



Wendie L. Kellington
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January 27, 2022

Via Electronic Mail
Via Electronic Mail
City of Salem Planning Commission
C/O Olivia Dias
Planner
555 Liberty St SE
Salem OR 973

RE: CPC-ZC21-04

Dear Chair Griggs and Members of the Planning Commission:

This letter is written to clarify the process in which you are engaging. And, since the record is "open" ostensibly staff will have no reason to withhold this letter from you. It is worth pointing out, that in truth, you need not have "reopened the record" in the first place. Please see Attachment 1 to this letter. While the dispute here is the first I have ever seen in my nearly 40 years of Oregon land use practice (which includes a nearly 6-year stint as a LUBA judge), disputes between staff and applicants about findings have come up in reported cases. In turn, the resulting law is clear that the record is not required to be reopened to resolve such findings disputes. The record, however, has been reopened in this case because, for whatever reason, that was the only option you were given. Given that, there is simply no basis for staff objection, if in your February 1, 2022 proceeding you wish to ask the applicant or their team any questions. If you wish to ask questions, you should feel free to do so.

Staff also suggested that if the applicant did not like staff's findings, they could appeal them. That is not quite accurate. In all but the most rare case where there are unconstitutional conditions of approval, no applicant in their right mind ever appeals an approval decision. An applicant-driven appeal is not only stupid, but also is no cure for lousy findings. The cure for indefensible findings, unfortunately is self-announcing (viz.) indefensible findings if appealed by project opponents will be remanded because they are - tautologically - indefensible.

Very truly yours,

A handwritten signature in black ink that reads "Wendie L. Kellington". The signature is written in a cursive, flowing style.

Wendie L. Kellington

WLK:wlk
CC: Client

From: [Wendie Kellington](#)
To: [Dan Atchison](#)
Cc: [Olivia Dias](#); [Lisa Anderson-Ogilvie](#); [Thomas Cupani](#); mshipman@sglaw.com
Bcc: jeremys@mosaicdevelopmentsservices.com
Subject: RE: Ltr Obj Staff Findings and Exhs.pdf
Date: Monday, January 24, 2022 3:52:00 PM

Dan, this is mistaken. The city has the duty to provide the applicant's findings to the planning commission to include the outline of the problems with staff's which I understand Tom wrote. There is no record problem in doing so or in duking it out before the PC regarding which findings to adopt. What can't happen is new evidence cannot be submitted, but that is not a concern here.

The law says that the city commits error following the path outlined below. In *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190, 201-02 (2009) staff and the applicant were at odds over findings after the record was closed. LUBA decided that "where planning staff has objected to some findings or conditions, and proposed modified or alternative findings and conditions" from those submitted by the applicant "At that point in the process, the final decision maker has already made the critical decision that the application complies with applicable approval criteria, and the only remaining task is to adopt findings expressing the final decision maker's precise rationale for that conclusion, and conditions of approval that the final decision maker deems necessary." LUBA held that "We do not see that the statute is offended by allowing the applicant and planning staff to exchange views on how to resolve their differences regarding findings and conditions of approval, or by allowing the applicant to submit revised findings and conditions in response to that exchange of views. That planning staff subsequently presents such revised findings and conditions to the final decision maker, along with a staff recommendation informed by the exchange of views between staff and the applicant, does not violate any statutory provision cited to us." Here, failing to present the Applicant's findings would be a very serious procedural error that would substantially prejudice the Applicant's substantial rights since they have the burden and will be tasked to defend staff's indefensible findings. It is my sincere hope that city staff will not deprive the planning commission of these important facts. They have earned findings supporting the decision they made. Best, Wendie



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From: Dan Atchison <DAtchison@cityofsalem.net>
Sent: Monday, January 24, 2022 2:40 PM
To: Wendie Kellington <wk@klgpc.com>
Cc: Olivia Dias <ODias@cityofsalem.net>; Lisa Anderson-Ogilvie <LMAnderson@cityofsalem.net>; Thomas Cupani <TCupani@cityofsalem.net>
Subject: RE: Ltr Obj Staff Findings and Exhs.pdf

Wendie:

I have not reviewed the record or the hearing testimony and I can't comment on your concerns about the findings. Staff has reviewed the findings in light of the objections and believes they are sufficient. In regard to your letter, we will not forward it to the planning commission at this time. The record is closed and the letter would be considered an ex parte contact. We will provide a cover memo with the proposed order and findings notifying the commission that the applicant objects to the proposed findings, and that if the commission wants to consider the issue, it will be necessary to reopen the hearing to allow all parties the opportunity to submit comment.

I also note that the commission decision is subject to appeal to the city council, which is likely to occur. It will be a de novo proceeding and the parties will have an opportunity to submit testimony on the findings as well as all other issues.

Dan

From: Wendie Kellington <wk@klgpc.com>
Sent: Monday, January 24, 2022 11:10 AM
To: Olivia Dias <ODias@cityofsalem.net>; Dan Atchison <DAtchison@cityofsalem.net>; Lisa Anderson-Ogilvie <LMAnderson@cityofsalem.net>; Thomas Cupani <TCupani@cityofsalem.net>
Cc: jeremys@mosaicdevelopmentservices.com; mshipman@sglaw.com
Subject: Ltr Obj Staff Findings and Exhs.pdf
Importance: High

Olivia, Dan, Lisa and Tom,

Please see the attached and please provide it to the planning commission for their consideration before their meeting tomorrow. This is time sensitive. As always we remain open to discussing these concerns. Thank you. Best, Wendie



Wendie L. Kellington | Attorney at Law.

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