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Oregon Land Use Law

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Via Email

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Hon. Mayor Akins and City Council
c/o Derek Severson, Senior Planner
City of Ashland
Community Development
51 Winburn Way
Ashland, OR 97520

Re: Magnolia Terrace Appeal - PA-T2-2022-00037/PA-APPEAL-2022-00015
Subject Property: 165 Water St./160 Helman St./95 Van Ness Ave.
Applicant/Appellant Oral Argument Written Narrative

Dear Mayor Akins and City Council,

I am legal counsel for the applicant/appellant/owner Magnolia Investment Group LLC and Gil Livni (the “Applicant”). Along with Amy Gunter of Rogue Planning & Development Services I represent the Applicant in this appeal of the Planning Commission’s denial (the “PC Decision”) of the “Magnolia Terrace” mixed use development proposal, PA-T2-2022-0037 (the “Application”).

Please accept this letter and its attachment from Ms. Gunter as the Applicant’s written argument pursuant to AMC 18.5.1.060.I.5.b and include into the written record on this matter, PA-APPEAL-2022-00015.

This written argument will address only the Applicant’s ground for appeal/assignment of error, regarding the PC Decision’s misapplication of AMC 18.4.2.050.B.1.

I. The Planning Commission Misapplied AMC 18.4.2.050.B.1

The PD Decision misapplied AMC 18.4.2.050.B.1. The PC Decision states, on page 8, as follows:

*“The Planning Commission finds that the subject properties are located within a transitional area, and that to address the transitional area standard, the building designs **need** to incorporate adjustments to building form, massing, height, scale,*

*placement, or architectural an material treatment to address compatibility with the transitional area which includes the existing historic residential block across Helman Street, **while not losing sight of the underlying standards and requirements applicable to the subject properties which are zoned E-1 (Employment).***" (Emphasis mine)

First, the Planning Commission's use of the word "need" above is in error. That is not a term used by the drafters of AMC 18.4.2.050. The Planning Commission may not insert new or alternative language into the text of the code as it did in the PD Decision. See ORS 174.010 and *City of Astoria v. Kozzer*, 124 Or 261 (1928).¹

The text of AMC 18.4.2.050.B.1 states as follows:

*"**Transitional Areas.** For projects located at the boundary between zones or overlays, appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment **may be considered** to address compatibility with the transitional area **while not losing sight of the underlying standards or requirements applicable to the subject property.**"* (Emphasis mine)

It must be understood that adjustments to building form, massing, height, etc. "may be considered" but such adjustments are certainly not required, especially in the case where to do so would frustrate the ability to develop a site pursuant to its underlying zoning classification (as discussed below).

Second, the above-cited transitional areas provision does, in fact, require the City to "not los[e] sight of the underlying standards or requirements applicable to the subject property." This is exactly what the PC Decision does – it loses sight of the underlying standards of the E-1 zone that requires minimum floor-area ratios and which has development standards for employment uses that are different that the adjacent R-3 zone. The PC Decision is totally devoid of any discussion and weighing of the underlying standards of the E-1 zone. This absence of rationale is reversible error. *Hunt v. City of The Dalles*, 79 Or LUBA 265 (2019).

The PC Decision does not describe or analyze how the Planning Commission evaluated the underlying E-1 zone standards – it only addresses the "compatibility" standards for height,

¹ ORS 174.010 states:

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

This statutory command applies to the construction of local ordinances and to local decision makers, including the Planning Commission and the City Council. *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202 (2009).

scale and massing as described in AMC 18.4.2.050.B.2-B.4. However, those transitional areas standards are highly subjective and appear to apply only to single-family residential development on the same block. There is no related illustration in the code to show compatibility of mixed-use projects that must implement the E-1 zoning district in transition zones. Instead, all of the illustrations are clearly used to show how to provide “compatible” single-family dwellings adjacent to other existing single-family dwellings. As such, the code illustrations are not to be used in the analysis of a proposal for a mixed-use proposal in the E-1 zone. These illustrations do not apply in this situation.

It is clear that the Planning Commission lost sight of the E-1 zoning standards and impermissibly applied the Historic Development Design Standards for height, scale and massing without any regard to the E-1 zoning standards. By failing to analyze how the proposal could be approved under the current E-1 zoning standards and also meet the discretionary criteria of AMC 18.4.2.050.B.2-B.4, the PC Decision erred and it must be reversed. *See Fay v. City of Portland*, 43 Or LUBA 390 (2002) and *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

Lastly, in violation of ORS 197.522(3) the PC Decision failed to explain with certainty what steps could be taken to achieve compliance with the code.²

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² See *Bridgestreet Partners v. City of Lafayette*, 56 Or LUBA 387 (2008). In *Bridgestreet* LUBA stated in relevant part:

“We agree with petitioners that the city's findings are inadequate to explain the basis for its denial. In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, the local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. Commonwealth Properties v. Washington County, 35 Or App 387, 400, 582 P2d 1384 (1978); Rogue Valley Manor v. City of Medford, 38 Or LUBA 266, 272 (2000). The findings must provide a coherent explanation for why the city believes the proposal does not comply with the criteria. Caster v. City of Silverton, 54 Or LUBA 441, 457 (2007). The findings adopted by the city in the present case merely express ‘concern’ over drainage into the creek and note that the slopes and soil conditions ‘suggest’ erosion problems. Other than a general reference to the slopes and soil conditions ‘suggesting’ erosion and a reference to the intent of the RDO zone, the city's findings do not explain which criteria the application fails to meet or otherwise inform the applicant what steps are necessary to obtain approval under the relevant criteria. Such findings are inadequate to explain the city's basis for denying the proposed PUD based on concerns about storm drainage. While we tend to agree with petitioners that the evidence submitted by petitioners indicates that erosion concerns can be mitigated by the use of an energy dissipater, and that the neighbor's testimony cited by the city to support the city's decision is not particularly strong, we will not address petitioners' evidentiary arguments until the city has adopted findings that adequately explain why it believes the PUD does not comply with relevant criteria and what facts the city believes are essential to those findings. DLCDC v. Columbia County, 15 Or LUBA 302, 305 (1987).” (Emphasis added).

ORS 197.522(3) states in relevant part:

“(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.”

II. Conclusion

By failing to implement the entirety of AMC 18.4.2.050.B.1, the PC Decision erroneously denied the Application because it lost sight of the underlying standards of the E-1 zone. Therefore, the City Council should reverse the PC Decision and approve the Application.

Respectfully submitted,

/s/Micheal M. Reeder

Micheal M. Reeder
Attorney for Applicant/Appellant

Attachment

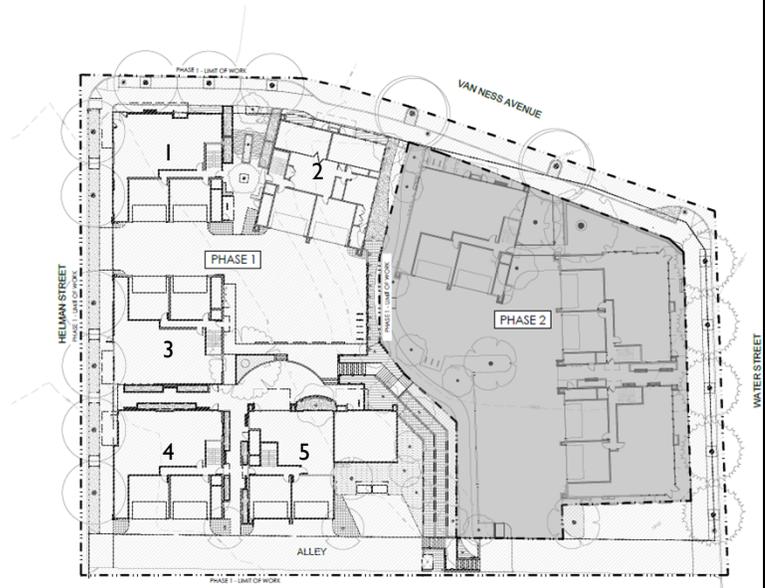
MAGNOLIA TERRACE

APPEAL



Good Evening, Mayor, and City Council. Thank you for your continued efforts to see a bright future for Ashland. Development of Employment Zoned properties as envisioned in the Comprehensive Plan and the Employment Zoning District to allow for increased areas for employment uses.

SITE LAYOUT



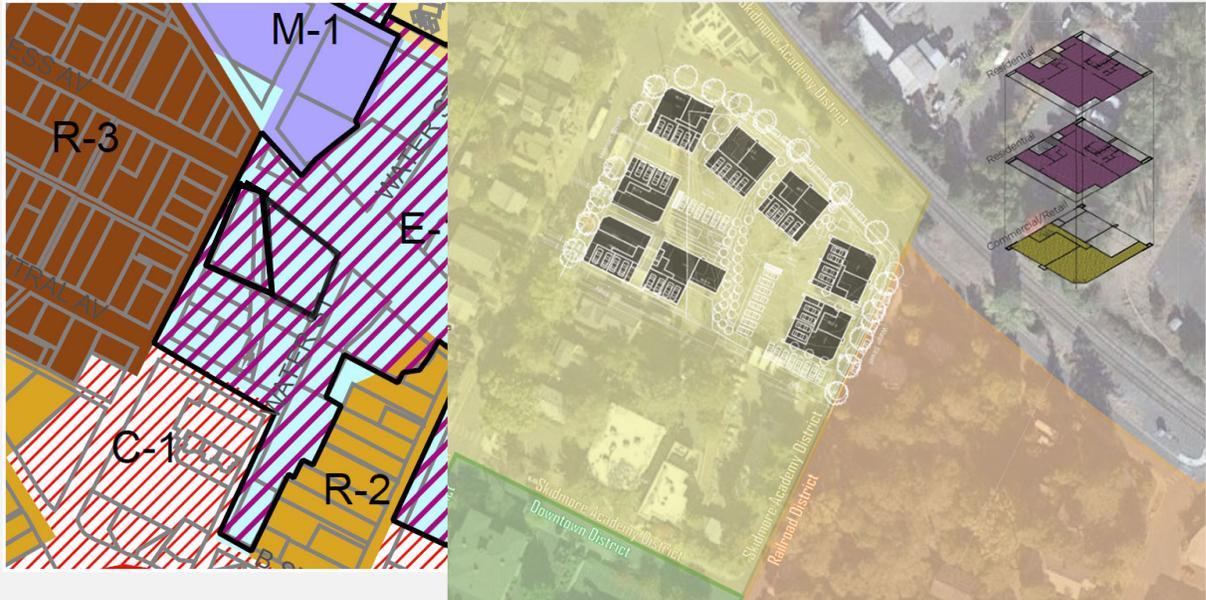
The proposal sought Phase One approval of a Subdivision of the property and includes a request for Site Design Review for the development of five of the eight, mixed-use commercial buildings, required parking area for the first phase of development and proposed required public street frontage improvements, and subdivision infrastructure.

GROUNDS FOR APPEAL

- The specific ground for which the decision should be reversed or modified is Application of the Historic District Development Standards in Transitional Areas
- Denial on this grounds is an error because the applicable criteria or procedure in the Ashland Municipal Code 18.4.2.050 states that projects at the boundary between zones or overlays may have appropriate adjustments considered, but the underlying zoning standards and requirements applicable to the subject property must be kept in sight.

In addition to the other items listed on the appeal notice, we will focus our discussions tonight on third ground for appeal and that the application should be reversed or modified based on the in appropriate application of the Historic District Design Standards (the discretionary code) over the standards from Employment Zoning code and the applicable Site Design Standards from AMC 18.4 which regulate the Basic and Detail Site review standards all of which are described as mandatory and not discretionary.

ZONING AND HISTORIC OVERLAYS



The subject property and the directly adjacent properties North and South are zoned Employment (E-1) and Industrial (M-1)

Additionally, The property is situated at the cross section of **3** Historic Preservation districts, this mixed used development proposes commercial and residential uses on a vacant site.

UNDERLYING ZONING STANDARDS

SUBJECT PROPERTY, ADJACENT PROPERTIES TO SOUTH AND WEST

- 18.2.6 STANDARDS FOR NON-RESIDENTIAL ZONES
- Purpose: 18.2.6 sets forth lot and development standards, including minimum dimensions, area, density, coverage, structure height, and other provisions that control the intensity, scale, and location of development, for Ashland's base employment zones, pursuant to the Comprehensive Plan and the purposes of this ordinance.
- No minimum lot area, lot width or lot depth
- There is no minimum front, side, or rear yard required, except where buildings on the subject site abut a residential zone, in which case a side of not less than 10 ft and a rear yard of not less than 10 ft per story is required.
- Maximum height of 40-feet
- Minimum Floor Area Ratio of $\frac{1}{2}$ the acreage of the property
- Minimum Landscape area of 15%
- Maximum coverage area of 85%

The specific underlying zoning standards and requirements that apply to the subject property are found in AMC 18.2.6. These standards, in particular, maximum setbacks and minimum floor area ratios and the intended uses of the zone encourage, if not outright require large area buildings.

There is no minimum front, side, or rear yard required, except where buildings on the subject site abut a residential zone, in which case a side of not less than 10 ft and a rear yard of not less than 10 ft per story is required.

Maximum height of 40-feet

Minimum Floor Area Ratio of $\frac{1}{2}$ the acreage of the property

Minimum Landscape area of 15%

Maximum coverage area of 85%



Again, the proposal is to build, employment zoned, commercial use with Residential component, but the zone requires substantially larger buildings, mass and scale per the zoning standards.

The proposed design is appropriate for the zone and when considered contextually to what is allowed in the Historic Districts. The proposed building design, massing, scale, base, sense of entry on the proposed buildings allow for zoning district compliant, historically accurate, mixed use commercial development.

The proposed type of uses (lower residential density (E-1 = 15 Du per acre) and current parking restrictions, intensity of use is reduced versus a strict commercial or industrial type of use in a larger building area as allowed by the zoning dist. The residential use allows similar use as those across Helman Street and the mixed use like across Van Ness.

The average height of all of the structures is less than the 40-foot maximum in the zone.

HISTORIC DISTRICT DESIGN STANDARDS COMPLIANCE

- AMC 18.4.2.050.B
- 1. Transition Zone compliance
- 2. Height: All buildings are less than the maximum in the zone which is 40'.
- 3 & 4. Massing and Scale:
 - The roofline has been cut back substantially to reduce the massing of the overhang.
 - The center bay of the third floor on Buildings 3 and 4 steps back three feet from the wall plane of the second floor and a shed roof has been added that emphasize the step back.
 - Recessed corners on ground floor to provide variation in the façade.



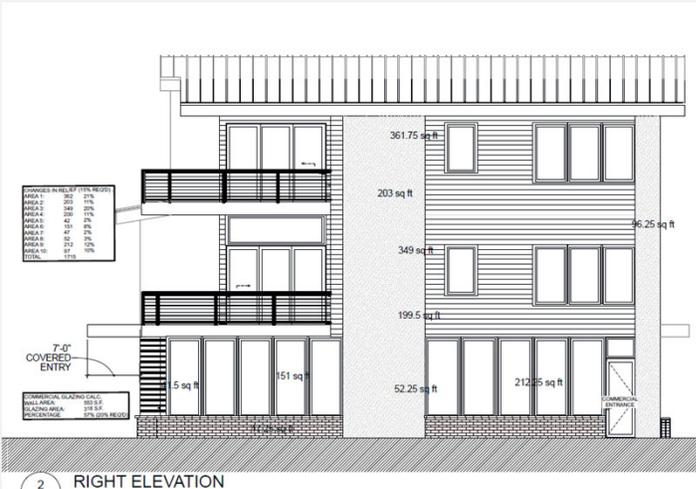
Each proposed building has numerous traditional architectural elements and materials. The scale, form, and massing of some of the material elements are more modern in styling and more commercial in nature than the small residential homes in the area.

The proposed buildings are architecturally compatible with the historic district design standards and provides a neighborhood anchor development similar to the allowed uses, building masses and heights found on A Street in the Railroad Historic District. And in the commercial downtown adjacent to residences on First Street. The mass and the scale of the buildings is reduced through the separation of

the structures with 12-feet between.

The scale of the proposed development is appropriate for an Employment zoned property that has three public street frontages, abuts a railroad track, and more than one acre in area. The property is at the transition area between not only commercially zoned properties and residentially zoned properties but also at the boundary of three different types of historic districts and adjacent to the historic industrial area of Ashland.

HISTORIC DISTRICT DESIGN STANDARD COMPLIANCE



- 6. Roof: The shape, pitch and materials are consistent with buildings in the vicinity
- 7. Rhythm of Openings: The proposed pattern of wall to door and window openings on the street frontages are clearly defined.
- 8. Base or Platforms: Buildings 3 & 4 both include a brick base to ground the building.
 - The use of a darker material on the lower levels enhances and adds strength to the base.
- 9. Form: The proposal has a form appropriate in a commercial zone.
- 10. Entrances: The commercial entrances are well defined and covered.

The buildings comply with the underlying standards and have numerous design elements that comply with the intent of the Historic Standards.

Height: The buildings are less than 40-feet in average height. (The maximum height in the E-1 zone).

Scale: To meet the FAR standards in the E-1 zone, it is not appropriate to be compared with the single and 1 ½ story single family type homes.

The scale and mass is reduced through the changes in mass with use of columns, framed bays, commercial storefront windows and recessed entries.

Massing: The ground floor has distinct business facades within the one building façade. This divides the mass and varies the massing. Use of windows and columns also breaks up the mass.

The recessed entrances covered pedestrian areas, wide sidewalks, street trees all provide visual relief and reduce the massing.

Roof: The shape, pitch and materials are consistent with buildings in the vicinity and are consistent with the pitches on the historic buildings that were historically in the vicinity.

Rhythm of Openings: The proposed pattern of wall to door and window openings on the

street frontages is clearly defined. Each building has a rhythm of openings and the ground floor of each building is divided into two separate masses. The proposed window and door patterns are compatible with a width to height ratio maintained across the façade of each proposed building.

Base or Platforms: Each buildings has slightly different types of windows and door openings and in some instances the windows extend to the ground level and some of the buildings have more pronounced four-foot base with siding or stucco materials to differentiate the base from the remainder of the structure.



The applicant made substantial modifications to the structures made following the first Historic Commission review. Specifically, bulk and scale reduced, roof lines pushed back, increased recesses, increase and added overhangs to increase shadow lines, lower level painted darker and lighter paint on levels above.

