

From: [Jamie Donaldson](#)
To: [Amy Johnson](#)
Cc: [Laurel Christian](#); [Lisa Anderson-Ogilvie](#); [Olivia Dias](#); [Robert Chandler](#)
Subject: FW: Case No. SUB-UGA-SPR-ADJ-TRV-DR23-02 for 2100 Block of Doaks Ferry Road NW
Date: Thursday, July 20, 2023 5:02:33 PM
Attachments: [image001.png](#)
[Titan Hill Appeal Legal Memo Revised, 4866-3446-6416, 4.pdf](#)

Hi Amy,

Additional Testimony for the Titan Hill Appeal attached.

Thank you,

Jamie Donaldson

Planner II

City of Salem | Community Development Department

555 Liberty St SE, RM 305, Salem, OR 97301

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Questions on Zoning and Sign Permits can be submitted by email to Planning@cityofsalem.net

From: Alan M. Sorem <asorem@sglaw.com>

Sent: Thursday, July 20, 2023 4:44 PM

To: Jamie Donaldson <JDonaldson@cityofsalem.net>

Cc: Brandie Dalton <bdalton@mtengineering.net>

Subject: Case No. SUB-UGA-SPR-ADJ-TRV-DR23-02 for 2100 Block of Doaks Ferry Road NW

Jamie,

Please see the attached memo and include it into the record.

Thank you!

Alan M. Sorem

Lawyer – Real Estate & Land Use Practice Group



Saalfeld Griggs PC

Park Place, Suite 200 | 250 Church Street SE | Salem, Oregon 97301

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MEMO

To: Jamie Donaldson
City of Salem Planning Department

From: Alan M. Sorem on behalf of Titan Hill Property LLC

Date: July 20, 2023

Re: Appeal Memorandum for Titan Hill Estates/Titan Hill Apartments
City of Salem Case No. SUB-UGA-SPR-ADJ-TRV-DR23-02; Application No. 22-119071-PLN



I. Introduction

On May 10, 2023, the City of Salem (the “**City**”) issued an approval for a proposed six-lot subdivision for Titan Hill Estates in conjunction with a proposed multi-family development of 436 units for Titan Hill Apartments (the “**Decision**”). The Decision is more particularly identified as City of Salem Case No. SUB-UGA-SPR-ADJ-TRV-DR23-02 for Subdivision Tentative Plan, Urban Growth Preliminary Declaration, Class 3 Site Plan Review, Class 2 Adjustment, Tree Variance, and Class 1 Design Review. The Decision further approves the following:

- (1) A Subdivision Tentative Plan to divide the 36.72-acre property into six lots ranging in size from approximately .4 acres to 12 acres, with a request for Alternative Street Standards to allow increased street grades, block lengths, and an adjustment to street connectivity requirements in SRC Chapter 803 to provide a street connection to the undeveloped lot to the south;
- (2) An Urban Growth Area Preliminary Declaration to determine the public facilities required to serve the proposed development;
- (3) A Class 3 Site Plan Review and Class 1 Design Review for development of 436 units in 31 buildings across five lots, with associated amenities and improvements including a resident clubhouse, recreation areas, parking, and landscaping;
- (4) Four Class 2 Adjustment requests to:
 - (a) Increase the maximum height allowed for an accessory structure from 15 feet to 22 feet (SRC 514.010);
 - (b) Eliminate the requirement to orient buildings toward the street with direct pedestrian access to adjacent sidewalks (SRC 702.020(e)(5));
 - (c) Reduce the minimum 40 percent buildable width requirement at varying percentages along Doaks Ferry Rd NW, Landaggard Dr NW, and “Street A”

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- (SRC 702.020(e)(4)); and
- (d) Increase the maximum allowed parking spaces throughout the development by 22 spaces (SRC 806.015(e)); and
- (5) A Tree Regulation Variance request for removal of 46 significant trees on site.

The City granted the Decision approving the application of Titan Hill Property LLC, an Oregon limited liability company (the “**Applicant**”), which is the owner of the real property identified as the 2100 Block of Doaks Ferry Road NW, Salem, OR 97304 (the “**Subject Property**”). The total area of the Subject Property is 36.72 acres, and it is currently zoned RM2 (Multiple Family Residential 2).

The purpose of this memorandum is to respond to the legal issues raised in the appeal of the Decision by the West Salem Neighborhood Association (“**WSNA**” or “**Appellant**”) in its written statement dated May 25, 2023 (the “**WSNA Appeal Letter**”). The stated reasons for the appeal by the WSNA cannot substantiate a reversal or remand of the Decision. The City must deny the appeal for the following reasons:

1. The reasons stated by the WSNA lack adequate specificity to provide the City and the Applicant an opportunity to respond.
2. The reasons ignore the findings of fact and conclusions of law in the Decision that explain how the evidence in the record satisfies all the applicable criteria.
3. The WSNA provides no evidence in the record to contravene the substantial evidence submitted by the Applicant determined by the Planning Administrator as satisfactory.
4. The Appellant’s reasons ask the City to misinterpret and misapply the City’s Urban Development Code (“**UDC**”).
5. The UDC unlawfully incorporates development standards from uncodified elements of the City’s Comprehensive Plan. Reversal of the Decision and denial of the application based on non-conformance with elements of the City’s Comprehensive Plan violates ORS 197.195. *Oster v. City of Silverton*, LUBA No. 2018 (May 7, 2019).
6. The UDC includes ambiguous and unclear standards, criteria, and procedures. The City has not adopted an alternative clear and objective tract for land division and development of the Subject Property. Reversal of the Decision and denial of the application based on non-conformance with unclear or ambiguous standards, criteria, or procedures violates ORS 197.307(4). *Warren v. Washington County*, 296 Or. App. 595 (2019).
7. Reversal of the Decision and denial of the Application based of the City’s tree regulations (UDC Chapter 808) violates the Applicant’s Fifth Amendment rights under the United States Constitution and the unconstitutional conditions doctrine. It is the City’s burden to establish that its tree ordinance has an adequate nexus to a legitimate interest and make an individualized determination that the burdens on the Applicant are roughly proportionate in

both nature and extent to the impacts of the proposed development. *F.P. Development, LLC v. Charter Twp. of Canton, Michigan*, 16 F4th 198, 208 (6th Cir 2021); citing *Nollan v. California Coastal Commission*, 483 U.S. at 835–37, 107 S. Ct. 3141; *Dolan v. City of Tigard*, 512 U.S. at 386–88, 114 S. Ct. 2309; *St. John’s River v. Koontz*, 570 U.S. at 604, 133 S. Ct. 2586.

A reversal of the Decision and denial of the Application based on the stated reasons of the Appellant would violate local, state, and US Constitutional law. The City could be subject to 42 U.S.C. § 1983 and/or ORS 197.796 for damages incurred together with an award for attorney fees and costs incurred. The Applicant requests the City to affirm the Decision.

II. Summary of the Decision and Relevant Local Code

The issues in this matter concern the interpretation and application of the City’s tree preservation code (UDC 808) as it pertains to the preservation of Significant Trees and their Critical Root Zones, the standards, procedures, and conditions related to their removal in whole or in part, and the penalties for removal of such vegetation in violation of the code.

The Subject Property contains forty-six (46) “Significant Trees” under SRC 808.005 identified for removal. Except for certain enumerated exceptions not applicable to this matter, removal of these Significant Trees, including their Critical Root Zones, is only allowed under a vegetation removal permit issued under SRC 808.030, under a tree conservation plan granted under SRC 808.035, or a tree variance granted under SRC 808.045. SRC 808.025. Critical Root Zones (CRZ) of Significant Trees equal one-foot in radius for every one-inch of dbh of the tree. Tree conservation plans apply to developments for single family housing and middle housing. The proposal is for a consolidated application involving 436 units of multifamily housing; therefore, SRC 808.035 is inapplicable.

The criteria for a tree removal permit under SRC 808.030(d)(5) are as follows:

(5)Removal of significant tree in connection with the construction of a development other than single family, two family, three family, four family, or cottage cluster. The removal of the significant tree is necessary for the construction of a development other than single family, two family, three family, four family, or cottage cluster and:

(A)Without approval of the tree removal permit the proposed development cannot otherwise meet the applicable development standards of the UDC without a variance or adjustment.

(B)There are no reasonable design alternatives that would enable preservation of the tree. In determining whether there are no reasonable design alternatives, the following factors, which include but are not limited to the following, shall be considered:

(i)Streets. The removal is necessary due to:

(aa)The location and alignment of existing streets extended to the boundary of the subject property;

(bb)The planned alignment of a street identified in the Salem Transportation System Plan (TSP);

(cc)A street required to meet connectivity standards, to serve property where a flag lot accessway is not possible, or where a cul-de-sac would exceed maximum allowed length;

(dd)Any relocation of the proposed street resulting in lots that do not meet lot standards;

(ee)A required boundary street improvement.

(ii)Utilities. The removal is necessary due to existing or proposed utilities that cannot be relocated to an alternative location.

(iii)Site topography. The removal is necessary due to the topography of site which will require severe grading in the critical root zone of the tree in order to comply with maximum street or intersection grades, fire department access requirements, or Fair Housing Act or ADA accessibility standards.

The Decision found in relevant part:

“Under SRC 808.030(d)(5), a typical tree removal permit could be granted where removal of the significant tree is necessary for the construction of a development other than single family, two family, three family, four family, or cottage cluster, and there are no reasonable design alternatives that would enable preservation of the tree. Factors including existing or planned street alignment, boundary improvements, proposed utilities, or site topography where severe grading of the critical root zone would occur in order to comply with maximum street or intersection grades, fire department access requirements, or ADA accessibility standards would satisfy the criteria for removal. In consideration of what would be allowed for similar multi-family developments, staff finds the location of the remaining 40 trees requested for removal meet the one of these criteria for removal. Removal of the remaining 40 trees on site are due to the location of trees well within the interior of the development site affected by substantial grading, or within areas dedicated for streets or stormwater facilities, which would interfere with providing the necessary infrastructure to meet standards. There are no other options to provide the required street connections or stormwater facilities on site due to site topography.”¹

In sum, the Planning Administrator found that forty (40) of the identified forty-six (46) Significant Trees, including their CRZs, could be removed under SRC 808.030(d)(5). The remainder of the Significant Trees must be removed under the tree variance criteria under SRC 808.045. It states in relevant part:

(d) Approval criteria. A tree variance shall be granted if either of the following criteria is met:

(1) Hardship.

(A) There are special conditions that apply to the property which create unreasonable hardships or practical difficulties which can be most effectively relieved by a variance; and

¹ The Staff Report contains a typo and mistakenly cited SRC 808.020(d)(5) instead of SRC 808.030(d)(5). Applicant requested the correction. The passage above contains the correct citation.

(B) The proposed variance is the minimum necessary to allow the otherwise lawful proposed development or activity; or

(2) Economical use.

(A) Without the variance, the applicant would suffer a reduction in the fair market value of the applicant's property, or otherwise suffer an unconstitutional taking of the applicant's property;

(B) The proposed variance is the minimum necessary to prevent a reduction in the fair market value of the applicant's property or otherwise avoid a taking of property; and

(C) The proposed variance is consistent with all other applicable local, state, and federal laws.

The Decision concluded that the evidence in the record substantiates granting a variance approval for removal of the remaining six (6) Significant Trees under SRC 808.045(d)(1)(A) and (B). The Decision adopted the following conditions related to the partial denial under SRC 808.030(d)(5) and approval of the tree variance under SRC 808.045(d)(1)(A) and (B).

TREE VARIANCE

Condition 51: At the time of grading permit review, the applicant shall submit an updated tree inventory plan representing all conditions of approval for tree preservation or removal, and verification of trees located on property lines, including the critical root zone and protection measures of all trees on site and directly abutting the property in compliance with Chapter 808.

Condition 52: The two 32-inch Fir trees labeled 45 and 46 near the northern property line shall be preserved, until such time that a Tree Variance application can be approved for their removal.

Condition 53: The 30-inch Oak tree along the northern property line shall be preserved.

Condition 54: All trees designated for preservation shall have protective ground silt fencing encompassing 100-percent of their critical root zones. For all trees where construction is proposed within the critical root zone, the applicant shall either submit an arborist report documenting that disturbance up to a maximum of 30 percent of the critical root zone will not compromise the long-term health and stability of the tree; revise the plans to ensure the survival of the tree designated for preservation; or obtain approval of a new Tree Variance for additional removal of a significant tree.

Condition 55: Significant trees 35 and 36, two 30-inch Fir trees, adjacent to the parking lot near Building 3 shall be preserved. All other non-significant Fir and Maple trees in the vicinity of this parking lot shall also be preserved.

Condition 56: Significant trees 38 and 39, a 30-inch Madrona and 36-inch Oak, adjacent to the parking lot near Building 6 shall be preserved. All other non-significant Oak and

Fir trees in this area shall also be preserved.

III. Applicable State and Federal Laws

ORS 197.307, as amended by section 14, chapter 401, Oregon Laws 2019, and section 2, chapter 54, Oregon Laws 2022, and Section 81 of HB 2001 (2023) states in relevant part:

(3) A local government shall permit needed housing in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

(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.

ORS 197.015(12)(a) defines “Limited Land Use Decision” as:

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

(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

(B) 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.

ORS 197.195(1) states in relevant part:

“Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision.”

ORS 197.522(2) and (3) state:

(2) A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land for

needed housing that is consistent with the comprehensive plan and applicable land use regulations.

(3) If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to making a final decision on the application, shall allow the applicant to offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations. If an applicant seeks to amend the application or propose conditions of approval:

(a) A county may extend the time limitation under ORS 215.427 for final action by the governing body of a county on an application for needed housing and may set forth a new time limitation for final action on the consideration of future amendments or proposals.

(b) A city may extend the time limitation under ORS 227.178 for final action by the governing body of a city on an application for needed housing and may set forth a new time limitation for final action on the consideration of future amendments or proposals.

ORS 197.797(1) states:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

Takings Clause, Fifth Amendment, United States Constitution: “nor shall private property be taken for public use, without just compensation.”

IV. WSNA Fails to Raise Issues Adequately for Applicant and City Response

The WSNA Appeal Letter fails to identify the issues on appeal in adequate specificity to allow the Applicant and the City an opportunity to respond. ORS 197.797(1). The Appellant generally requests the City Council to reverse or remand the Decision because it purportedly “will adversely affect the environment and not comply with the code.” These statements fail to adequately raise any issue with adequate specificity and do not provide a basis for reversal or remand of the Decision. The WSNA Appeal Letter’s remaining statements are brief and absent of any explanation as to how the City misapplied the UDC or why the evidence in the record does not support the Decision as to require the City to reject the appeal for failure to preserve any argument sufficient for review.

V. The Appellant Asks the City to Misinterpret and Misapply UDC

WSNA's Appeal Letter cites SRC 808.001, the purpose statement of the City's tree code, as a basis for an appeal; however, it fails explain how SRC 808.001 is a mandatory approval criterion. The purpose statement of the tree code, like other purpose statements, is intended to provide a general statement of the City's purpose in guiding future interpretations of the local code. It is not itself a mandatory approval criterion, and WSNA's mere citation to this section without argument or explanation fails to adequately preserve any assignments of error related thereto.

The WSNA Appeal Letter cites SRC 808.020, which regulates removal of trees in riparian corridors. Applicant provided an updated tree plan, which shows the retention of an 18' Madrona tree from within the Riparian Corridor. No further approval is needed.

VI. Appellant Offers No Evidence to Convert the Findings of Fact and Conclusions of the Planning Administrator

The Planning Administrator found that all applicable criteria have been met. This evidence includes stamped engineering and survey documents provided by licensed professionals showing compliance with the City's development standards, including Chapter 808. The Appellant offers no evidence that demonstrates that the Planning Administrator erred in concluding that the Applicant has satisfied its burden of proof. As a matter of law, the opinions offered by non-experts unsupported by clear evidence cannot overcome the professional opinion of the Applicant's expert professionals and the technical staff of the City supported by underlying technical reports. *Diana v. Gardener, v. Marion County*, 56 Or LUBA 583, 595, 2008. For example, comments from neighbors questioning the accuracy and veracity of the tree survey are not supported by evidence that controverts the tree survey provided by Applicant's expert witnesses. They offer no survey of their own that demonstrates any errors in measurements of the Applicant's surveyor's work product. Opponents merely question whether all trees located on the Subject Property were surveyed and properly identified for removal, but anecdotal comments and questions by neighbors do not outweigh the expert testimony and reports in the record. Even the photographic evidence provided by opponents lacks all necessary context and does not respond to the actual criteria, which require measurements of trees taken in accordance with the City's code. Applicant's tree survey is uncontroverted, and the City must approve the proposal.

VII. The City Cannot Deny the Application Based on Ambiguous Criteria and Standards, nor Can it Discourage Needed Housing Through Unreasonable Cost or Delay

The proposal is for a housing development located outside of Oregon's City of Portland Metro area and outside of any designated historic area. The City has not adopted an applicable alternative

approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics. The Decision applies the non-discretionary standards under SRC 702.020. The issues in this appeal do not involve a request for or application of the City's discretionary design standards. Therefore, the City may "only [apply] clear and objective standards, conditions and procedures regulating the development of housing." ORS 197.307(4). Even the application of clear and objective standards or criteria or other conditions of approval "[m]ay not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." ORS 197.307(4)(b). It is the City's burden of proof to demonstrate "that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner."

The City generally prohibits removal of significant trees or trees within a riparian corridor related to housing developments on lots greater than 20,000 square feet, including removal of 30 or more of the CRZs, unless an applicant can prove that "[t]here are no reasonable design alternatives that would enable preservation of the tree(s)." SRC 808.030(d)(5); SRC 808.035(d). By the plain text of this standard, it requires application of subjective discretion. In *Backer v. City of Salem*, LUBA acknowledged the latitude this standard creates in the factfinder's analysis in determining whether other design alternatives are "reasonable" or not. LUBA No. 2022-053 (December 1, 2022) WL 18354153, at *4. While LUBA did not reach the assignments of error challenging whether this ordinance complies with ORS 197.307(4), and the City did not make findings itself on the issue, it is clear the City cannot satisfy its burden of proof on judicial review. The City is prohibited from reversing or denying the proposal based on SRC Chapter 808 restrictions on removal of significant trees or trees in the riparian areas, and all conditions of approval are unlawful.

As a second alternative assignment of error, the Applicant asserts that requiring the Applicant to retain any trees that have been identified for removal will cause an unreasonable cost or delay, and such conditions of approval are prohibited under ORS 197.307(4)(b).

VIII. The City Cannot Reverse or Remand the Decision without Complying with ORS 197.522 and ORS 197.195

The proposal is for residential housing, and it is entitled to procedural protections under ORS 197.522. The proposal was approved by the City's Planning Administrator after making findings of fact and conclusions of law that the proposed development is consistent with the applicable approval criteria and standards. The City Council may not reverse the underlying Decision denying the proposal without first providing the Applicant notice of the reasons for the City Council's proposed denial and provide an

opportunity to Applicant to modify the proposal or offer conditions of approval. In the event that, after the close of the record and hearing, the City Council concludes that the application does not satisfy a mandatory approval criterion or standard, the City Council must reopen the record and provide the Applicant an opportunity to modify the proposal or propose a condition. *Icon Construction and Development, LLC, v. City of Oregon City*, LUBA No. 2022-100 (May 19, 2023) WL 3968361, at *9. Applicant requests a minimum of thirty (30) days to modify or propose conditions in the event the City Council votes to remand or reverse the Decision and conditionally grants a corresponding extension to the City's 120 rule obligations.

IX. The City Cannot Apply Uncodified Development Standards

This proposal is for site development on property located within the City's UGB. It is a limited land use decision. The City may only apply codified development standards and criteria. It may not apply to any standards that are part of the City's comprehensive plan. The Decision makes the following findings:

"Salem Revised Code (SRC) 200.025(d) & (e) set forth the applicable criteria that must be met before an Urban Growth Preliminary Declaration may be issued. The following subsections are organized with approval criteria followed by findings identifying those public facilities that are currently in place and those that must be constructed as a condition of the Urban Growth Preliminary Declaration in order to fully serve the ***development in conformance with the City's adopted Master Plans and Area Facility Plans*** (emphasis added)."

The City's UGA criteria violates ORS 197.195(1) as it requires conformance with uncodified master plans and area facility plans.

X. Conclusion

The City must affirm the Planning Administrator's Decision without new conditions of approval.

From: [Jamie Donaldson](#)
To: [Amy Johnson](#)
Subject: FW: Titan Hill Hearing
Date: Thursday, July 20, 2023 4:09:25 PM
Attachments: [6773b-SDR12-GRD SE.pdf](#)
[Memo.pdf](#)

Hi Amy,

Additional testimony attached for Titan Hill Appeal on Monday night.

Thank you,

Jamie Donaldson

Planner II

City of Salem | Community Development Department

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JDonaldson@cityofsalem.net | 503-540-2328

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Questions on Zoning and Sign Permits can be submitted by email to Planning@cityofsalem.net

From: Brandie Dalton <BDalton@mtengineering.net>
Sent: Thursday, July 20, 2023 1:33 PM
To: Jamie Donaldson <JDonaldson@cityofsalem.net>
Subject: Titan Hill Hearing

Jamie,

We wanted you and the Council to have a copy of the revised grading plan. Not sure if this is already part of the packet, but we want to make sure it is.

Please make my memo and revised grading plan part of the record for the July 24, 2023 hearing.

Thank you,

Brandie Dalton

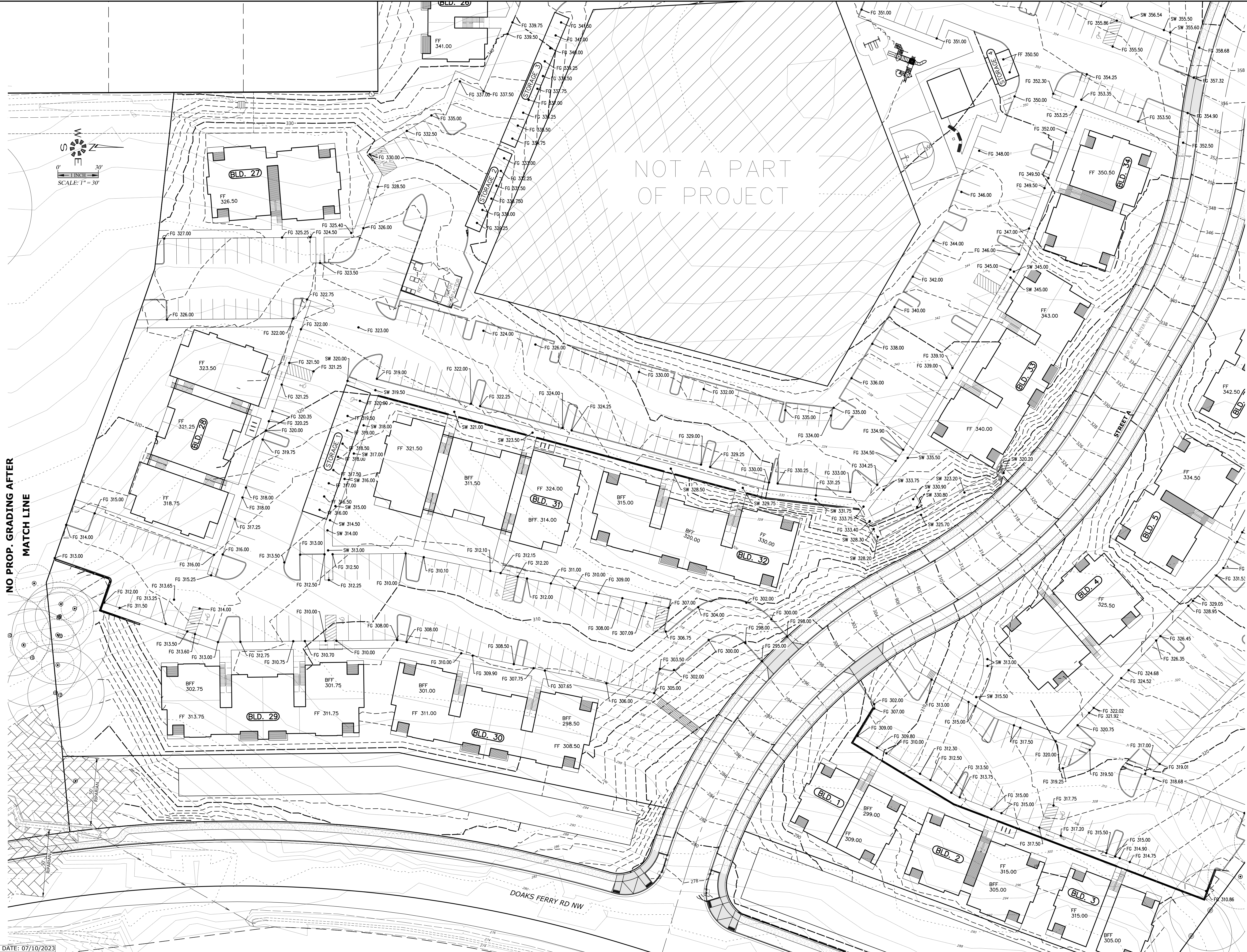
Land-Use Planner

Multi/Tech Engineering Services, Inc

1155 SE 13th Street

Salem, Oregon 97302

(503) 363-9227



**NO PROP. GRADING AFTER
MATCH LINE**

NOT A PART
OF PROJECT

DOAKS FERRY RD NW

ISSUE DATE: 07/10/2023



MULTI/TECH

ENGINEERING SERVICES, INC.
 1155 13th St. S.E. Salem, OR, 97302
 PH: (503) 363 - 9227 FAX (503) 364-1260
www.intengineering.net office@intengineering.net

LOT GRADING PLAN SOUTHEAST

TITAN HILL APARTMENTS

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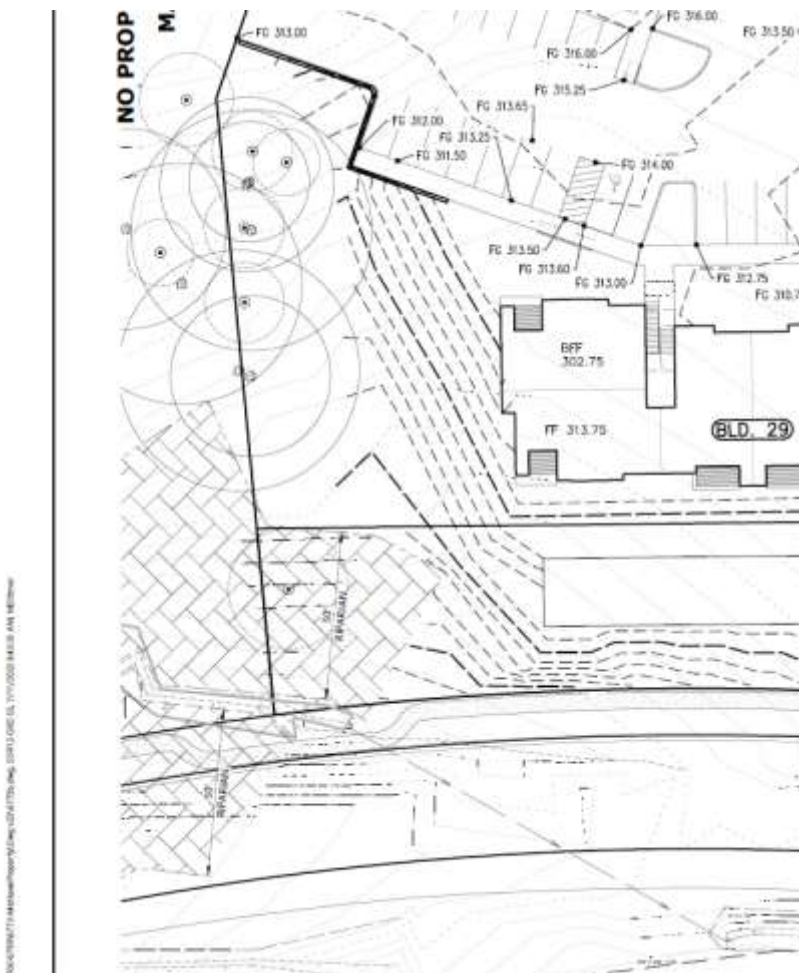
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Drawn: M.K.D.
Checked: J.J.G.
Date: OCT. 2019
Scale: AS SHOWN



JOB # 6773

SDR12



From: [Amy Johnson](#)
To: [Steve Anderson](#); [CityRecorder](#)
Cc: [Jamie Donaldson](#); [michaelfreitas9459@att.net](#)
Subject: RE: Testimony for 7_24 City Council Meeting
Date: Thursday, July 20, 2023 3:47:24 PM

Hello Mr. Anderson,

I'm confirming receipt of your email and your testimony will be included in the record. I won't be sending out testimony packet today, but you're welcome to forward your email directly to citycouncil@cityofsalem.net.

Sincerely,

Amy

Amy Johnson
Deputy City Recorder
City of Salem
555 Liberty Street SE, Rm. 225
Salem, OR 97301
ajohnson@cityofsalem.net | 503-588-6091

From: Steve Anderson <andersonriskanalysis@comcast.net>
Sent: Thursday, July 20, 2023 1:25 PM
To: CityRecorder <CityRecorder@cityofsalem.net>
Cc: Jamie Donaldson <JDonaldson@cityofsalem.net>; michaelfreitas9459@att.net
Subject: Testimony for 7_24 City Council Meeting

City Recorder:

Please include the attached two PDFs containing the West Salem Neighborhood Association testimony for Agenda Item 4.a. in the packets to be distributed today to mayor and council and the official record. Please confirm receipt of this email and action. If you have questions, please let me know. Thank you.

Steven A. Anderson, West Salem Neighborhood Association Land Use Chair
andersonriskanalysis@comcast.net
503-602-1623



Mayor Hoy and Salem City Council Members:

The combined Titan Hill subdivision and development request is a complex land use action approved by the Salem Planning Administrator with 63 separate conditions. This large number of conditions of approval raises questions as to the merits of this application. While City staff has diligently sought to answer the six questions raised by the West Salem Neighborhood Association (WSNA), there remains multiple elements of the decision that raise unanswered questions (see Exhibit 1). Specifically:

- The decision does not satisfy the Salem Revised
- The applicant failed to include relevant and accurate data (errors and omissions)
- The applicant submitted inaccurate declarations of fact

Staff, too, have erred. For example, the May 10th decision packet states:

“The subject property is approximately 37 acres in total size, zoned RM-II (Multiple Family Residential), and located at the 2100 Block of Doaks Ferry Rd NW (Polk County Assessor Map and Tax lot 073W17B / 400).”

Then on July 3rd in the Notice of Appeal before the City Council repeated the same declaration:

“The subject property is approximately 37 acres in total size, zoned RM-II (Multiple Family Residential), and located at the 2100 Block of Doaks Ferry Rd NW (Polk County Assessor Map and Tax lot 073W17B / 400).”

The error:

The approximately 37-acres are **NOT** zoned RM-II; only a portion of Tax Lot 400 is so zoned.

It would be easy to conclude we are viewing a simple scrivener’s error. That may be the case, but as we reviewed the entire decision package, more findings of questionable accuracy were discovered. Therefore, the WSNA appealed.

A Point of Order: To the city attorney, given that the Decision of Approval package and the Appeal notice both are not a true description of the proposed project under consideration, how does this misstatement of fact affect the case? Can an erroneously noticed appeal hearing proceed? How should testimony and any further submissions of all parties in this matter be verified to reflect the truth and accuracy?



AT ISSUE

The Titan Hill subdivision and development applicant **has not met their burden of proof** or shown that the 63 conditions of approval can be satisfied by the facts in the record.

The WSNA herein presents arguments, and will in verbal testimony before council, that the evidence submitted by the applicant does not satisfy the Salem Revised Code. Furthermore, numerous errors and omissions compound the applicant's failure to include relevant and accurate data and inaccurate declarations of fact will be presented.

Exhibit 1 shows 51 specific examples of questions not addressed in the May 10th findings. The WSNA requests that the council consider and address the evidence in each of the 51 issues specifically, not in a summary judgement.

The WSNA believes that there is sufficient evidence that the applicant has not met their burden of proof. Even with 63 conditions of approval, the applicant has not shown that approval criteria can be satisfied by the proposed project, or that the Salem Revised Code has been complied with. There is merit and evidence for a council decision not to approve this application.

Council Rule 19 "Burden of Proof; Standards and Criteria"

- The applicant has the burden of proof on all elements of the proposal, and the proposal must be supported by proof that it conforms to **all applicable standards and criteria**.
- The decision shall be based on the **applicable standards and criteria set forth in the Salem Revised Code**, the Salem Area Comprehensive Plan, and, if applicable, any other land use standards imposed by state law or administrative rule.
- The applicant and any opponents may submit to the hearing body a set of written findings or statements of factual information which are intended to demonstrate that the proposal complies or fails to comply with any or all applicable standards and criteria.

KEY/FOCUAL ISSUES HERE

Until the 51 specific examples in Exhibit 1 are addressed by the applicant, this proposal fails to comply with **all** applicable standards and criteria. Other community members will address, in detail, where the applicant has not met their burden of proof. The weight of evidence questions the validity of approval of this application. Findings related to the following are of prime concern here.

1. A key issue centers on the "intent to preserve" declaration of SRC 808 regarding significant trees and White Oaks and the request by the applicant for a tree variance to remove 53 significant trees on the site. Given the large number of trees to be removed, "intent to preserve" is questionable.



2. The White Oaks along the west side of Doaks Ferry Road NW north of Orchard Heights Road are not identified on the SDR7 sheet. Any sidewalk work here will result in the removal of a large number of White Oaks not addressed in the tree variance application.
3. Wilark Brook passes across this property. It is a cold-water trout stream that empties into a temperature water quality limited salmon habitat stream. What effects will this subdivision have on the temperature profile of Wilark Brook? What effects will this subdivision have on the hydrological flow and groundwater recharge of Wilark Brook? What effect will the stormwater detention system have on nutrient levels and metal levels and forever chemicals in Wilark Brook? Are there benefits from having a zero-discharge stormwater detention system versus a flow release system? What are the environmental impacts, including an analysis of changes to the urban forest canopy, from this subdivision, on Wilark Brook and the wetlands immediately downstream across Doaks Ferry from this subdivision? There is no demonstration or evidence to show that SRC 205.01(d)(2) regarding impeding the future use or development of the property (specifically lot 6) or adjacent land has been met.
4. The validity of including conditions of approval based upon future city council action. Are these enforceable conditions with certain outcomes? There is no way to prove that the applicant can meet these conditions of approval. Additionally, if the expected future approval is not achieved, what then? Staff in their answer to EV Chargers (Decision of Approval, page 8) states:

*“The provision for multi-family buildings to ensure 40 percent of their parking on spots are available for Electric Vehicle (EV) charging stations (are wired to allow chargers) was adopted to the Salem Revised Code and effective as of December 28, 2022. The subject application was submitted on September 21, 2022, **prior to the code amendment, as is therefore reviewed with conformance with the standards in place at the time the application was submitted**, which did not include the requirement for EV charger conduits.”*

Staff stated that they cannot enforce a future standard here. Thus, it seems contrary to logic that, given this position, why a future action of the city council can be considered a valid condition of approval.

Therefore, conditions of approval relating to council's future action, for example, changing the Salem TSP, are unenforceable. The applicant is not able to comply with them.

5. In conclusion, there are numerous additional questions in Exhibit 1 that demonstrate the applicant has not followed the provisions of the Salem Revised Code.

General Questions:

1. Do the documents submitted by the applicant demonstrate that all Salem subdivision and development approval criteria have been met?
2. The DECISION report indicates that the site totals 34.72-acres pg. 1¹ which is approximately 1,599,598 SQ FT pg. 81 and that the acreage is to be divided into six lots of varying sizes² containing 1,392,286 SQ FT. What explains the total six lot square foot area reduction?
3. How many linear feet of public right-of-way explain the reduction in the total land in the proposed subdivision 6 lots?
4. Has or does the applicant intend to request an SRC 205.035(c)(7)(B) deferral for any of the listed conditions?

“SRC 205.010(d)(3): Development within the tentative subdivision plan can be adequately served by City infrastructure.”

Finding: The subject property is located outside of the Urban Service Area, and therefore, an Urban Growth Preliminary Declaration has been required. The Public Works Department reviewed the proposal and determined that the proposed development is designed to accommodate required on-site and off-site improvements, as conditioned.” pg. 2 & 24

Condition 5: Extend a minimum 12-inch public water main within the new internal streets to serve neighboring property and the proposed development pursuant to PWDS. pg. 2 & 24

Questions:

1. Where will the required potable water link be made to the Salem public water main?
2. How will the development protect the Orchard Heights Water District customers and provide potable water service to the Orchard Heights Water District customers on Emerald Lane?
3. How will the new public water main provide service to Landaggard residential properties?

Condition 6: Construct a Salem Wastewater Management Master Plan identified sewer main in Doaks Ferry Road NW from the intersection of Doaks Ferry Road NW and Brush College Road NW to the proposed development pursuant to PWDS. pg. 2 & 24

Questions:

1. As far as Condition 6 is a subdivision approval criterion, does this mean the proposed sewer main service must extend to the western boundary of Tax Lot 400 on Orchard Heights Road?
2. Why or why not?

¹ This and all other page numbers of references are the PDF page number of the 125-page Notice of Decision document.

² Lot 1= 206,793 Lot 4= 104,572
Lot 2= 16,862 Lot 5= 393,067
Lot 3= 151,296 Lot 6= 519,696 pg. 79

Total square feet= 1,392,286



3. Is the proposed sewer line diameter adequate to serve all future development west of Doaks Ferry and north of Orchard Heights?

Condition 7: Extend a minimum 8-inch public sewer main within the new internal streets to serve neighboring property and the proposed development pursuant to PWDS. pg. 2 & 25

Questions:

1. Does condition 7 requirements include Landaggard properties?
2. Why or why not?
3. How can the sewer system serve the Landaggard properties abutting Orchard Heights Rd without extending the Doaks Ferry sewer line facility up to Landaggard along Orchard Heights Rd?
4. Will Landaggard property owners be eligible for Bancroft bonding? [ORS 223.207]
5. Will the 8-inch line extend to the north west termination of Street A?

Condition 11: Convey land for dedication to equal a half-width right-of-way of 48-feet on the development side of Doaks Ferry Road NW, including sufficient right-of-way to accommodate public infrastructure at the property corners. pg. 3 & 26

Questions:

1. By how much does this condition reduce the total area of proposed lot 6?
2. What are the legal metes and bounds for each of the six parcels created upon approval of SUB-UGA-SPR-ADJ-TRV-DR23-02?

Condition 12: Construct a half-street improvement along the frontage of Doaks Ferry Road NW to an interim minor arterial street standard as specified in the City Street Design Standards and consistent with the provisions of SRC Chapter 803. pg. 3 & 26

Question:

What is the disposition of white oak trees along the west side of Doaks Ferry Road south of Orchard Heights Road?

Condition 14: Dedicate a 10-foot public utility easement along the street frontage of all internal streets and along Doaks Ferry Road NW abutting the proposed “W.Q. Parcel” as shown on the applicants tentative Plan. 3 & 27

Questions:

1. Why are the two “Water Quality Parcels” not separate lots within the proposed subdivision?
2. Since this condition is a subdivision approval requirement does condition 14 address a 10-foot easement along the lot 6 public rights-of-way frontage?
3. Why or why not?

Condition 16: Prior to issuance of Public Construction Permits, the applicant shall receive a final City Council decision on the proposed Salem Transportation System Plan Amendment (22-121104-GP) relating to the collector street alignment that is mapped through the property. pg. 3 & 27



Question:

Does Condition 16 mean the TSP amendment must be approved prior to the initiation of subdivision infrastructure construction?

Condition 22: Modify the proposed “Street C” stub street location to the north line of proposed Lot 2 to avoid conflicts with existing structures on neighboring property not included in the development proposal. pg. 29

Finding: Proposed Lot 2 is 16,862 square feet in size, while the remaining lots are 104,572 square feet or greater. The applicant’s plans indicate development of Lot 2 will contain a building of six attached dwelling units, meeting the minimum standard of three or more attached dwelling units. However, due to the street alignment changes of “Street C,” as required by Condition 22, Lot 2 will not be platted as a separate lot. This standard is met. pg. 22

Questions:

1. With the approval of condition 22, what is the disposition of lot 2?
2. Which lot will increase in size?
3. How does this revision in the number of lots modify SUB-UGA-SPR-ADJ-TRV-DR23-02?
4. Does such a modification in the proposed subdivision require the applicant to revise the subdivision application?
5. Why or why not?

Condition 23: Obtain any necessary street tree removal permits pursuant to SRC Chapter 86. pg. 29

Questions:

1. To which “street trees” does Condition 23 apply?
2. Under what provisions of SRC 86.090 will the required removal permit be issued?
3. If either criterion (a)(8) or (9) are cited, what “adverse effect on adjacent infrastructure” or “if there is no reason alternative due to construction”³ which justification will be cited to explain the removal of Oregon white oaks along the public rights-of-way.
4. Since condition 23 is a subdivision obligation, does this mean the final plat cannot be issued until a valid tree removal permit is issued?

Condition 24: Install street trees to the maximum extent feasible along Doaks Ferry Road NW, Orchard Heights Road NW, and internal streets constructed within the subdivision. pg. 29

Questions:

1. What does the phrase “maximum extent feasible” mean?
2. Under what detailed circumstances can “significant street trees” become eligible to be replaced?

³ According to the Salem Transportation System Plan public right-of-way center lines may be move left or right by 200-feet.

3. Is the Oregon white oak eligible to be “installed” as a street tree?

Condition 26: As shown on the applicant’s tentative plan, dedicate public pedestrian access easement from “Street A” to Lot 6. pg. 31

Questions:

1. Why is this condition needed in light of condition: 27?
2. A review of applicant's sheet SDR8 at PDF page 81 shows no “tentative” direct pedestrian access between “Street A” and Lot 6. Which tentative plan sheet is condition 26 referencing?

Condition 27: Dedicate an additional public access easement for vehicular and pedestrian access from “Street A” to Lot 6 through the southeastern drive aisle within the development site. This easement may be dedicated by separate document and extinguished if determined not necessary at time of Site Plan Review for proposed Lot 6. pg. 31

Question:

How does condition 27 interface with condition 26?

Condition 28: Along Wilark Brook on the subject property, dedicate an Open Channel Drainage Easement. In accordance with PWDS, the easement width shall be either 15 feet from the channel center line, or 10 feet from the top of the recognized bank, whichever is greater. pg. 32

Question:

Is this mapping requirement to be completed prior to final plat approval obligation?

SRC 205.010(d)(6): 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. For purposes of this criterion, neighborhood activity centers include, but are not limited to, existing or planned schools, parks, shopping areas, transit stops, or employment centers. pg. 34

Finding: The proposed development is served by Grice Hill Park .25 miles west of the subject property, and West Salem High School Park .35 miles southwest of the subject property. Access to the park is available through the existing transportation system. This criterion is met. pg. 34

Questions:

1. The SRC205.010(d)(6) finding accurately identifies the distance to the two cited parks from Titan Hill subdivision southwest corner on Orchard Heights Road. How will that corner be linked to the area being developed and/or the intersection of Landaggard and the driveway to the West Salem High School?
2. Is there an existing pedestrian transportation system between Landaggard and the Grice Hill Park?
3. Does the actual Titan Hill development include any access through lot 6 to the dwellings that will be accessed via “Street A” at Doaks Ferry Road and the current northern terminus of Landaggard?



4. Access from the development via Landaggard to the WSHS Park is under a half-mile provided Landaggard is upgraded to pedestrian ADA standards. Will Landaggard be upgraded for safe pedestrian access to the WSHS and WSHS Park?

Condition 30: As specified in the TIA, provide the following mitigation:

ii. Construct sidewalks along Doaks Ferry Road from the intersection of Orchard Heights Road NW to the northern boundary of the site.

iii. Construct a linked ADA pedestrian connection from the proposed development across Orchard Heights Road NW, including a raised pedestrian refuge on the west side of the intersection. Improvements shall include upgraded ADA ramps on both sides of Landaggard Drive NW and the western side of the West Salem High School driveway, and a sidewalk extension along the north side of Orchard Heights Road NW to the intersection with Doaks Ferry Road NW. Pursuant to SRC 200.035(a)(4), sidewalks shall also be provided along the frontage of 2357 Orchard Heights Road NW (Polk County Assessors Tax Lot No. 073W17D00900). pg. 34/35

Questions:

1. Must all the elements of condition 30 be completed before the final plat is approved?
2. Does item **iii** require sidewalk construction along Orchard Heights Road west of the lot 6 property line?
3. What improvements beyond those listed under **iii** are to make to the intersection of Landaggard and Orchard Heights Road?
4. Does **iii** include a sidewalk or sidewalks along the length of Landaggard?
5. Why or why not?

Condition: 31: Install not more than four speed humps on Landaggard Drive NW in locations approved by Public Works and in accordance with PWD. pg. 35

Questions:

1. Since this is a subdivision requirement which appears applicable only when construction of the dwellings begin, when are the speed humps to be installed.
2. Will such humps be permanent?

SRC 200.060 – Standards for Sewer Improvements

Finding: The proposed development shall be linked to adequate facilities by the construction of sewer lines and pumping stations, which are necessary to connect to such existing sewer facilities (SRC 200.060). The nearest adequate sewer is located at the intersection of Doaks Ferry Road NW and Orchard Heights Road NW, approximately one-half-mile north of the subject property. The applicant shall construct the Salem Wastewater Management Master Plan improvements and link the site to existing facilities that are defined as adequate under 200.005(a). As a condition of sewer service, all developments will be required to provide public sewers to adjacent upstream parcels, discussed further below. pg. 37



Questions:

1. Why are there no conditions associated with the SRC 200.060 findings?
2. Do the SRC 200.060 findings require the applicant to include sewer facilities along the Orchard Heights frontage or along Landaggard?
3. Why or why not?

SRC 200.070 – Standards for Water Improvements

Finding: The proposed development shall be linked to adequate facilities by the construction of water distribution lines, reservoirs, and pumping stations that connect to such existing water service facilities (SRC 200.070). The nearest available public water system appears to be located in Doaks Ferry Road NW and Orchard Heights Road NW abutting the subject property. The applicant shall provide linking water mains consistent with the Water System Master Plan adequate to convey fire flows to serve the proposed development as specified in the Water Distribution Design Standards. pg. 37.

Questions:

1. Why is there no reference or no conditions associated with existing Orchard Heights Water District service to Landaggard, portions of tax lot 400 and properties north of the Titan Hill development?
2. The applicant's demolition plan pg. 80 indicates the vacation of an existing water line that serves tax parcels north of the Titan Hill property. Which Orchard Heights Water District lines will be replaced?

Condition 41: Prior to issuance of any building permits, the final plat for the Titan Hill Subdivision shall be recorded. pg. 50

Question:

Does Condition 41 mean the Titan Hill subdivision must be approved and recorded with Polk County before dwelling construction permits are issued?

Condition 45: An additional pedestrian connection shall be provided along the west side of Landaggard Drive NW adjacent to Building 21 or 22. pg. 53

Question:

How does condition 45 support the findings associated with SRC 205.010(d)(6) and condition 30 iii?