PERKINSCOIE

1120 NW Couch Street
10th Floor
Portland, OR 97209-4128

+1.503.727.2000
+1.503.727.2222
PerkinsCoie.com

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Michael C. Robinson
MRobinson@perkinscoie.com
D. +1.503.727.2264
F. +1.503.346.2264

VIA EMAIL ONLY

Mayor Russ Axelrod
West Linn City Council
City Hall
22500 Salamo Road
West Linn, OR 97068

Re: Appeal of Planning Commission Denial of Applications for Mixed-Use Development
City File Nos. DR-15-11 and LLA-15-01 (AP-15-01)
Appellant's Letter in Support of Appeal

Dear Mayor Axelrod and Members of the West Linn City Council:

This office represents Con Am Properties, LLC ("Appellant"), the appellant in this matter and the applicant requesting approval of the Design Review II and Lot Line Adjustment applications to allow development of multi-family residential, commercial, and open space uses ("Applications") on the property located at 2410, 2422, and 2444 Tannler Drive ("Property"). This letter identifies the errors of law committed by the Planning Commission and explains why the City Council must reverse the Planning Commission's denial and approve the Applications. I have asked City staff to place a copy of this letter before you and to place a copy in the official record for this matter. Please review this letter before making a final decision on this appeal.

I. Executive Summary

The City Council must grant the appeal and reverse the Planning Commission's decision for the following reasons:

- The Planning Commission erred by making an implausible interpretation of Community Development Code ("CDC") 21.050.2.

- The Planning Commission erred in concluding that the OBC purpose statement in CDC 21.010 supports the conclusion that commercial uses are required on the first floor of structures with apartments on upper floors in the OBC zone.
- Multi-family residential uses are permitted in the OBC zone, subject to prescribed conditions, and those conditions are met in this case.
- The Planning Commission provided no valid basis to deny Appellant's property-line adjustment application, and there is none.
- The Planning Commission's conclusion that approving the Applications would lead to absurd results lacks merit.

Appellant responds to opponents' contentions as follows:

- Opponents admit that the Planning Commission erred.
- It is feasible to develop and operate permitted uses in the project's commercial spaces.
- The legislative history of CDC Chapter 21 reflects that the City Council knew how to expressly impose maximum and minimum areas limits on specific uses but chose not to do so.
- Concerned Citizens of West Linn ("CCWL") misinterprets the meaning of the term "multiple-family unit."
- Contrary to CCWL's contention, the Planning Commission erroneously applied the OBC zone purpose statement as a basis to deny the Applications.
- The City's available supply of commercial lands is not relevant to the Applications.
- Appellant identified the "first floor" and measured building height consistent with the CDC.
- The State's definition of "mixed use" is not applicable to the Applications.

- The proposed use is not an "unlisted use" subject to CDC Chapter 80.
- The City Council is not required to consider whether this is the best or most preferred development plan for the Property.

II. Background and Procedural Status

The Applications request approval of: (1) a Design Review II application to allow a mixed-use development with 180 multi-family residential units and 1,973 square feet of ground-floor commercial uses and related parking, landscaping, clubhouse, and swimming pool; and (2) a property-line adjustment to facilitate the development and create approximately three acres of open space. As set forth in the Applications, Appellant will comply with all applicable development standards, mitigate all transportation impacts caused by the development, and provide diverse housing types needed by the City.

Appellant filed the Applications in July 2015, and the City deemed them complete on July 20, 2015. City Planning staff reviewed the Applications and recommended approval, subject to conditions. The Planning Commission held the initial evidentiary hearing on August 26, 2015 and two subsequent hearings on September 2, 2015, and September 9, 2015. At the conclusion of the September 9, 2015, the Planning Commission closed the record, deliberated, and voted to deny the Applications. On September 17, 2015, the City mailed the written, signed decision of denial.

On September 30, 2015, Appellant filed the appeal form and fee and summary of appeal issues. The appeal hearing was scheduled for October 26, 2015, but it was continued to November 16, 2015. In conjunction with that continuance, Appellant requested an extension of the City's review period for the Applications until December 9, 2015.

The City Council's review is limited to the issues set forth in the Appellant's summary of appeal issues. CDC 99.280.B.1. Further, the City Council's review is on the record, and no new evidence may be considered. CDC 99.280.B.2. The City Council's standard of review is whether or not the Planning Commission committed errors of law. CDC 99.280.D. The City Council may affirm, reverse, modify, or remand the matter. CDC

99.290. This letter does not contain any new evidence and is limited to addressing issues raised in the appeal and responding to issues raised by opponents.

III. Grounds to Grant the Appeal and Reverse the Planning Commission

The City Council must grant the appeal because the Planning Commission committed the following errors of law:

A. The Planning Commission erred by making an implausible interpretation of CDC 21.050.2.

LUBA will defer to and affirm a local government's interpretation of its own code provisions, provided that interpretation is "plausible." *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). An interpretation is "plausible" if it is not inconsistent with all of the language of the local government's code relevant to the interpretation. *Id.*

In this case, the City Council cannot affirm the Planning Commission's interpretation of CDC 21.050.2 because it is not "plausible." The Planning Commission's interpretation is inconsistent with the plain language of CDC 21.050.2 in two ways because it inserts requirements that are not included in this code section.

First, the Planning Commission found that the entire first floor must be developed with commercial uses. Planning Commission Decision at p. 2. Second, the Planning Commission found that the first floor could not be utilized for parking for multiple-family uses that were located above the first floor. *Id.*

The plain language of CDC 21.050.2 does not impose either of these requirements. Instead, this section simply requires that multi-family residential units must be located above the first floor:

> "21.050 USES AND DEVELOPMENT PERMITTED UNDER PRESCRIBED CONDITIONS
>
> "The following uses are allowed in this zone under prescribed conditions:

"* * * *

"2. Multiple-family units, as a mixed use in conjunction with commercial development, only above the first floor of the structure."

CDC 21.050.2. As this passage reflects, there is no restriction that only commercial uses be located on the first floor. Rather, the restriction provides that multi-family residential uses not be located on the first floor. Additionally, the restriction does not prohibit any type of parking on the first floor. Again, the restriction on first-floor uses only applies to "[m]ultiple-family units." To the extent that the Planning Commission considers "[m]ultiple-family units" to include parking required for such "[m]ultiple-family units," the Planning Commission's interpretation is not "plausible" because it is inconsistent with the plain language of the definitions in CDC 2.030.

For example, the definition of "multiple-family unit" in CDC 2.030 does not include parking:

"A structure containing three or more attached dwelling units in any vertical or horizontal arrangement."

CDC 2.030. That definition does cross-reference the term "dwelling unit," but again, the definition of "dwelling unit" in CDC 2.030 also does not include parking:

"One or more rooms, designed for occupancy by one family for living purposes providing complete, independent living facilities for one or more persons including permanent provisions for living, sleeping, eating, cooking and sanitation."

CDC 2.030. As the plain language of this definition provides, a "dwelling unit" must provide for a litany of activities, but parking is not one of them. As a result, the Planning Commission's interpretation that "[m]ultiple-family unit" includes parking is inconsistent with all of the applicable language of the CDC and is not plausible.

Additionally, the Planning Commission's interpretation is not consistent with a recent LUBA decision, where LUBA affirmed a local government's interpretation that allowing parking on the ground floor would not violate a prohibition on ground-floor residential

uses: "As the city council points out in its findings, the standard at issue here does not mandate commercial development; it simply prohibits ground floor residential. As the city council found, it would be entirely consistent with that standard to develop surface parking * * *." *LO 138, LLC v. City of Lake Oswego*, __ Or LUBA __ (LUBA No. 2014-092, April 15, 2015) (slip op. at 24).

Because the Planning Commission's interpretation of CDC 21.050.2 effectively rewrites this code section to add requirements that the City Council has not legislatively adopted, the Planning Commission's interpretation is implausible. Therefore, the City Council should find that the Planning Commission has erred. Further, because the Planning Commission relied upon its erroneous interpretation as a basis to deny the Applications, the City Council should reverse the Planning Commission's decision to deny the Applications.

B. For two reasons, the Planning Commission erred in concluding that the OBC zone purpose statement in CDC 21.010 supports the conclusion that commercial uses are required on the first floor of structures with apartments on the upper floors in the OBC zone.

First, the OBC zone purpose statement in CDC 21.010 is not an applicable approval criterion because nothing in this provision or elsewhere in the CDC requires that the purpose statement be applied or satisfied in order to approve development in the OBC zone. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312, 323 (2003) (unless the text expressly requires otherwise, a purpose statement does not play a direct role in reviewing permit applications and does not operate as a mandatory approval criterion).

In this case, CDC 21.010 simply establishes the purpose of the OBC zone:

> "The purpose of this zone is to provide for groups of businesses and offices in centers, to accommodate the location of intermediate uses between residential districts and areas of more intense development, to provide opportunities for employment and for business and professional services in close proximity to residential neighborhoods and major transportation facilities, to expand the City's economic potential, to provide a range of

> compatible and supportive uses, and to locate office employment where it can support other commercial uses. The trade area will vary and may extend outside the community. The zone is intended to implement the policies and criteria set forth in the Comprehensive Plan."

As this passage reflects, CDC 21.010 does not require that the City take a specific action or even consider the objectives set forth in the purpose statement. Further, none of the Design Review II approval criteria require compliance with the purpose statement. Therefore, it is not an applicable approval criterion in this case.

Although opponents contend that the Planning Commission simply considered it as context, the City Council should deny this contention. The Planning Commission effectively elevated the purpose statement to an approval criterion, finding that the Applications were inconsistent with CDC 21.010 because they did not effectively provide for multiple commercial uses. *See* Planning Commission Decision at p. 2.

Second, even if CDC 21.010 were applicable to the Applications, the plain language of this provision does not address, let alone require, commercial development on the first floor of structures. *See* language of CDC 21.010 above. Moreover, to the extent CDC 21.010 is applicable to the Applications, it must be interpreted consistent with its stated intent to "implement the policies and criteria set forth in the Comprehensive Plan." These Comprehensive Plan policies include Goal 2, Land Use Planning, Section 3, Goal 1, which requires that commercial areas be developed with mixed uses and in a manner that increases housing choices:

> "Develop/redevelop commercial areas as mixed use/commercial districts that blend housing and commercial uses to: enhance the community's identity; encourage strong neighborhoods; increase housing choices; promote socioeconomic diversity; promote alternative modes of transportation; promote civic uses; and improve community interaction and involvement."

Approving the Applications would foster mixed-use development of the Property and increase housing choice in the City by increasing the supply of multi-family housing. Therefore, approval of the Applications is consistent with this policy and thus consistent

with CDC 21.010. The Planning Commission failed to give any effect to this Comprehensive Plan provision.

For these reasons, the City Council should reverse the Planning Commission's decision because the Planning Commission has misinterpreted and misapplied the purpose statement of CDC 21.010.

C. Multi-family residential uses are permitted in the OBC zone, subject to prescribed conditions, and those conditions are met in this case.

In the OBC zone, uses permitted under prescribed conditions are uses that "will be granted provided all conditions are satisfied." CDC 21.020.B. Multiple-family units are permitted in the OBC zone, "as a mixed use in conjunction with commercial development, only above the first floor." CDC 21.050.2.

Appellant has proposed multi-family residential units located above the first floor in conjunction with 1,973 square feet of commercial uses. The Planning Commission's conclusion that parking for multi-family uses is not allowed on the first floor is refuted for the reasons explained in Section III.A above. Therefore, the Applications propose a use that meets all prescribed conditions. Under these circumstances, the City does not have the discretion to deny the Applications, pursuant to CDC 21.020. The Planning Commission erred in doing so.

For these reasons, the City Council should reverse the Planning Commission's decision.

D. The Planning Commission provided no valid basis to deny Appellant's property-line adjustment application, and there is none.

In order to deny a land use or limited land use application, a local government must explain why the application does not satisfy relevant approval criteria and the steps the applicant would need to take in order to gain approval of the application. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472, 477 (2000). In this case, the Planning Commission's findings are all directed at the Design Review II application. Other than a terse denial, the Planning Commission decision does not address the property-line adjustment application at all, let alone explain why it fails to satisfy applicable criteria or the steps

Appellant must take to obtain approval of this application. Therefore, the Planning Commission erred.

Appellant submits that the Planning Commission decision failed to identify a basis to deny this application because there is none. For the reasons explained in the Appellant's August 5, 2015 application narrative at pages 63-65, and as supported by the Planning staff report prepared for the August 26, 2015 Planning Commission hearing, the property-line adjustment application satisfies all applicable criteria and should be approved. The Planning Commission erred in finding to the contrary.

The City Council should reverse the Planning Commission decision on this point.

E. The Planning Commission's conclusion that approving the Applications would lead to absurd results lacks merit.

The Planning Commission also denied the Applications on the grounds that allowing only 1,943 square feet of commercial uses would open the door to absurd results, such as allowing vending machines to qualify as "commercial development." Planning Commission Decision at p. 2. The Planning Commission erred in making this finding for two reasons. First, Appellant has not proposed to locate vending machines on the first floor of its structures. Instead, Appellant provided photographs and floor plans of multiple small businesses in the Portland area, including realtors and insurance agents, that are permitted in the OBC zone and operate in spaces of about the same size as those proposed by Appellant. Therefore, the Planning Commission's conclusion is not supported by substantial evidence and appears to be based upon a hypothetical not included in the Applications. Alternatively, if the Planning Commission's fear were legitimate, it could have simply imposed a condition prohibiting vending machines on the first floor of the project.

Second, even if the Planning Commission is correct that a vending machine might constitute "commercial development," the proper remedy is not to misinterpret the term in an effort to deny a pending application. Rather, the proper remedy is for the City Council to amend CDC 21.050.2 to establish a mandatory minimum amount of commercial uses that must be provided or to prohibit vending machines.

For these reasons, the City Council should reverse the Planning Commission's decision.

IV. Responses to Opponent Testimony

Appellant responds to opponents' testimony as follows:

A. Opponents admit that the Planning Commission erred.

CCWL admits that the Planning Commission erred in concluding that CDC 21.050.2 requires that only commercial uses can be located on the first floor of structures with multi-family residential uses in the OBC zone: "* * * [T]his language does not state or mean simply that 'the commercial development must, at a minimum, be located on the first floor of each structure.'" CCWL memo dated October 19, 2015 at p. 2. Yet, this is precisely what the Planning Commission concluded. Thus, CCWL's own testimony supports Appellant's position that the Planning Commission erred. The City Council should rely upon CCWL's testimony to reverse the Planning Commission.

B. It is feasible to develop and operate permitted uses in the Project's commercial spaces.

The OBC zone permits a variety of commercial uses by right, including Business support services (including "secretarial services"); Financial, insurance and real estate services (including offices for banks, insurance companies, or investment services); Personal services and facilities (including photography studios and weight-loss centers); and Professional and administrative services (including professional offices for law or engineering firms). CDC 2.030, 21.030.

Each of these uses can feasibly be developed in the project's commercial spaces. *See* sample floor plans set forth in the record. These floor plans are not merely conceptual either. Successful businesses of this type in the Portland area operate in approximately 300 square feet. *See* photographs of insurance office and real estate office dated September 2015 also set forth in the record.

Although CCWL asserts that it is not feasible to develop and operate such uses, CCWL only offers a bare assertion. CCWL fails to address, let alone undermine, this substantial

evidence submitted by Appellant on this issue. Therefore, there is no basis to sustain CCWL's contention on this issue.

C. The legislative history of CDC Chapter 21 reflects that the City Council knew how to expressly impose maximum and minimum area limits on specific uses but chose not to do so.

The City Council considered but rejected placing a cap on the amount of multi-family development in the OBC zone. Specifically, the 1982 draft CDC includes the following provision:

> "21.040 Uses and Development Permitted Under Prescribed Conditions
>
> 1. Residential uses as provided in chapter 16, High Density Residential provided--
>
> a. The residential use is located above the first story of the structure; or
>
> b. The residential use is part of an overall Business-office center Planned Unit Development and occupies no more than 25% of the site area; and
>
> c. All standards applicable to residential development are met."

Moreover, draft CDC section 21.040.1.a contains the same condition as does CDC 21.050.2: that is, multi-family dwellings must be located above the first floor of the structure.

The City Council did not adopt this proposal. Instead, the City Council adopted a version of the code that did not include any maximum area for residential uses or minimum area for commercial uses in the OBC zone. The fact that the City Council considered, but ultimately rejected, a cap on the amount of residential uses in the OBC zone underscores that the City Council knew how to expressly state maximum and minimum areas for specific uses, but the City Council chose not to do so. Therefore, the Planning

Commission erred in concluding that only commercial uses are allowed on the first floor of structures in the OBC zone.

Although CCWL contends that the legislative history does not support Appellant's contention, CCWL does not offer any alternative history nor does CCWL identify where the adopted version of CDC Chapter 21 expressly prohibits all uses or activities (except commercial uses) on the first floor.

D. CCWL misinterprets the extent of a "multiple-family unit."

CCWL's contention that the CDC definition of "multiple-family unit" refers to the entire structure proves too much. Under CCWL's theory, it would never be possible to develop a building that could satisfy CDC 21.050.2 (with first-floor commercial uses and apartments on upper floors) because the mere existence of the apartments would render the entire "structure" a "multiple-family unit." CCWL's theory renders CDC 21.050.2 a nullity, which is an absurd result. The City Council should deny CCWL's contention.

E. Contrary to CCWL's contention, the Planning Commission erroneously applied the OBC zone purpose statement as a basis to deny the Applications.

Although CCWL contends that the Planning Commission did not apply the OBC zone purpose statement of CDC 21.010 as an approval standard, CCWL is mistaken for the reasons explained in Section III.B above. Specifically, the Planning Commission erroneously relied upon the purpose statement as a basis to deny the Applications while ignoring the very Comprehensive Plan policies that the purpose statement directed the City to apply. The City Council should deny CCWL's contention and reverse the Planning Commission's decision.

F. The City's available supply of commercial lands is not relevant to the Applications.

Although Ms. Knight contends that approving the Applications will increase the City's need for commercial lands, this is not a basis to deny the Applications. Appellant is not proposing to amend the map designations of the Property. Appellant is seeking design

review approval of a use permitted in the OBC zone, subject to prescribed conditions. If the City intended to prohibit residential uses in this location, the City could do so. But, the City has not.

G. Appellant identified the "first floor" and measured building height consistent with the CDC.

Although Ms. Knight contends that Appellant erred in characterizing the first floor of the buildings as the "first story" for purposes of locating the multi-family residential units when that same first floor was considered below the highest grade for purposes of calculating building height, Ms. Knight is mistaken. In fact, as explained in Appellant's September 2, 2015 letter to the Planning Commission, the first floor of the structures meets the definition of "first story" in CDC 2.030 and not the CDC definition of "basement." Further, these terms are not utilized in the City's regulations for calculating building height in CDC Chapter 41. As such, they are inapplicable to that context. Appellant has correctly calculated the building height pursuant to the methodology set forth in CDC Chapter 41. Finally, the Planning Commission did not deny the Applications on this basis, and no one appealed the decision on this basis. Therefore, this issue is not properly before the City Council.

H. The State's definition of "mixed use" is not applicable to the Applications.

Although Ms. Knight contends that Applicant's proposed mix of uses is not consistent with the State definition of "mixed use," the City Council should deny this contention. Ms. Knight does not identify the source of this definition, and there is no basis to conclude that it is applicable. There is no basis for the City Council to sustain Ms. Knight's contention.

I. The proposed use is not an "unlisted use" subject to CDC Chapter 80.

In the OBC zone, if a use is not listed as permitted outright in CDC 21.030 or permitted subject to prescribed conditions in CDC 21.050, it may be allowed as a "similar unlisted use" pursuant to CDC Chapter 80. CDC 21.020.A. Although Ms. Knight contends that any use that is not permitted outright is subject to the requirements of CDC Chapter 80,

including that the use be consistent with the purpose and intent of the OBC zone, Ms. Knight is mistaken for two reasons. First, CDC 21.050 lists uses that are subject to prescribed conditions. Therefore, these listed uses cannot be "similar unlisted uses." Second, CDC 21.020.B expressly allows these uses subject to prescribed conditions in the OBC zone. Therefore, there is no basis to conclude that they are subject to CDC Chapter 80.

J. The City Council is not required to consider whether this is the best or most preferred development plan for the Property.

Although Ms. Knight contends that a retirement village would be an appropriate and preferred use of the Property, the City Council should deny this contention. The issue before the City Council is whether or not the Planning Commission erred, not whether or not the proposed development plan is the best option or the most popular option. There is no basis to sustain Ms. Knight's contention.

K. The introduction of transportation mitigation measures after the filing of the Applications was not a procedural error.

To the extent the issue is raised, the City Council should deny opponents' contention that the introduction of the transportation mitigation measures after the filing of the Applications resulted in procedural error. The proposed traffic mitigation information became available on August 25, 2015 after final input from staff at the City and the Oregon Department of Transportation. The measures were discussed at the noticed public hearing on August 26, 2015, and members of the public had the opportunity to respond to this information at that meeting. Then, the Planning Commission both continued the public hearing by seven days and held the record open for a total of 14 days to allow members of the public to respond on this issue. Dozens of members of the public have taken advantage of this opportunity to present written and oral testimony on the proposed transportation mitigation solutions. Further, opponents even retained a transportation consultant who had sufficient time to review and respond to these mitigation measures by September 2, 2015. Accordingly, the City has cured any procedural error that may have occurred. Because there was no procedural error, there was no prejudice to any parties. Finally, the Planning Commission did not deny the Applications based upon this issue, and no one appealed the Planning

Commission's decision on this issue. Therefore, the issue is not properly before the City Council.

V. Conclusion

This process is not a popularity contest. It is also not an opportunity to amend the CDC to say something it does not. It is simply a question of whether or not the Applications meet the plain language of the approval criteria in the CDC. Based upon the argument and evidence set forth in the record, the Applications satisfy all applicable approval criteria. Therefore, the City Council must grant the appeal, reverse the Planning Commission, and approve the Applications.

I will attend the City Council appeal hearing in this matter and am happy to answer your questions at that time. Thank you for your consideration of the points in this letter.

Very truly yours,

Michael C. Robinson

cc: Mr. Chris Kerr (via email)
Mr. John Boyd (via email)
Ms. Megan Thornton (via email)
Mr. Seth King (via email)
Mr. Jeff Kleinman (via email)
Client (via email)