

September 24, 2021

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VIA E-MAIL

Mr. Kelly O'Neill, Jr., Director
City of Sandy Development Services Department
Sandy City Hall
39250 Pioneer Blvd.
Sandy, OR 97055

RE: City of Sandy (the "City") File No. 21-021 SUB/TREE, Bornstedt Views Single Family Subdivision Application (the "Application"); Applicant's Objection to Use of Subjective Procedures

Dear Mr. O'Neill:

This office represents Even Better Homes, the Applicant. The Applicant has asked me to write you concerning two issues in the City's September 1, 2021 letter (the "Letter") deeming the Application complete (**Exhibit 1**). Please place this letter in the official Planning Department file for the Application.

The Application is a Needed Housing application as defined in ORS 197.303(1)(a). The Application land is zoned for residential uses. The City's population exceeds 2,500 persons and the City has not taken an exception to the definition of "needed housing" as evidenced by a lack of an exception in the City's acknowledged Comprehensive Plan.

The Application is also subject to ORS 197.307(4), (6) and (7) regulating housing, including needed housing. These sections collectively require the City to apply only clear **and** objective standards, conditions and procedures to the regulation of housing unless a clear and objective approval process is available (no such process was available in the Sandy Development Code (the "SDC") for a subdivision application submitted on May 6, 2021 based on the "Goal Post Rule" in ORS 227.178(3)) and under ORS 92.040(2) and the City's approval procedures for the Application are subject to the clear **and** objective requirements in ORS 197.307(4). The Application land is not subject to ORS 197.307(5) because it is not in a formally adopted central city plan nor is it in an historic area.

Other statutes applicable to the Application include ORS 197.522(1)-(3), 227.173(2) and 227.175(4)(b)-(e).

The Letter deemed the Application complete but also stated that the Director elevated the Application to a Type III procedure and that unspecified Type III variance applications, not requested by the Applicant, are the basis for the Director's subjective decision. The Applicant explained in its completeness submittal why all of the relevant clear and objective approval criteria were satisfied.

The Director does not have the authority to subjectively elevate the Application from a Type II to a Type III procedure because doing so is not subject to clear and objective standards and procedures. The Letter's sole reason for doing so is the lack of Type III variances not requested by the Applicant.

SDC 17.12.20.D (**Exhibit 2**) provides that a subdivision application in compliance with the SDC is a Type II application and authorizes the Director to elevate the Application to a Type III procedure under limited situations in SDC 17.12.30. SDC 17.12.30 is referred to as a "discretionary process." Neither standard is clear and objective but even if one were, the elevation provision is dependent upon a subjective standard-"*if the Director contemplates persons other than the applicant can be expected to question the application's compliance with the Code*"-which is contrary to the Director's authority under ORS 197.307(4). Moreover, the Letter shows that the Director elevated the Application because of the lack of requested Type III variances, which is *not* a basis for elevation under SDC 17.12.30, thus demonstrating the Director's use of unknown and subjective standards to elevate the Application. In addition to improperly applying a subjective standard to the Application, the Director exceeded his authority to do so under the relevant SDC standard for elevation under a Type II procedure.

The Director has no authority to apply Type III variances for the Application not requested by the Applicant. ORS 227.178(1)-(3). If the City finds that the Application does not meet applicable clear and objective approval standards, the Applicant has the unfettered right to either propose a modification to the Application or to propose a condition of approval to make the application consistent with the relevant clear and objective standard. ORS 197.522(3) (**Exhibit 3**). Further, the Director failed to identify in the Letter the relevant standards subject to the variances and thus did not meet the City's burden of showing that such standards meet *both* ORS 197.307(4) and 197.195(1).

The Applicant respectfully requests that the Director apply the Type II procedure to the Application and not apply unknown variances not requested by the Applicant in the Application. Failure to do so violates ORS 197.307(4) by applying a subjective process which has the cumulative effect of discouraging needed housing through unreasonable cost and delay.

Mr. Kelly O'Neill, Jr., Director
September 24, 2021
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Very truly yours,

A handwritten signature in blue ink that reads "Michael C. Robinson". The signature is written in a cursive, flowing style.

Michael C. Robinson

MCR:jmhi
Enclosures

cc: Mr. Mac Even (*via email*) (*w/enclosures*)
Mr. Tracy Brown (*via email*) (*w/enclosures*)
Mr. Ray Moore (*via email*) (*w/enclosures*)
Mr. Mike Ard (*via email*) (*w/enclosures*)
Mr. Chris Crean (*via email*) (*w/enclosures*)
Mr. Garrett Stephenson (*via email*) (*w/enclosures*)

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September 1, 2021

Mac Even
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Gresham, OR 97030

All County Surveyors & Planners, Inc.
PO Box 955
Sandy, OR 97055

William Bloom
PO Box 1283
Wrangell, AK 99929

Tracy Brown Planning Consultants
17075 Fir Drive
Sandy, OR 97055

RE: NOTICE REGARDING INCOMPLETION OF SUBMISSION
FILE NUMBER: 21-021 SUB/TREE
PROJECT NAME: Bornstedt Views Subdivision

Application accepted as complete on: August 17, 2021

- Application incomplete. The additional information necessary to consider your application is listed below. The application will be deemed complete upon submission of one of the following options:
1. All of the missing information;
 2. Some of the missing information and written notice that no other information will be provided; or
 3. Written notice that none of the missing information will be provided.

If one of the above listed options is not received by the city by the 180th day following submittal of your application, the application will be void per state law (ORS 227.178 (4)).

Requested additional information filed on: _____

Following submission of your land use application (received on 5/06/2021), staff found the application incomplete on June 3, 2021. On August 17, 2021, the applicant submitted some of the missing information and written notice that no other information will be provided. The applicant further requested that the application be deemed complete effective August 17, 2021 for the purpose of beginning the "120-day clock." Thus, staff finds the application complete as of August 17, 2021 for the purpose of beginning the "120-day clock."

The applicant submitted the application as a Type II Subdivision and did not apply for any variances. However, as explained in the incompleteness letter from June 3, 2021 staff finds that several Type III variances are required to process the subdivision request as submitted. Therefore, staff has elevated the subdivision request to the Planning Commission for review. A Planning Commission hearing will be scheduled.

Please call me at (503) 783-2585 or email emeharg@ci.sandy.or.us if you have any questions.

Sincerely,



Emily Meharg,
Senior Planner

Sec. 17.12.20. Type II—Noticed administrative review.

Type II decisions are made by the Planning Director or designee with public notice, and an opportunity for a public hearing if appealed. An appeal of a Type II decision is heard by the Planning Commission according to the provisions of Chapter 17.28. Notification of a Type II decision is sent according to the requirements of Chapter 17.22. If the Director contemplates persons other than the applicant can be expected to question the application's compliance with the Code, the Director may elevate an application to a Type III review.

Types of Applications:

- A. Design Review, except Type I Design Reviews under Subsection 17.12.10.B. and Type III Design Reviews under 17.12.30.
- B. Historic Preservation Provisions Procedures for Alteration of an Historic Resource.
- C. Adjustments and Variances of up to 20 percent of a Quantifiable Dimension which does not increase density.
- D. Subdivisions in compliance with all standards of the Development Code.**
- E. Partitions and Minor Replats.
- F. Flood, Slope and Hillside Development and Density Transfer-Uses listed in 17.60.40.
- G. Request for Interpretation.
- H. Tree Removal Permit (greater than 50 trees).
- I. Minor Conditional Use Permit.

Comprehensive Land Use Planning

ORS 197.522

Local government to approve subdivision, partition or construction

- **conditions**

(1) As used in this section:

- (a) “Needed housing” has the meaning given that term in ORS 197.303 (“Needed housing” defined).
- (b) “Partition” has the meaning given that term in ORS 92.010 (Definitions for ORS 92.010 to 92.192).
- (c) “Permit” means a permit as defined in ORS 215.402 (Definitions for ORS 215.402 to 215.438 and 215.700 to 215.780) and a permit as defined in ORS 227.160 (Definitions for ORS 227.160 to 227.186).
- (d) “Subdivision” has the meaning given that term in ORS 92.010 (Definitions for ORS 92.010 to 92.192).

(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 (Final action on permit or zone change application) 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 (Final action on certain applications required within 120 days) 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.**

(4) A local government shall deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through amendments to the application or the imposition of reasonable conditions of approval. [1999 c.838 §4; 2015 c.374 §3]

Note: 197.522 (Local government to approve subdivision, partition or construction) was added to and made a part of ORS chapter 197 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

Location:https://texas.public.law/statutes/tex._occ._code_title_3_subtitle_h.