

MEMO

To: Olivia Glantz

From: Alan Sorem

Date: July 22, 2019

Re: Wren Heights Subdivision: City of Salem Case No. SUB-ADJ 19-02, 18-125034-LD & 18-125035



This firm represents the Thomas Kay Co., an Oregon corporation ("**Applicant**"), with respect to the above-referenced consolidated limited land use applications (the "**Applications**") concerning property located in the 500 to 600 blocks of Salem Heights Avenue (Marion County Assessor Map and Tax Lot Numbers: 083W04AA10400, 10600, 10601, 10700, 10800) (the "**Subject Property**"). On June 6, 2019, the Planning Administrator's designee (the "**Administrator**") for the City of Salem (the "**City**") issued a Notice of Decision (the "**Decision**") approving the Applications. Two appeals were filed, one by Nathan Rietmann and one by Ron Eachus. The City Council called up the Applications for a de novo hearing to take place on July 22, 2019. Applicant offers the following evidence and argument to supplement the evidence, argument, and findings already submitted into the record. This response memorandum will address issues raised in the appeals to the Applications and comments submitted in opposition to the Applications. Mr. Reitman, Mr. Eachus, and the other individuals submitting comments in opposition to the Applications are referred to herein collectively as the "**Opponents**."

Applicant's memo is divided into two sections. The first section describes the applicable state and federal laws that apply in addition to the City's Unified Development Code ("**UDC**") that circumscribe the City Council's role in reviewing the appeal of the Decision. The second section summarizes and responds to the specific issues raised by Opponents.

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Section I

Applicable State and Federal Laws

I. The Applications are limited land use decisions and are subject only to the standards and criteria authorized in ORS 197.195.

Each of the pending Applications meet the definition of a “limited land use decision” in the Oregon Revised Statutes (ORS) and should be treated as such in the City’s review of the Applications.

ORS 197.015(12) defines a limited land use decision as:

“a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

1. The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (Application for approval of subdivision or partition) (1).
2. The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

Tentative subdivision applications and Class 1 adjustments are both designated by the City’s UDC as Type II procedures. SRC 205.010(b) and SRC 250.005(b). Type II applications are limited land use decisions. SRC 300.100(a). Therefore, both the local code and the applicable state definitions require the City to apply the limited review of ORS 197.195.

ORS 197.195(1) states “[a] limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations.” The Oregon Land Use Board of Appeals (LUBA) prohibits general incorporation of a city’s planning documents as a standard or mandatory approval criterion in a limited land use decision.

“[I]n our view ORS 197.195(1) contemplates more than a broad injunction to comply with unspecified portions of the comprehensive plan. In order to ‘incorporate’ a comprehensive plan standard into a local government’s land use regulations within the meaning of ORS 197.195(1), the local government must at least amend its land use regulations to make clear what specific provisions of the comprehensive plan apply to a limited land use decision as approval criteria.” *Paterson v. City of Bend*, 49 Or LUBA 160, *aff’d*, in 11 part, *rev’d and rem ’don other grounds*, 201 Or App 344, 118 P3d 842 (2005).

LUBA expanded on this general prohibition in the recent decision, *Oster v. City of Silverton*, LUBA ____ Or LUBA ____ (LUBA No. 2018-103, Opinion May 7, 2019). In *Oster*, the City of Silverton denied a tentative plat subdivision application because the application failed to conform to a transportation development standard contained in the City’s transportation system plan. The City of Silverton’s development code incorporated the city’s transportation system plan as general development standard

and approval criterion. *Oster*, 7-8 citing SDC 3.4.010(A). LUBA reviewed both the original ordinance adopting the city's plan and the subsequent ordinance incorporating the plan as a general development standard. Ultimately, LUBA rejected the city's argument that the incorporation of a transportation system plan, even one with potentially clear standards within, satisfied ORS 197.195(1).

"The city attempts to distinguish *Paterson* by arguing that, unlike general comprehensive plan policies, 'the City's TSP provides specific action items to be implemented under Policies.' City's Response Brief 21. The city contends that ORS 197.195(1) does not require the city to codify all approval criteria and standards for limited land use decisions. Instead, the city emphasizes, ORS 197.195(1) requires the city to "incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations." (Emphasis added.) However, the city's arguments are directed at the wrong question. The question under ORS 197.195(1) and *Paterson* is not whether the LOS D standard is clear in the TSP or "codified" in the SDC; instead, the question is whether the SDC provisions that the city concluded incorporated the LOS D standard make clear what specific policies or standards in the TSP apply to a limited land use decision as approval criteria.

We conclude that the sections of the SDC that the city relied upon to deny the application, SDC 4.3.140(A)(1), (B)(7), and SDC 3.4.010(A), fall far short of incorporating the LOS D traffic performance standard in TSP, Chapter 2, Goal 4, Policy (f), under the "incorporation" standard in ORS 197.195(1), as interpreted in *Paterson*. Those provisions do not make clear what specific policies, action items, or performance standards contained in the TSP apply as approval criteria for a limited land use decision. For example, SDC 4.3.140(A)(1) and (B)(7) do not refer to the TSP at all. Similarly, SDC 3.4.010(A) generally "incorporates by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." Incorporation by reference of the entirety of each of the city's public facilities plans falls far short of satisfying the incorporation standard in ORS 197.195(1). We agree with petitioner that by applying the LOS D standard, the city violated ORS 197.195(1)." *Oster*, 11-12.

Under *Oster*, the City is prohibited from denying an application based on the failure to conform with a plan document, even if such a plan document is expressly referenced in the approval criterion as an applicable standard. The City may only apply as a basis to deny an application a standard that is either expressly codified in the UDC or the incorporation to the applicable standard within such plan documents is plainly stated in the approval criterion. SRC 205.010(d)(1) and (4) violate the limitations of ORS 195.010(1). As described in the Decision, the City has reviewed the tentative plan for conformance with both the Transportation System Plan and the Water, Sewer, and Storm Drain System Master Plans. While Applicant requests the Decision to be affirmed because the evidence in the record satisfies these standards as described in the Decision and below, Applicant argues in the alternative that the City

Council does not have discretion to deny the Applications or add additional conditions of approval based on nonconformance with these plans.

II. The Applications are for “needed housing.” Therefore, the City may only apply standards and criteria that are clear and objective, and the City is prohibited from applying standards and criteria in a manner that cumulatively or individually cause unreasonable cost or delay.

The Applications are for the development of needed housing. ORS 197.303(a)(needed housing means all housing on lands zoned for residential). Accordingly, the City is prohibited from denying the Applications or requiring further conditions of approval based on ambiguous standards or criteria. ORS 197.307(4) states:

“(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.**

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.**

Land use regulations are ambiguous or unclear if they are capable of one or more reasonable interpretations. *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000). This definition of ambiguity or unclear standards and criteria applies to the prohibition against needed housing. If a development standard can be interpreted in a manner that reasonably requires either a denial of an application or an approval of an application, the significant discretion is prohibited by the needed housing law. The City may not use such discretion to deny the application for needed housing, and if it does so, LUBA shall reverse the decision and award attorney fees to the applicant. *Group B LLC v. City of Corvallis*, 72 Or LUBA 74 (2015), *aff'd* 275 Or App 577, 366 P3d 847 (2015), *rev den* 359 Or 667 (2016). Standards that impose “subjective, value-laden analyses that are designed to balance or mitigate impacts” are inherently ambiguous and are prohibited by ORS 197.307(4) as a basis of denial or conditions of approval. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998). Even seemingly objective standards may be ambiguous and prohibited by ORS 197.307(4) if it is unclear how an applicant can satisfy the criteria. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 402 (2002) (ordinance provision that requires that new dwellings must be within four or five minutes of emergency services is unclear and subjective where it is not clear how the response time is measured, i.e., as the crow flies or by surface streets).

LUBA has held that certain standards are so inherently ambiguous as to be prohibited as a matter of law from needed housing matters. For example, development code requiring the applicant to demonstrate something is “safe” without defining such a standard in an objective manner is prohibited. *Rudell v. City of Bandon*, 62 Or LUBA 279, 288-89 (LUBA No. 2010-037, November 29, 2010) (a code standard requiring that the property be “safe to build” is not clear and objective). Similarly, criteria requiring an applicant to “minimize” impacts or conflicts is prohibited as a development standard for needed housing. *Home Builders Association*, 41 Or LUBA at 399 (code language requiring developments to “minimize vehicular/pedestrian conflicts” conflicts violated ORS 197.307).

III. The City Council must either approve the Applications or afford Applicant all procedural rights required under ORS 197.522(2) and (3).

The Applications are for needed housing and the Administrator has concluded that Applicant has satisfied the mandatory approval criteria in the Decision. Therefore, the City Council cannot deny the Applications without affording Applicant a prior opportunity to modify the Applications or propose an alternative condition of approval. Such an opportunity to cure any deficiency in the Applications must be preceded by a written determination identifying what, if any, mandatory approval criteria have not been satisfied by the evidence in the record and an explanation identifying how Applicant may cure such a deficiency. Failure to do so will prejudice Applicant’s substantial rights by causing unnecessary delay and cost.

IV. The City cannot deny the Applications based on Applicant’s unwillingness to accept conditions of approval that lack an adequate nexus to the applicable criterion or are roughly disproportionate, nor can the City condition approval of the Applications based on such unconstitutional conditions.

Applicant accepts the conditions of the approval in the Decision. However, if the City were to either require additional conditions of approval or deny the Applications based on Applicant’s objection to any additional condition of approval requested by Opponents, Applicant reserves the right to challenge the potential additional condition of approval on constitutional grounds. For example, any proposed conditions requiring Applicant to bear the entire cost of additional public facilities are subject to judicial review for unconstitutional takings under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 120 L Ed 2d 304 (1994) and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013). The City may not condition approval based on an unconstitutional exaction and may not deny an application in lieu of such an approval.

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Section II

Response to Opponents' Comments

A. SRC 205.010(d)(1)(A)

1. Lot Depth Standard Adjustment

SRC 205.010(d)(1)(A) states “[t]he tentative subdivision plan shall be approved if all of the following criteria are met: (A) Lot standards, including, but not limited to, standards for lot area, lot width and depth, lot frontage and designation of front and rear lot lines.”

Opponents' Argument: Opponents argue that SRC 205.010(d)(1)(A) cannot be met because Applicant has requested a Class 1 Zoning Adjustment (the “**Adjustment**”) for Lot 7¹ of the proposed subdivision, adjusting the minimum lot depth from 120 feet to approximately 111 feet. They contend there is no basis for suggesting that the fact that a double frontage lot’s privacy interests are different whether they are located on a local street as opposed to a collector or arterial street. They argue the Decision lacks substantial evidence supporting the Administrator’s conclusion of law that SRC 205.010(d)(1)(A) is satisfied.

Response: In the Decision, the City made a finding that “[a]ll of the lots within the subdivision, including those requiring the Class 1 Adjustment, are suitable for the general purpose for which they are intended to be used, and each of the lots is of a size and design that will not be detrimental to the public health, safety, and welfare.” *Decision*, p. 16. All of the lots on Applicant’s tentative subdivision plan meet the minimum lot size, dimensions and street frontage standards as described under SRC 511.010(a) Table 511.2, with the exception of Lots 22 and 23. The Decision contains a typographical error and references Lot 7 instead of Lots 22 and 23. Applicant requests the City Council’s final decision note the change, which is consistent with Applicant’s tentative plat and application materials.

The City also found that the Adjustment satisfied the relevant approval criteria, SRC 250.005(d)(1)(A). SRC 250.005(d)(1) sets out that an adjustment shall be approved if:

“A: [t]he purpose underlying the specific development standard proposed for adjustment is:

- (i) Clearly inapplicable to the proposed development; or
- (ii) Clearly satisfied by the proposed development.

¹ Rietmann and the City refer to the lot depth adjustment as relating to Lot 7. Applicant’s request was actually a request for a lot depth adjustment for Lots 22 and 23. Applicant has notified the City about this discrepancy. For the purposes of this memo, references to Lot 7 relating to the request for adjustment of the lot depth standard should be read to apply to lots 22 and 23.

B: The proposed adjustment will not unreasonably impact surrounding existing or potential uses or development.”

The Decision explains that the purpose of the 120-foot minimum lot depth standard within the Single Family Residential zone is to ensure that those lots with street frontage adjacent to both their front and rear property lines have an increased lot depth to provide potential for additional privacy and separation from the streets. The Administrator agrees with Applicant that the Adjustment was needed based on the proposed street configuration, which is constrained by the Subject Property’s topography and the location of existing streets on the perimeter of the Subject Property. The purpose of providing privacy to Lots 22 and 23 is satisfied in this case because the proposed cul-de-sac turnaround of Earhart Street will convey very little traffic. While Opponents disagree with this conclusion, it is supported by substantial evidence and is a reasonable interpretation of the code. Only two homes will access the cul-de-sac turnaround of Earhart Street. *See Plan C, Preliminary Site Plan.* It is the functional equivalent of backing up to a shared driveway. The traffic associated with the rear yards of these lots is significantly less than typical traffic on arterial or collector streets. Opponents’ arguments that there is no distinction are meritless. The 9-foot adjustment does not defeat the purpose of privacy to Lots 22 and 23. The reduced depth of the lots will still satisfy the purpose of the 120-foot lot depth requirement. The Administrator correctly concluded that the reduced lot depth still provides enough depth to allow for separation and privacy from the streets, and the purpose is satisfied by the proposed development.

Opponents did not challenge the sufficiency of the evidence or application of 250.005(d)(1)(B). Applicant concurs with the City’s finding that this criterion is met.

2. Designation of front lot line for Lot 16.

Opponents’ Argument: Opponents argue that the designation of the front lot line for Lot 16 does not comply with SRC 800.020.

Response: On page 1 of the Decision, Condition of Approval No. 1 requires: “Lot 16: The front lot line of Lot 16 shall be the west property line.” Unfortunately, page 16 of the Decision mistakenly identifies the front lot line of Lot 16 to be the east property line, but this scrivener’s error is not repeated on pages 17 and 31 of the Decision, which correctly identify the front lot line of Lot 16 to be the west property line. The front lot line for Lot 16 as identified by Applicant on the tentative subdivision plan is the west property line. *See Plan C* In its supplemental staff report, the City concedes that it made a typo on page 16 of the Administrator’s report, and that the correct front property line for

Lot 16 lies on the west property line. Applicant requests the City Council's final decision correct the scrivener's error and find that the west property line of Lot 16 is the front lot line.

B. SRC 205.010(d)(1)(B)

SRC 205.010(d)(1)(B) requires that "[t]he tentative subdivision plan complies with the standards of this chapter and with all applicable provisions of the UDC, including but not limited to: . . . (B) City infrastructure standards."

1. Stormwater, sewer, and water

Opponents' Argument: Opponents assert that the record lacks substantial evidence that Applicant can comply with Condition No. 4 and the City's stormwater regulations.

Response: The Administrator found that with the recommended conditions of approval, the Applications comply with the following relevant city infrastructure standards: SRC Chapter 71 (Stormwater), SRC Chapter 802 (Public Improvements), SRC Chapter 803 (Streets and Right-of-Way Improvements), and Public Works Development Standards ("**PWDS**") as adopted in Administrative Rule 109, Division 004. The Public Works Department written comments state that existing stormwater facilities in the area include a 10-inch main located on adjacent property along the east boundary. There are existing water and sewer infrastructure along the perimeter of the Subject Property that appear adequate to serve the subdivision. Applicant has provided enough evidence to show that it can feasibly comply with the City's infrastructure standards.

Applicant has submitted a grading and drainage plan showing the location of all existing and proposed water, sewer and stormwater lines. *See Plan D.* Applicant submitted a preliminary drainage report as Appendix A to the Applications' narrative. Applicant plans to construct a 10-inch storm line with the improvements along Salem Heights Avenue and continue down Doughton Street where it will connect to an existing 12-inch storm line located in an easement at the northeast corner of the Subject Property. Applicant has designated a storm water treatment and detention facility to be located on Lot No. 34. *See Plan C.* Applicant plans to extend existing water service through the Subject Property from an 8-inch water line located within Salem Heights Avenue through the proposed public streets and individual laterals and tie into an existing 6-inch line located within an easement located adjacent to the Subject Property's east property line. A 10-inch sanitary sewer line is located within Doughton street and will be extended through the proposed public street and individual laterals to construct each parcel. Applicant has prepared and submitted a letter from engineer Keith Whisenhunt, PE, PLS (the "**Feasibility Letter**") indicating that Applicant can feasibly build all public infrastructure elements in compliance with

the City's standards. The written narrative, relevant plans, and letter attesting as to the feasibility of construction of such facilities provide substantial evidence to support the Decision approving the Applications. Opponents offer no evidence to contradict Applicant's evidence or the Decision.

2. Tree removal

Opponents' Argument: Opponents contend that Applicant cannot satisfy the City development standards because it has not feasibly shown that it can satisfy SRC Chapter 86 which regulates trees on City-owned property ("**City Trees**") and requires a removal permit to remove any City Trees. Opponents argue, without offering any evidence of their own, that there is no substantial evidence or legal findings demonstrating that it is feasible for Applicant to obtain the necessary permits to remove trees within the City right of way and satisfy the related conditions of approval.

Response: Opponent's comments pertain to future street trees – not trees within the Subject Property. SRC 86.090(8) sets out the criteria for removing City Trees. SRC 86.090(8) provides that "the Director may permit the removal of a City tree due to construction if there is no reasonable alternative. The applicant shall be required to bear all cost of the tree's removal and replacement." The Administrator found that street improvements along Salem Heights Avenue may require removal of one or more street trees and tentatively approved removal of trees labeled 10001-10004 and 10012, and tentatively approved the Reasonable Alternatives Analysis submitted by Applicant. Applicant submitted a tree preservation plan, which is incorporated into the Decision and is binding on the Subject Property. For the removal of any additional future street trees, a new removal permit is required to be granted pursuant to SRC 86.090. The future street trees will likely need to be removed to accommodate widening, sidewalk installation, and grading associated with improvement of Salem Heights Avenue in accordance with the plans submitted into the record.

Applicant has submitted a tree plan with comments and signed by a certified arborist. *See Plan F.* Applicant's proposed tree conservation plan preserves 41.9% of the existing trees on the Subject Property, well exceeding the minimum 25% preservation requirement set out in SRC Chapter 808. Additionally, the Feasibility Letter submitted by project engineer, Keith Whisenhunt, stated that based on his experience, compliance with the conditions of approval and SRC Chapter 86 is feasible. Whisenhunt also indicated that he is familiar with the criteria to remove street trees and that Applicant can feasibly comply with the requirements for removal of City Trees. In addition to SRC 86.090(8), a City tree can also be removed based on SRC 86.090(9) provides that the "Director may permit the removal of a City tree if the tree is having an adverse effect on adjacent infrastructure and that effect cannot be

mitigated by pruning, reasonable alternative construction techniques, or accepted arboicultural practices.”

There are multiple trees located within the City right-of-way that would likely need to be removed to accommodate the widening of the street, sidewalk installation, and grading associated with improvement of Salem Heights Avenue. *See Decision, p. 12.* In other arguments raised by Opponents, they note the importance of widening and improving Salem Heights Avenue. Because the trees are in an area that is proposed be part of the widened Salem Heights Avenue, there are no reasonable design alternatives that would enable the trees preservation. The evidence in the record demonstrates that is reasonable to conclude that the Planning Director feasibly can find that those trees are having an adverse effect on adjacent infrastructure that cannot be mitigated. Applicant will be required to further develop and explain the justification for removal of City Trees when obtaining removal permits, at which time, Opponents will receive notice and an opportunity to comment. However, Applicant has shown that it can feasibly comply with the criterion to obtain the removal permits.

Moreover, Opponents’ arguments regarding the lack of evidence demonstrating that it is feasible to satisfy the conditions of approval are misplaced and do not provide a basis for reversing the Decision. Removal of future street trees require a separate application and review proceeding, which when combined with the subdivision application, makes the removal of the trees a multi-stage approval process. In *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), LUBA set out the ways a local government can demonstrate compliance with applicable approval criteria concerning an application for discretionary land use approval that involves a multi-stage approval process with an early stage approval that occurs in a public planning process, but later stage approvals that might not include an opportunity for public hearings. In *Rhyne*, LUBA stated:

“Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage

approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decision in other circumstances.”

The permitting process for removal of the future street trees does provide public notice (notice is to be provided to the neighborhood association and posted a minimum of 30 days prior to the effective date of the decision) and opportunity to comment. Applicant has provided substantial evidence in the record that compliance with the criteria is feasible. Opponents offer no evidence to the contrary. Applicant has satisfied the applicable criteria, and therefore, the City Council must affirm the Decision; however, even if the City Council were to disagree with the Administrator’s conclusion, reversal is not warranted as Opponents will have an opportunity to comment on those specific permits and the evidence presented in support of the permits at that time.

C. SRC 205.010(d)(1)(B)

Opponents’ Arguments: Opponents claims that Applicant failed to provide substantial evidence that the tentative subdivision plan does not impede the future use or development of the adjacent land because it does not provide direct access to the property owned by Mr. Rietmann at 475 Salem Heights Avenue (the “*Rietmann Property*”).

Response: The proposed needed housing Applications are for infill development. Properties to the north, south, east, and west of the Subject Property are currently developed and in use, and because of this, opportunities to provide additional access and connectivity to surrounding properties is limited. However, the proposed subdivision still provides additional connectivity by making connections and extending streets that are stubbed to the northern boundary of the Subject Property, filling gaps within the existing street network and improving access for future residences within the subdivision and residences on surrounding properties. The Administrator correctly concluded that because the proposed subdivision improves connectivity to the north and south, rather than impeding existing connectivity, Applicant satisfies this criterion.

Opponents argue that the layout of the proposed subdivision would limit access from a potential future development on the Rietmann Property to Doughton Street and Felton Street. Opponents’ assertion is without merit. While the plan for the potential subdivision does not extend Doughton Street such that it directly borders the Rietmann Property, the subdivision does increase

connectivity to the theoretical future development on the Rietmann Property. The Rietmann Property includes an approximately 28-foot-wide access onto Salem Heights Avenue. Applicant proposes to extend Doughton Street south through the subdivision to connect with Salem Heights Avenue. The theoretical future development on the Rietmann Property would have quick, easy access to both Doughton and Felton Streets via a right turn from the Rietmann Property onto Salem Heights Avenue and a right turn onto Doughton Street. Additionally, any future development would also have access onto Dave Street S to the east.

Opponents' comments regarding stormwater runoff are misplaced and inconsistent with the evidence in the record. Applicant is required by SRC Chapter 71 to develop storm water infrastructure that limits runoff from the development to levels not exceeding pre-existing conditions. Applicant has submitted a preliminary drainage report and a drainage and stormwater plan. *See Appendix A and Plan D.* Proposed stormwater facilities can also be found on the preliminary site plan. *See Plan C.* Applicant has submitted substantial evidence that construction of these facilities to City standards is feasible. Opponents' comments that stormwater runoff might impede the future use of surrounding properties is not supported by any evidence in the record.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. Whether or not the plan impedes a future use of the adjacent property is an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4).

D. SRC 205.010(d)(3)

Opponents' Argument: Opponents assert, as they did above, that SRC 205.010(d)(3) is not met because Applicant cannot feasibly show with substantial evidence that development within the tentative subdivision plan can be adequately served by City infrastructure.

Response: Applicant concurs with the City's determination that the Subject Property can be adequately served by City infrastructure that currently surrounds the Subject Property. Applicant has submitted detailed plans proposing the location of the proposed infrastructure development. *See Plan C and Plan D.* A 10-inch storm line will be constructed with the improvements along Salem Heights Avenue and continued through Doughton Street where it will connect to an existing 12-inch storm line located in an easement located at the northeast corner of the Subject Property. Applicant has designated Lot 34 as a storm water treatment and detention facility. Applicant has proposed to extend

water service through the proposed subdivision from an 8-inch water line located within Salem Heights Avenue through the proposed public streets and individual laterals and tie into an existing 6-inch line located within an easement located adjacent to the Subject Property's east property line. A 10-inch sanitary sewer line is currently located in Doughton Street and proposed to be extended through the proposed public streets, and individual laterals will be constructed to serve each parcel. There is also a sewer main located in Salem Heights Avenue, but the Public Works Department commented that the existing sewer main is in poor condition and may not be able to accommodate new connections. Applicant has submitted a Feasibility Letter from project engineer, Keith Whisenhunt, attesting to the feasibility of the project and Applicant's ability to develop the Subject Property consistent with the City's development standards. Applicant has satisfied this criterion.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. Whether or not the development is adequately served is an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4).

E. SRC 205.010(d)(4)

Opponents' Argument: Opponents assert that the Decision misconstrues SRC 205.010(d)(4) in failing to require Applicant to improve all existing conditions of Salem Heights Avenue that are below the standards set forth in the Salem Transportation System Plan ("*TSP*") for dimensions, lanes, signaling, and infill. Opponents further state that there is no substantial evidence showing that the required improvements to the portion of Salem Heights Avenue will not cause the system to conform to the TSP beyond the area immediately adjacent to the Subject Property.

Response: The City identifies the street system adjacent to the proposed subdivision as Salem Heights Avenue and three dead-end streets (Felton Street, Earhart Street, and Doughton Street). The proposed subdivision extends the three streets into and through the subdivision and provides vehicular access to the proposed lots and required connectivity. The City does acknowledge that Salem Heights Avenue does not currently meet the standard for a collector street regarding right-of-way and improvement widths. In addition, a small section of the street, exceeds the maximum street grade for a collector street. As required conditions of approval of the subdivision, Applicant will be required to dedicate right-of-way and construct a half-street improvement on Salem Heights Avenue along the frontage of the Subject Property, improving it to collector street standards. Regarding the street grades, SRC 803.065(a) allows for utilization of alternative street standards in situations where a street may not

be able to meet applicable standards, including where existing development or physical constraint make compliance with the standard impracticable and where topography or other conditions make construction that conforms to the standards impossible or undesirable. In this case, the portion of Salem Heights Avenue which currently exceeds the maximum street grade is authorized and warranted due to topography, the existing grade of Salem Heights Avenue, and potential impacts on adjacent properties to the west if the grade of the street were required to be lowered to conform to the maximum 8% standard. The Administrator found that the extension of the streets, the dedication of right-of-way, and improvements to Salem Heights Avenue ensure that the street system adjacent to the subdivision will conform to the TSP.

Applicant concurs with the City's finding that, as conditioned, the Applications cause the street system in and adjacent to the tentative subdivision plan to conform to the Salem TSP. Applicant is proposing to extend and improve the three streets that dead end at the Subject Property. *See Plan C and Plan E.* Additionally, the portion of Salem Heights Avenue that is adjacent to the Subject Property will be improved to comply with the TSP. *See Plan C and Plan E.* While the entirety of Salem Heights Avenue does not comply with the Salem TSP, Applicant is fulfilling its responsibility to improve the system *adjacent* to the tentative subdivision. Applicant concurs with staff's interpretation that this provision applies only to the infrastructure directly adjacent to the proposed subdivision and asks the City Council to adopt that interpretation. Applicant will also contribute system development charges ("*SDCs*") which are meant to contribute to funding future roadway and infrastructure improvements throughout the greater transportation system.

Opponents' requested interpretation of SRC 205.010(d)(5) is inconsistent with the text and purpose of the applicable criterion and would violate relevant state and federal laws. Opponents propose no limitation to what could be required under their interpretation that an applicant must improve the entire length of Salem Heights Avenue. This would cause one single property owner, adjacent to a non-conforming arterial or collector street to be responsible for potentially millions of dollars in public infrastructure improvements, regardless of the size of the development or amount of traffic contributed to the street. Logistically, performing such improvements would require an applicant to initiate and litigate countless condemnation proceedings on behalf of the City to obtain the required right-of-way. Opponents' interpretation would be cost prohibitive for anyone to subdivide property near any infrastructure that does not meet TSP standards. These requirements would be unconstitutional and an overbroad interpretation of the code. *See Koontz v. St. Johns River Water*

Mgmt. Dist., 570 US 595, 595, 133 S Ct 2586, 2589 (2013) (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right to not have property taken without just compensation.”) Applicant urges the City to adopt staff’s interpretation that Applicant’s proposed improvements adequately bring the street system adjacent to the Subject Property in conformity with the TSP standards.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. If the City were to require Applicant to improve the entire Salem Heights Avenue, such a condition of approval would result in unreasonable cost and delay. ORS 197.307(4). Moreover, the City is prohibited from denying the Applications or requiring further conditions of approval based on an alleged nonconformance with the City’s non-codified facilities plans such as the TSP.

F. SRC 205.010(d)(5)

Opponents’ Arguments: Opponents disagree with the City’s finding that the street system in and adjacent to the tentative subdivision is designed to provide for the safe, orderly, and efficient circulation of traffic into, through, and out of the subdivision and claim that there is no substantial evidence to support the finding. Opponents repeat their contention that because Salem Heights Avenue does not conform to the TSP, the street system in and adjacent to the tentative subdivision is not designed to provide for the safe, orderly, and efficient circulation of traffic into, through, and out of the subdivision.

Response: The Administrator correctly found that the proposed network of internal streets, improvements to boundary streets at the perimeter of the Subject Property, and connections to existing streets in the vicinity improve traffic circulation in the area by providing additional connectivity. The Administrator’s finding that the criterion is satisfied is supported by substantial evidence in the record. The finding is further supported by the conditions of approval that will ensure the portion of Salem Heights Avenue adjacent to the Subject Property is improved to TSP standards (Conditions Nos. 2 and 3 – restricting flag lot accessway; Condition No. 6 – requiring dedication of necessary right-of-way; Condition No. 7 – requiring construction of half-street improvements; Condition No. 10 – requiring internal streets to be constructed to local street standards; and Condition No. 12 – eliminating additional access on Salem Heights Avenue). Applicant’s proposed design and the conditions cited herein have the cumulative effect of ensuring traffic is safe, orderly, and efficient into, through, and out of the subdivision.

To further support the Decision, Applicant hired traffic engineer, Mike Ard, to analyze the traffic issues at the proposed subdivision, and he provided a transportation analysis memo to the City (the "**Transportation Analysis**"). As part of the Transportation Analysis, Ard evaluated whether Salem Heights Avenue is currently unsafe by obtaining the Oregon Department of Transportation crash data for the most recent five-year period for which data is available (January 2013 through December 2017). The crash data showed there were 15 crashes in the five-year analysis period, none of which were fatalities or incapacitating injuries. *Transportation Analysis*, pp. 4. Ten of the fifteen crashes occurred at the intersection of Salem Heights Avenue at Liberty Road. *Id.* The crash rate at this intersection was calculated to be 0.272 crashes per million entering vehicles, which is significantly lower than the average crash rate of 0.477 for signalized urban four-way intersections in Oregon. *Id.* Ard evaluated the crashes that occurred on Salem Heights Avenue west of Liberty Road in greater detail and found one crash at 6th Avenue was a turning-movement collision that occurred when a northbound driver turned left onto Salem Heights Avenue without yielding and resulted in no injuries. *Transportation Analysis*, pp. 4-5. Another crash at Sunridge Drive was a fixed-object collision that occurred when a driver attempted to make a left turn in snowy conditions and slid off the road. *Id.* At p. 5. Based on Mr. Ard's analysis of the crash data and the traffic volume data, there are no indications of a traffic problem for Salem Heights Avenue.

Ard makes the following conclusions relevant to SRC 205.010(d)(5):

Additionally, in contrast to the assertions of Mr. Rietmann, the proposed development will improve conditions for people walking and biking in the site vicinity. Although the proposed development will provide frontage improvements along Salem Heights Avenue S, the primary contribution of the development will be to improve the connectivity of the local street system. Following completion of the Doughton Street S extension through the site, residents of the existing residential areas north of the site will be able to travel through the site and along Winola Avenue to reach destinations to the south on Liberty Road. Similarly, residents of areas south of Salem Heights Avenue will be able to use Doughton Street to reach Missouri Avenue and beyond, decreasing the need to walk or bike along Salem Heights Avenue, as well as reducing the distance traveled along the Liberty Road S, a very busy urban street.

Since the proposed development will result in improved conditions for pedestrians and people riding bicycles and conditions have been demonstrated to be adequate for people driving motor vehicles, there is no logical basis for concluding that the increased traffic from the proposed development would contribute to a documented safety problem.

The evidence in the record supports the Administrator's conclusion that this criterion, as conditioned, is satisfied. Applicant's proposed subdivision, as conditioned, will provide for the safe, orderly, and efficient circulation of traffic into, through and out of the subdivision in and adjacent to the tentative subdivision.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. Whether or not the development provides for safe, orderly, and efficient traffic circulation is an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4). Similar to the previous criteria, if a single property owner were required to improve the entirety of any non-conforming facility within the vicinity of a proposed development, such a condition of approval would violate state law in causing unreasonable cost and delay, and it would be unconstitutional under *Koontz*.

G. SRC 205.010(d)(6)

Opponents' Arguments: Opponents dispute the City's finding that the tentative subdivision plan provides safe and convenient bicycle and pedestrian access from within the subdivision to adjacent residential areas and transit stops and to neighborhood activity centers within one-half mile of the development is unsupported by substantial evidence and incorrect. Opponents continue to rely on the unfounded assertion that Salem Heights Avenue is unsafe, and that there is no substantial evidence that the subdivision plan can provide safe and convenient bicycle and pedestrian access from within the subdivision to adjacent residential areas and transit stops and to neighborhood activity centers within one-half mile of the proposed development.

Response: The bicycle and pedestrian access near the Subject Property is constrained by the existing development patterns, street network gaps, and underimproved streets. The proposed subdivision will improve the bicycle and pedestrian access in the vicinity by improving Salem Heights Avenue along the frontage of the Subject Property and extend local streets through the Subject Property to connect to other existing streets on the perimeter of the Subject Property. This finding of fact and conclusion of law is supported by the tentative subdivision plan, the surrounding area map, and the Transportation Analysis. As part of the proposed subdivision, Applicant will improve the frontage along Salem Heights Avenue to include a sidewalk and bike lane. The Administrator found neighborhood activity centers within one-half mile of the Subject Property, which include: Candalaria Elementary School, Salem Heights Elementary School, Fircrest Park, and shopping areas along Commercial Street.

The sidewalk and bike lane improvements will improve safe and convenient bicycle and pedestrian access in an area where it is currently limited by the existing development pattern. Opponents identify no other plausible activity centers within a one-half mile of the Subject Property.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. Whether or not the development provides for safe and convenient bicycle and pedestrian access is an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4). Moreover, even the application of the one-half mile standard is a potentially ambiguous standard capable of multiple reasonable meanings, and therefore, it may not be a basis of denial or additional conditions of approval. If the City were to adopt conditions of approval requested by Opponents, such as being obligated to purchase additional right-of-way or improve all or additional portions of Salem Heights Avenue, such conditions would cause unreasonable cost and delay and would be unconstitutional conditions in violation of *Koontz*.

H. SRC 205.010(d)(7)

Opponents' Argument: Opponents argue that the City's finding that a Traffic Impact Analysis ("*TIA*") is not required for the proposed subdivision is arbitrary and capricious, violates the Equal Protection Clause of the 14th Amendment, and violates SRC 803.015.

Response: SRC 803.015(a) states that the purpose of the TIA requirement is "to ensure that development generating a significant amount of traffic provides the facilities necessary to accommodate the traffic impacts of the proposed development." Further, SRC 803.015(b) provides that:

"[a]n applicant shall provide a traffic impact analysis if one of the following conditions exists:

- (1) The development will generate 200 or more daily vehicle trips onto a local street or alley, or 1,000 daily vehicle trips onto a collector, minor arterial, major arterial, or parkway. Trips shall be calculated using the adopted Institute of Transportation Engineer's Trip Generation Manual. In developments involving a land division, the trips shall be calculated based on the proposed development that will occur on all lots that will be created by the land division.
- (2) The increased traffic resulting from the development will contribute to documented traffic problems, based on current accident rates, traffic volumes or speeds, and identified locations where pedestrian and/or bicyclist safety is a concern.
- (3) The City has performed or reviewed traffic engineering analyses that indicate approval of the development will result in levels of service of the street system that do not meet adopted level of service standards.

The Administrator found that because the proposed subdivision will generate less than 1,000 average daily vehicle trips onto Salem Heights Avenue, a collector street, the trips estimated to be

generated by the proposed subdivision do not trigger the threshold requiring a TIA. SRC 803.015(b)(1). The TSP provides the official classification for the City's transportation facilities and has designated Salem Heights Avenue as a collector street.

In the Transportation Analysis, Applicant's traffic engineer, Mike Ard, explained the functional differences in local streets and collector streets. A local street has limited carrying capacity, contains closely spaced driveways, and often has insufficient width to serve continuous two-way traffic. Collector streets contain limited driveways and maintain two full width travel lanes regardless of whether there are sidewalks, medians, or bike lanes. Accordingly, collector streets support a far greater carrying capacity whether or not they are fully up to standard.

SRC 803.015(b)(2) requires a TIA when increased traffic resulting from a development will contribute to documented traffic problems, based on current accident rates, traffic volumes or speeds, and identified locations where pedestrian and/or bicyclist safety is a concern. Applicant's traffic engineer has submitted a technical analysis memo into the record addressing the traffic volume and accident data. Ard calculated the trip generation for the proposed subdivision and found the entire subdivision would contribute 302 daily trips to the surrounding street system including 24 trips in the morning peak hour and 33 in the evening peak hour. *See Transportation Analysis, p. 1-2.* The trip distribution is projected to add 68 daily trips to Missouri Avenue S, 204 trips via Salem Heights Avenue headed east and 30 daily trips via Salem Heights Avenue to the west. *Id. at p.2.* The number of trips being added to Salem Heights Avenue would narrowly trigger a requirement for a TIA if Salem Heights Avenue were a local street. The project will not be adding significant traffic to the system, and as Salem Heights is a collector street, the street can carry the proposed traffic.

Ard also reviewed the crash data for Salem Heights Avenue and found that there were only 15 crashes in the most recently available analysis period (Jan 2013 through December 2017). *Transportation Analysis, p. 4-5.* Ten of the Fifteen crashes took place at the intersection of Salem Heights Avenue and Liberty Road S. *Id.* That intersection has a calculated crash rate of 0.272 crashes per million entering vehicles, which is substantially less than the 0.477 average crash rate for signalized urban four-way intersections in the State of Oregon. *Id.* Ard also did a detailed review of the other five crashes and found that they were not indicative of a traffic problem on Salem Heights Avenue. *Id.*

Ard reviewed the crash data for Salem Heights Avenue and determined that "[t]he detailed crash data for Salem Heights Avenue is not indicative of a traffic problem, nor is the traffic volume data. . .". *Transportation Analysis, p.5.* Ard further concluded that because "the proposed development will

result in improved conditions for pedestrians and people riding bicycles and conditions have been demonstrated to be adequate for people driving motor vehicles, there is no logical basis for concluding that the increased traffic from the proposed development would contribute to a documented safety problem. As such, city staff's determination that a traffic impact analysis is not required is appropriate." *Id.*

Finally, there is no evidence that the City has found that approval of the development would result in a change in the level of service on the street system or that the street system does not meet adopted level of service standards. The City correctly concluded that a TIA is not required by the proposed subdivision. The record contains substantial evidence supporting the findings of fact and conclusions of law that a TIA is not required based on either a documented traffic problem or pre-existing City study. SRC 803.015(b)(2) and (3). Opponents anecdotal evidence and comments cannot rebut the evidence of Applicant's expert witness.

Opponent arguments citing the 14th Amendment are undeveloped and without merit. Opponents make no argument as to how SRC 803.015(b) fails the rational basis test. The City's TSP classifications and implementing regulations are supported by reasoned explanations and technical memorandums. There is no evidence of any arbitrary or capricious action by the City. It is unlikely that Salem Heights Avenue is the only street that is designated as a collector street that does not meet the required street conditions. The City correctly found that a TIA is not required based on SRC 803.015(b).

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. The City's TSP cannot operate as a development standard in a limited land use decision. Moreover, if City were to adopt conditions of approval requested by Opponents, such as being obligated to purchase additional right-of-way or improve all or additional portions of Salem Heights Avenue, such conditions would cause unreasonable cost and delay and would be unconstitutional conditions in violation of *Koontz*.

I. SRC 205.010(d)(8)

Opponents' Arguments: Opponents argue that SRC 205.010(d)(8) is not met because it can only be satisfied due to the Class 1 zoning adjustment. They state that because they believe the administrative adjustment should be denied, this criterion is not satisfied.

Response: SRC 205.010(d)(8) requires the "tentative subdivision plan takes into account the topography and vegetation of the site so the need for variances is minimized to the greatest extent

practicable.” The City found that “[t]he proposed subdivision has been reviewed to ensure that adequate measures have been planned to alleviate natural of fabricated hazards and limitations to development, including topography and vegetation of the site.” The City’s finding is supported by substantial evidence in the record submitted by Applicant, including, but not limited to, Applicant’s tree plan and grading plan. Additionally, the lot and street configuration proposed by Applicant meets the applicable development standards, with the adjustment to lot depth for Lots 22 and 23, which are subject to the administrative adjustment. The Administrator correctly found that no existing conditions of topography or vegetation have been identified on the site that would require further adjustments and the proposed layouts allows for development of all the lots without any anticipated variances. Opponents identify no such need, and arguments are a mere recitation of their previous objection to the Adjustment. The response above under Section II(A) of this response memo is incorporated herein.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. Whether or not the development is designed so the need for variances is minimized to the greatest extent practical is an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4).

J. SRC 205.010(d)(9)

Opponents’ Argument: Opponents contend that SRC 205.010(d)(9) is not met because there is not substantial evidence to support the finding that the tentative subdivision considers the topography and vegetation such that the least disruption will result from the reasonable development. They claim that there because the proposed subdivision proposes to remove trees, including some white oaks, the Subject Property cannot be reasonably developed. Opponents argue that the Subject Property could be subdivided into fewer lots that would avoid removing the trees, and therefore this criterion is not met.

Response: The Administrator found that the tentative subdivision plan configures the lots and streets to allow single family residential development of the site while minimizing disruptions to the topography and vegetation. The City notes that a significant number of trees have been designated for preservation, including along the western and southern borders of the Subject Property. Applicant’s tree plan proposes to preserve 41.5%, which is well over the required 25% minimum. Applicant has reduced the overall size of the project from 9.1 acres to 7.7 acres and reduced the number of lots from 38 to 33, which undoubtedly reduces the impact on the site, topography, and vegetation. The amount of impervious surface associated with interior roads is designed to be the least amount reasonable while

still connecting Felton Street and Doughton Street. Applicant's grading plan is consistent with City standards. Further reduction in the number of lots within the Subject Property to increase retention of existing vegetation would result in the per lot cost of development to substantially increase with marginal benefit. The Administrator's finding of fact and conclusion of law is consistent with the plain text of the code and supported by substantial evidence. Opponents evidentiary objections lack specificity and fail to explain what alternative design is required or why the Administrator's determination was unreasonable.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. Whether or not the development is designed so that there is the least disruption to result from the reasonable development an inherently ambiguous standard that cannot be the basis for denial or further conditions of approval. ORS 197.307(4).

K. SRC 205.010(d)(10)

Opponents' Arguments: Opponents disagree with the City's findings that an Urban Growth Preliminary Declaration or Urban Growth Area ("**UGA**") Permit is not required by the proposed subdivision. SRC 803.035(r) states "[w]here a subdivision or partition is located in the Urban Growth Area or the Urban Service area, and the construction of street improvements by the City has not yet, the street improvements and dedications shall meet the requirements of SRC chapter 200." Chapter 200.010 requires "development proposed outside the USA, or inside the USA, if development precedes city construction of required facilities, shall require an urban growth area development permit and must conform to the requirements of this chapter." Opponents argue that Salem Heights Avenue is a "required facility" and that the Applications should require an Urban Growth Preliminary Declaration because Salem Heights Avenue was constructed prior to the adoption of the TSP and does not meet the current standard for collector streets in the most recent TSP. Additionally, Opponents disagree with the City's distinction between the property in the "Current Developed Area" ("**CDA**") and property within the Urban Service Area ("**USA**"), but not within the CDA.

Response: Applicant concurs with the Administrator's reasonable interpretation of the applicable code provisions. The Decision states in relevant part:

"[t]he Urban Service Area (USA) is comprised of two distinct areas: (1) the boundary formerly called the "Current Development Area" (CDA) prior to the establishment of the USA; and (2) boundaries added to the CDA through USA amendments pursuant to SRC 200.015. In SRC 200.010 and SRC 200.015, consideration is given to amend the USA boundary based on the availability of the city construction of required facilities to serve

properties in the USA. In other words, USA amendments can be made only when infrastructure is available to serve the area or when funds are committed to serve the area.

That USA amendment process is the context of the phrase ‘precedes city construction of required facilities’ in SRC 200.010(c) and SRC 200.020(a). In particular, SRC 200.020(a) states, ‘or is within the urban service area (USA), but precedes city construction of required facilities that are shown in the adopted capital improvement plan, public facilities or comparable plan for the area of the development.’ This language is a direct reference to the capital improvement planning process as described in SRC 200.015 for USA amendments.

Therefore, UGA permits are not required for areas within the original CDA boundary because that area was not subject to the USA amendment criteria in SRC 200.015. Because there is no ‘city construction of required facilities’ pursuant to SRC 200.015, then no UGA permit is required.”

In sum, the Administrator concludes that property within the original CDA does not require a UGA permit because the factual determination has already been made that the required facilities are already available to serve the area. Additionally, the Administrator states that because there is no contemplated city construction of required facilities, no UGA permit is required.

Applicant argues that there is substantial evidence to conclude that, contrary to the contention of Opponents, the proposed development does not precede the City’s construction of required facilities, e.g., Salem Heights Avenue. Opponents’ attempt to equate the fact that Salem Heights Avenue is currently developed below standards provided in the TSP to a circumstance in which Salem Heights Avenue does *not exist*. The construction of Salem Heights Avenue has long preceded the proposed development. The fact that the most recent TSP states that additional improvements should be planned for Salem Heights Avenue is inapposite to SRC 200.010(c). Opponents’ interpretation that any traffic facility within 260 feet of a development site that is currently developed below TSP standard requires a UGA permit is inconsistent with the text, purpose and policy of SRC Chapter 200 and SRC 200.010(c). SRC 205.010(d)(4) already addresses the question of whether that portion of Salem Heights Avenue adjacent to the Subject Property needs to be updated to TSP standards. Opponents’ argument for a UGA permit because Salem Heights Avenue is below standard would require superfluous additional review.

Applicant argues in the alternative that the City Council is prohibited from reversing the Decision as a matter of law. If the City were to adopt conditions of approval requested by Opponents, such as being obligated to purchase additional right-of-way or improve all or additional portions of Salem

Heights Avenue, such conditions would cause unreasonable cost and delay in violation of ORS 197.307(4) and would be unconstitutional conditions in violation of *Koontz*. Moreover, the requirement for a subdivision application to conform with an uncodified TSP unlawfully expands the scope of review of a limited land use decision. ORS 197.195.

L. Impact on Property Values, Neighborhood, and Adjacent Properties

Opponents' Arguments: Opponents submitted comments related to the proposed development altering the character of the neighborhood, impacting property values, and arguing the subdivision should be denied based on these concerns.

Response: Applicant concurs with the City's determination that the subdivision's impact on property values, the character of the neighborhood, or adjacent properties are not approval criterion for the proposed subdivision. Applicant has attempted to design the subdivision to fit in with the surrounding properties and enhance the character of the neighborhood, but subjective determinations by Opponents of the Applications are not and should not be a basis for denying the Applications. Denial based on such uncodified standards would violate both ORS 197.307 and 197.195.

M. Wildlife

Oppositions' Arguments: Opponents have submitted several comments evincing concerns about wildlife that may utilize the Subject Property as habitat. Concerns were raised speculating that the project would displace acorn woodpeckers, hummingbirds, nesting red tail hawks, owls, deer, opossum, racoons, deer and other wildlife. Additional neighbors have raised concerns, without evidence, that the Subject Property may be home to endangered species.

Response: Applicant concurs with the City that concerns regarding loss of wildlife habitat that have not been identified as significant are not criteria for denying the Applications. Generalized concerns regarding potential non-compliance with federal law such as the Migratory Bird Treaty Act or Endangered Species Act are similarly not a review criterion for local land use decisions. See *Goodmonson v. City of Corvallis*, 70 OR LUBA 283 (2014). Opponents have supplied no evidence to show that endangered species exist on the Subject Property, and the Subject Property has not been deemed a significant wildlife habitat by state officials. Denial based on such uncodified standards would violate both ORS 197.307 and 197.195.