

TO: Planning Commission

FROM: Lisa Anderson-Ogilvie, AICP
Deputy Community Development Director and
Planning Administrator

DATE: September 7, 2021

SUBJECT: **Tentative Subdivision and Class 2 Adjustment Case No. SUB-ADJ21-05 –
2230 Doaks Ferry Road NW;**

Commissioner Slater raised a potential procedural issue related to request to adopt one of two orders on SUB-ADJ21-05 (Attachment 1).

On July 20, 2021, the Planning Commission held a public hearing to consider an appeal of the Planning Administrator’s Approval of a Tentative Subdivision and Class 2 Adjustment (Case No. SUB-ADJ21-05) and voted to modify and approve the application. The record was reopened, and an Order was presented to the Planning Commission to reflect their decision and all testimony submitted during the open record period.

The reopened record after the July 20th vote allowed rebuttal evidence, but that does not mean the Commission’s July 20th vote was void. When the record was reopened, the Commission was instructed to review all the material in the case file, including the rebuttal material, and vote on whether to adopt the order. That procedural action did not require the Commission to vote on the substance of the application, nor effect a motion for reconsideration.

On August 17th the Planning Commission needed to determine whether to adopt the order approving the application. The actual motion was to deny the application and was itself out of order. In order for the Planning Commission to consider whether to reconsider its initial July 20th vote, it would have been necessary for the Commission to pass a motion to reconsider. That didn’t occur on August 17th.

While the August 17th action to deny the application may have been procedurally improper it is too late in the process to correct it, since the 120-day deadline for this decision is September 11, 2021.

If the Commission fails to take final action before that date, the City will likely violate ORS 227.178, and the applicant will have the right to file for a petition for writ of mandamus in circuit court. Doing that will take jurisdiction to make a decision on the application out of the City’s hands. It will also trigger a requirement for the City to pay the applicant’s attorney fees. The City and the Planning Commission have a legal obligation to avoid violating the law.

In circumstances where a jurisdiction faces violating ORS 227.178, it may vary from its procedural requirements in order to issue a timely decision so long as those steps do not prejudice a party's substantial rights. *See, Wal-mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

Although a city may not take procedural short-cuts that it knows or reasonably should know will prejudice one or more party's substantial rights and thereby provide a reasonably certain basis for an appeal to and remand by LUBA, ORS 197.835(10)(a)(B) or ORS 227.178 do not prohibit a city from expediting its local review process to meet the 120-day deadline, provided that expedited process does not require one or more parties to sacrifice their substantial right to fully and fairly present their position on the merits of the application.

Even in the event that the Commission's vote on alternative orders constitutes reconsideration of a decision, varying from the Commission's bylaws for reconsideration is permitted in order for the City to avoid violating the 120-day rule in ORS 227.178. Given the procedural circumstances that have occurred thus far (one Commission vote to approve the application, and another to deny it) it is unclear which order the Commission will vote to adopt on September 7th. Therefore, in order to avoid a 120-day decision deadline violation, staff are presenting alternative orders for the Commission's consideration.

Staff Recommendation:

To ensure the 120-day deadline is met and avoid a violation of ORS 227.178, Staff recommends that the Planning Commission ADOPT either:

- Order SUB-ADJ21-05 – Facts and Findings from August 17, 2021 (DENIAL)
- Order SUB-ADJ21-05 – Facts and Findings from July 20, 2021 (APPROVAL)

Attachments:

1. Commissioner Slater email

Shelby Guizar

To: Lisa Anderson-Ogilvie
Subject: RE: Planning Commission Packet - September 7, 2021

From: michael Slater <commissionerslater@gmail.com>
Sent: Thursday, September 2, 2021 5:18 PM
To: Lisa Anderson-Ogilvie <LMAnderson@cityofsalem.net>
Cc: Lisa Heller <bhattys@aol.com>; Casey Kopcho <kopcho@pm.me>; Chane Griggs <chanegriggs@gmail.com>
Subject: Fwd: Planning Commission Packet - September 7, 2021

Hi Lisa,

I hope this email finds you well.

I am writing to express my confusion over Olivia's memo of August 31, 2021, entitled "Tentative Subdivision and Class 2 Adjustment Case No. SUB-ADJ21-05 – 2230 Doaks Ferry Road NW." In her memo, Olivia recommends that Commissioners vote either for the Facts and Findings of August 17, 2021, or the Facts and Funding of July 20, 2021. I do not believe this is procedurally correct or possible.

As you know, the record was held open after the July 20th meeting on this case in order to allow for rebuttal testimony. On August 17, after the record was closed and Commissioners reviewed the additional testimony and had an opportunity to speak to staff, no member of the Commission then present moved to adopt the facts and finding previously adopted on July 20th. Staff instructed Commissioners that we needed to address the case and simply could not let it "die." I then introduced a motion to deny the application for the reasons addressed in the draft Facts and Findings. A majority of Commissioners voted to adopt my motion to deny. The only item that should be before the Commission is the the facts and finding drafted to reflect the official decision of the Commission on August 17. By presenting the Commission with the option to vote for either finding, you have, de facto, enacted a motion to reconsider the August 17 vote. The commission, by Salem code, follows Roberts Rules of Order. A motion for reconsideration may be introduced only by a member who voted in the majority. The proper course of action is to present the facts and findings codifying the official vote on August 17. The only question on this case remaining before the Commission is whether the draft findings adequately represents the motion from August 17th that passed by a majority vote.

I am well aware that the motion to deny the application passed because of a quirk of attendance at that night's meeting, but that doesn't invalidate the decision. If there is some quirk of procedure or land use law that you believe allows us to essentially revote, I would be eager to read it.

As always, I hope these occasional moments of friction do not mar what I think of as our very positive working relationship.

Thank you,

MICHAEL K SLATER

Salem Planning Commissioner

C 202.425.5493

E commissionerslater@gmail.com

URL www.michaelkslater.com

Begin forwarded message:

From: Shelby Guizar <SGuizar@cityofsalem.net>

Subject: Planning Commission Packet - September 7, 2021

Date: August 31, 2021 at 4:12:33 PM PDT

To: Shelby Guizar <SGuizar@cityofsalem.net>

Cc: Lisa Anderson-Ogilvie <LMAnderson@cityofsalem.net>, Thomas Cupani <TCupani@cityofsalem.net>, Dan Atchison <DAtchison@cityofsalem.net>

Hello Commissioners,

Commissioner Augustyn will be absent from this meeting, as far as I know, everyone else will be present.

The information to access the Salem Planning Commission meeting on September 7, 2021 is listed below:

Join Zoom Meeting

<https://us02web.zoom.us/j/82731854091>

Meeting ID: 827 3185 4091

Please find the following materials, attached or linked below, for our upcoming Planning Commission meeting scheduled for September 7, 2021:

- September 7, 2021 Agenda
- August 16, 2021 Work Session Draft Minutes
- August 17, 2021 Draft Minutes
- *Revised* UDC Amendment Resolution No. 21-01
- **CPC-ZC21-03 Open Record Memo**
 - This case was heard on August 3, 2021. To view the previous discussion click [here](#) and skip to time 9:20 of the video.
- **SUB-ADJ21-05 Memo for Orders**
 - This case was heard on July 20, 2021. To view this discussion click [here](#) and skip to time 6:40 of the video.
 - This case had an order for adoption on August 17, 2021, to view this discussion click [here](#) and skip to time 6:00 of the video.
- **SUB-ADJ21-05 Approval Order & Facts & Findings**
- **SUB-ADJ21-05 Denial Order & Facts & Findings**

Thank you,

Shelby Guizar

Administrative Analyst

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