearly requires the Director's discretion to calculate the
14 estimated construction costs and then calculate the contribution. As demonstrated
15 in Section III, Subsection (ii), the City's calculations are based on interpretations of
16 the Parks Master Plan and SRC 200.075. For example, the Director makes
17 assumptions and misinterpretations regarding the scope of the Applicant's burden to
18 pay for the construction of the public park, the applicable level of service, the size
19 of the service area, and most obviously, the cost of the park acquisition and
20 development. These calculations are based on a multitude of interpretations.
21 Reasonably people can and will differ on when, if, and how much of a TFAA Fee is
22 required. The City has not always charged this fee for projects outside of the service
23 area, and this type of subjective and costly application of the development standards
24 is expressly prohibited by ORS 197.307(4).

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1 **IV. Under Oregon Law, SDCs are designed to encompass the totality of the**
2 **charges necessary to account for the impact of the proposed development,**
3 **therefore, in imposition of an additional fee results in an unlawful double**
4 **charge for the Applicant.**

5 In Oregon the municipality has the power to enact laws within the city
6 boundaries to the degree that such laws are purely local in nature. *Coleman v. City*
7 *of La Grande*, 73 Or 521, 525-526, 144 P 468, 470 (1914). However, "land use
8 regulation is addressed primarily to substantive, social, economic, or other
9 regulatory objectives of state" and therefore state law prevails over contrary policies,
10 rules, and regulations adopted by local municipalities. *Seto v. Tri-County*
11 *Metropolitan Transp. Dist. Of Oregon*, 311 Or. 457, 814 P.2d 1060 (1991) citing
12 Const. Art. 6 § 10; Art. 11, § 2. In this context, the City's Code is enforceable only
13 to the extent that it conforms with state law. Under state law, SDCs, and the statutory
14 framework for imposing them, were designed "to provide equitable funding for
15 orderly growth and development in Oregon's communities and to establish that the
16 charges may be used only for capital improvements." ORS 223.297. The statutory
17 definition of capital improvement expressly includes facilities and assets used for
18 parks and recreation and expressly excludes the "costs of the operation or routine
19 maintenance of capital improvements". ORS 223.299(1)(a)(E);(b).

20 As outlined above, the City has adopted a policy in an area expressly
21 preempted by State law which runs counter to the policies expressed by the statutory
22 scheme. The State's policy is to implement SDCs to ensure that developers are
23 treated equally and that cities are able to adequately fund the capital improvements
24 necessary to address the need for increased infrastructure created by new
25 development. The City specifically identified the intended use of the two-hundred
26 thousand-dollar (\$200,000) TFAA for the acquisition of NP-28, a park designated
within the Parks Master Plan for the area surrounding the Subject Property. *See Parks*

1 Master Plan, Map 3: Proposed Park System, NP 28, CP 6. As a designated park under
2 the Parks Master Plan which is eligible for reimbursement under the SDC system.

3 The addition of Condition 10 on top of the SDC fees creates a system in which
4 individual developers are treated differently based on the their proximity to City
5 owned land as well as allocating a financial contribution above and beyond what the
6 statute contemplates for the imposition of infrastructure development charges. As
7 the state has preempted the City's ability to make this specific policy choice, the City
8 is acting beyond the scope of its authority in applying Condition 10 to the Subject
9 Property. As such, Condition 10 should be removed from the Decision in order to
10 conform with state law.

11 **V. The City has the burden on appeal to show that the proposed**
12 **development will have an impact above and beyond the infrastructure**
13 **contemplated under the SDC and is Constitutionally required to provide**
14 **a clear explanation of why that impact necessitates additional**
15 **infrastructure expenditures.**

16 Applicant requests that City remove of Condition No. 10 because it is an
17 unconstitutional exaction. Specifically, Applicant requests the City remove
18 Condition No. 10 for failure to have the essential nexus to a legitimate state interest
19 and because the Applicant's impact as estimated by City staff on the affected parks
20 system is disproportionate to the cost of complying with Condition No. 10.

21 Applicant argues that Condition No. 10 violates the Takings Clause of the
22 Fifth Amendment of the United States Constitution. Specifically, Applicant
23 contends the following: the real property dedication or the monetary contributions
24 required by Condition No. 10 are disproportionate to the expected impacts and
25 would not comply with *Nollan* and/or *Dolan v. City of Tigard*, 114 S Ct 2309, 2319-
26 20 (1994), as required by *Koontz v. St. Johns Water Management District*, 133 S Ct
2586 (2013).

Page 15 – Applicant's Proposed Findings of Fact and Conclusions of Law (UGA 17-06, HSF Development, LLC)

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1 Condition No. 10 requires Applicant to pay for the dedication of an off-site
2 public improvement, or fee-in-lieu, that is for the benefit of not just the Subject
3 Property, but also for the community at large. Thus, *Dolan/Koontz* apply to
4 conditions placed on the development.

5 *i. Lack of Individualized Determination*

6 Applicant hereby satisfies its burden to raise the issue of possible
7 unconstitutional conditions before the local administrative body. Applicant's
8 objections create an affirmative obligation on behalf of the City to make an
9 individualized determination that the required exaction "is related both in nature and
10 extent to the impact of the proposed development." *Dolan* 114 S Ct at 2319-20. The
11 Decision contains no individualized determination that considers Applicant's SDC
12 fee contribution in addition to the TFAA Fee. Therefore, the City has failed to satisfy
13 its burden.

14 *ii. Monetary Contributions (Koontz/Dolan)*

15
16 In *Koontz*, the Supreme Court did not create any new balancing tests or require
17 any new analyses specific to the imposition of monetary contributions such as those
18 required for street improvements here. Instead, the Court merely held "that the
19 government's demand for property from a land-use permit applicant must satisfy the
20 requirements of *Nollan* and *Dolan*... even when its demand is for money." *Koontz*,
21 133 S Ct at 2603. As a result, if a requirement for a monetary contribution would
22 satisfy the "essential nexus" and "rough proportionality" requirements of those
23 cases, such a requirement would not violate the Takings Clause of Fifth Amendment
24 of the United States Constitution. However, if such requirements are not met, the
25 requirement for a monetary contribution is unconstitutional.

26 ///

1 iii. *Rough Proportionality*

2 In *Dolan*, the Court held that requirements imposed on a development must
3 be “roughly proportional” to the impacts of that development. *Dolan*, 114 S Ct at
4 391. That standard, the Court wrote, is an “intermediate standard” between “very
5 generalized statements as to the necessary connection...” on one hand, and, on the
6 other, a requirement that the government “demonstrate that its exaction is directly
7 proportional to the specifically created need.” *Id.* at 389-90.

8 “Rough proportionality” lies somewhere between those extremes of “too lax”
9 and a level of “exacting scrutiny” that the United States Constitution does not
10 require. *Id.* As the Court explained, “[n]o precise mathematical calculation is
11 required, but the city must make some sort of individualized determination that the
12 required [exaction] is related both in nature and extent to the impact of the proposed
13 development.” *Id.* at 391.

14 *Dolan* thus requires that Respondent (1) enumerate the potential impacts of
15 the proposed development here, and (2) demonstrate that the potential requirements
16 would be related to those impacts “in nature and extent.”

17 iv. *Dolan/Koontz Analysis - Impact Determination*

18 Applicant acknowledges the development proposal is likely to create *some*
19 impacts on the surrounding parks facilities. Applicant calculated above that the
20 Applicant’s proportionate share contribution represented 4 percent of the fair market
21 value of the land cost, i.e., \$25,446.00. However, Applicant’s proportionate share
22 obligation cannot be calculated in a vacuum and must take into account Applicant’s
23 Parks SDC obligations of \$4,404.24 per lot or \$378,764.64 expected total
24 contribution. Because the facility being impacted by the Applicant’s use is eligible
25 for SDC monies, the Applicant’s contribution must be taken into account under the
26 *Dolan / Koontz* analysis. In this case, the Applicant will pay substantially more in

Page 17 – Applicant’s Proposed Findings of Fact and Conclusions of Law (UGA 17-06, HSF Development, LLC)

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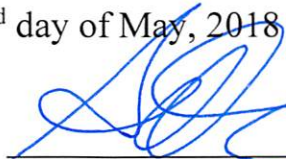
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1 SDC's that will be used for the acquisition and construction of the nearby park than
2 Applicant's impact, whether using the City's proportionate share calculation or
3 Applicants. Therefore, the TFAA Fee is disproportionate and unconstitutional.
4 Condition No. 10 must be stricken from the Decision.

5 **VI. CONCLUSION**

6
7 Applicant respectfully requests the City affirm the Decision subject to the
8 removal of Condition No. 10.

9 Respectfully submitted this 22nd day of May, 2018 at Salem, Oregon.

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11 Alan M. Sorem, OSB No. 065140
12 *Of Attorney for Applicant*
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