

MEMORANDUM

TO: Chair Crosby
Sandy Planning Commission

FROM: David Doughman, City Attorney's Office

SUBJECT: Deer Meadows Subdivision Application

DATE: November 1, 2021



On November 8, 2021, the Sandy Planning Commission (“PC”) will conduct deliberations for the Deer Meadows application. The PC held an initial evidentiary hearing on September 27. That evening, the PC closed the hearing but left the record open for additional written testimony. The record closed on Monday, October 25. The city asked us to provide a memo for the record with respect to some of the legal issues that relate to the application. In addition, we want to note a couple procedural matters for the November 8 deliberation.

Procedural Considerations

The deliberation on November 8 is for the PC to discuss the application and, based on the testimony and evidence presented, determine whether the application should be approved, approved with conditions or denied. The purpose is not to consider additional testimony or evidence from the applicant or members of the public. However, as part of deliberating, the PC may ask questions of staff or the city attorney.

In its final written argument dated October 25, the applicant noted two possible ways the PC could take additional testimony on (or after) November 8. These are addressed in paragraphs (I) and (K) of that letter. I want to briefly respond to both of those points.

- In paragraph (K), the applicant states it would not object to answering any questions the PC may have of the applicant while it deliberates. I did speak with Mike Robinson, the applicant’s lawyer, about this. As I said to him, while the PC could technically do this, it can create procedural problems (particularly in a remote environment) and potentially entitle other parties an opportunity to respond. To avoid procedural concerns, I would recommend the PC not ask questions of the applicant during its deliberation.
- In paragraph (I), the applicant refers to ORS 197.522, a statute that applies to housing applications. The statute says that before denying an application, the local government must allow an applicant the opportunity to either propose an amendment to its application or propose a condition of approval. If an applicant decides to offer an amendment or a condition of approval, the local government may then extend the 120-day deadline in order to study the

applicant's proposal and determine whether it resolves the basis for the denial. Although local governments must offer this opportunity to an applicant, an applicant is not required to take any action.

- Although I do not believe the PC has experience with this process, it was required and implemented during a hearing in 2020 before the Sandy City Council on the Bailey Meadows application.
- If it appears the PC will deny the application, before voting on a motion the PC will need to offer the applicant one opportunity to amend its application or propose a condition of approval. Our office would guide the PC through the particulars. If the applicant were to offer an amendment or a condition, we would need to work out the details of that on November 8. It would likely result in an additional open record period narrowly focused on the proposed amendment/condition and a subsequent rescheduling of the deliberation. As indicated above, the statute authorizes the city to establish a new 120-day deadline if an applicant proposes an amendment or a condition.

Finally, with respect to procedure, we would remind PC members at the start of the deliberation to declare any ex-parte contacts that may have occurred between September 27 and November 8. We will also want to allow for any party to challenge a disclosure through the appropriate mechanism on Zoom. For example, after the declarations, we should pause briefly to allow people to use the "raise hand" function or dial *9 if they are on the phone. Parties may also use the same raise hand or *9 functions if they believe they have a legal basis to object to some aspect of the PC's deliberation (for example, if they believe the PC is considering evidence that is not in the record).

Substantive Considerations

The primary legal issues involved in this application relate to two Oregon statutes. One of them, ORS 197.307(4), is specific to applications that propose housing, regardless of the cost of the housing or type of housing. It requires local governments to apply only "clear and objective" criteria, conditions and procedures to an application for housing. The other one, ORS 197.195, is applicable to subdivisions. It says comprehensive plan provisions that serve as a basis to approve or deny subdivisions must be incorporated into the development code. Both have existed for years. However, over the past few years and for a variety of reasons, the two statutes now often play a significant role in applications for housing. This has been true in Sandy and in many other cities and counties throughout the state.

Under ORS 197.307(4), "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing." While seemingly straightforward, this is easier said than done. The Land Use Board of Appeals ("LUBA") itself once remarked that "few tasks are *less* clear or *more* subjective than attempting to determine whether a particular land use approval criterion is clear and objective."¹ Nevertheless, LUBA and the courts will generally find standards that require "subjective, value-laden analyses that are designed to

¹ *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 155 (1998) (emphasis in original).

balance or mitigate impacts of the development” to violate ORS 197.307(4).² Examples have included:

- A criterion allowing a decision maker to impose conditions “if it is deemed necessary to mitigate any potential negative impact caused by the development.”
- A criterion requiring development to have a “minimal adverse impact on the livability, value and appropriate development” of other properties in a neighborhood.
- A standard requiring development to “minimize” possible conflicts between pedestrians and vehicles, “where necessary for traffic circulation.”

However, based on other cases that have considered ORS 197.307(4), it is very difficult to draw “bright lines” that readily distinguish criterion that are clear and objective from those that are not. In our opinion, simply because a decision maker must exercise some discretion does not result per se in a violation of the statute.

In a recent case from Cannon Beach, LUBA stated that a standard may be “clear and objective” and comply with ORS 197.307(4) even *if* an interpretation is required to apply it.³ In that case, the Board said: “[t]he fact that some interpretation is required does not make a term not clear and objective. Instead, a standard is not clear and objective if it is capable of being applied in multiple ways in a manner that allows the city to exercise significant discretion in choosing which interpretation it prefers.” Sometimes, it will be fairly easy to conclude that a standard requires a “value-laden” analysis and allows for significant discretion. Many other times, it is difficult to draw that conclusion.

In the interest of time and cost, we cannot respond in this memo to every specific argument the applicant makes regarding whether applicable code criteria are clear and objective, whether certain comprehensive plan standards are sufficiently incorporated into the code, etc. Of course, we will discuss these issues with the PC during its deliberation and advise the PC accordingly. One example we do wish to highlight concerns the dispute over whether the city can require the applicant to dedicate park land.

While not free of doubt, we believe the relevant law would permit the city to require a dedication of park land in accordance with the formula provided in Chapter 17.86 of the city’s code. The dedication requirement clearly applies to subdivisions. Determining the amount of land an applicant must dedicate does not involve any discretion. Rather, the amount is determined through a mathematical formula clearly stated in the code. The city does retain the discretion to require a fee-in-lieu of dedication. However, that discretion amounts to a binary choice between requiring land or requiring cash in-lieu, in an amount set by resolution. The criteria do not require a value-laden analysis that is susceptible to multiple different interpretations or that may be applied in a variety of ways to various applications.

As usual, we will participate in the PC’s deliberations on November 8. In the meantime, please let us know if we can answer any questions.

² *Id.* at 158.

³ *Roberts v. City of Cannon Beach* (LUBA No. 2020-116, July 23, 2021)