

TO: Hearings Officer

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

DATE: January 26, 2022

SUBJECT: **Conditional Use Permit, Site Plan Review, Adjustment Driveway Approach Permit and Design Review Case No. CU-SPR-DAP-DR21-05 – 4900 Block of State Street – 97301; Supplemental Staff Report**

On December 22, 2021, a public hearing was conducted for a proposed twenty-six building apartment complex with a total of 291 dwelling units with associated site improvements for property located at the 4900 Block of State Street.

The Hearings Officer continued the public hearing to January 26, 2022 to allow for additional findings and testimony to be submitted. At the December 22, 2021 hearing the applicant granted a 35-day time extension to the state mandated decision deadline for this collective application to allow for additional time for the continued hearing, extending the deadline from March 31, 2022 to May 5, 2022.

On January 24, 2022, the applicant submitted an updated site plan (Sheet SDR3) and building elevation plans (**Attachment A**). On January 26, 2022 the applicant submitted an updated written response. The following is a staff response to the applicant's updated plans and findings (**Attachment B**).

1) Updated Plans – Sheet SDR 3 and Building Elevations

The applicant's updated site plan provides five key changes from the site plan provided for the December 22, 2021 hearing.

a. Driveway to State Street has been removed.

The site plan provided for the December 22, 2021 hearing included a driveway approach with direct access to State Street. State Street is classified as a major arterial in the Salem Transportation System Plan, and the minimum driveway spacing standard between driveway approaches or intersection is 370 feet per SRC 804.035, the proposed driveway was approximately 275-feet from the intersection of Greencrest Street NE, and did not comply with minimum standards. The driveway has been removed. Primary access for the proposed multi-family use is now from Greencrest Street NE and secondary access is provided by Stella Street NE, however Stella Street NE will not be constructed until Phased 5 of the East Park Estates Planned Unit Development.

The Fire Department will require a minimum of two approved points of access for the apartment complex. Greencrest Street NE is scheduled to be complete with Phase 3 of the East Park Estates Planned Unit Development and Stella Street NE is scheduled to be complete with Phase 5. If the Hearings Officer approves the proposed multi-family development, Stella Street NE may be constructed later than the multi-family development, the applicant will need to provide a means for secondary access to the site, which may mean construction of Stella Street NE prior to Phase 5.

- b. A pedestrian pathway has been added on the east side of buildings 23 and 28.

The site plan provided for the December 22, 2021 hearing did not include a pedestrian connection on the east side of buildings 23 and 28. A pedestrian connection between the adjacent parking area and building entrance is required per SRC 702.020(d)(4). The applicant's updated site plan provides this missing pedestrian connection, staff has no further concerns.

- c. Adjusted bicycle parking location.

The site plan provided for the December 22, 2021 hearing showed required bicycle parking spaces in a location that was further than 50 feet from a primary building entrance, and therefore not in compliance with the bicycle parking location standards in SRC 806.060(a)(1). The applicant's updated site plan shifted the location of the bicycle parking space near Building 21 in a location within 50 feet of a primary building entrance consistent with the standards in SRC 806.060(a)(1), staff has no further concerns.

- d. Additional window area.

The building plans and elevations provided for the December 22, 2021 hearing showed that windows were not provided in habitable rooms at the end elevations for proposed buildings 1-8, 10, 14-20, 22, 25 and 27 which is not in compliance with the multi-family design standards for site safety and security. The applicant's update building plans identify additional windows provided in habitable rooms in compliance with the multi-family design standards, staff has no further concerns.

- e. Applicant has updated the site plan showing a new line to measure setbacks between the proposed multi-family use and a future commercial use.

The site plan provided for the December 22, 2021 hearing included a shared drive aisle between the proposed multi-family use and a future commercial use in the southwest corner of the property. Staff had previously noted that a shared drive aisle is not allowed to be located across the common property line separating the two uses and had also expressed concerns with compatibility between the multi-family use and a future gasoline service station and convenience store.

The updated site plan changes the location where the setback is measured but does not explain if the property line is shifting to this new location, to add to the

confusion, the line identifying the limits for the project seem to include development of drive aisles and parking spaces for the future commercial use. If the property line is shifting to the new bold line, then the multi-family use is required to have a minimum 10-foot wide landscaped setback per Table 522-3 meeting the Type C standard set forth in Chapter 807 along this line. In addition to landscaping, the Type C Standard includes the requirement for a six-foot-tall fence or wall. The applicant does not indicate how fencing will be provided for the site. Fencing could further complicate pedestrian access from the site to Greencrest Street and State Street. Provisions for access easements across the future commercial property and the proposed multi-family use are also not addressed on the updated site plan.

Staff's concern regarding compatibility has not been addressed with the revised method for measuring the required setbacks between uses. The update site plan continues to provide shared vehicle access between the proposed commercial use and the multi-family use while further limiting pedestrian access to the multi-family use.

2) Conclusion

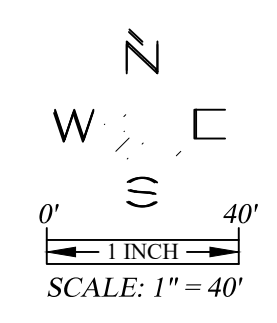
While the applicant has addressed some of the deficiencies relating to the multi-family design review standards and development standards in the CR zone, the proposal does not adequately demonstrate the required setbacks and separation between the proposed multi-family use and future commercial use are in compliance with City standards. In addition, the concerns identified by staff in the findings for the Conditional Use Permit request regarding the compatibility of the proposed multi-family use for the subject property have not been addressed by the updated plans. Staff recommends that the Hearings Officer deny the Conditional Use Permit and Class 3 Site Plan Review applications for these reasons.

City staff has not had adequate time to review and respond to the issues identified in the January 26, 2022 updated written statement provided by the applicant. **Staff asks that the Hearings Officer close the public hearing and leave the record open to allow for a formal response by staff.**

Attachments:

- A. Applicant's Updated Plans Dated January 25, 2022
- B. Applicant's Updated Written Statement Dated January 26, 2022

** THE INDICATED LOWER FLOOR UNITS IN BUILDINGS 7, 9, 20, 21, 25, & 26 ARE TO BE TYPE 'A' UNITS IN ACCORDANCE WITH THE 2014 OSSC SEC. 1107.6.2.1.1 (NOTED ON FLOOR PLANS). ALL OTHER LOWER FLOOR UNITS TO BE TYPE 'B' UNITS IN ACCORDANCE WITH THE 2014 OSSC SEC. 1107.6.2.1.2



- POLE LIGHT MAXIMUM 14' TALL
- POST LIGHT MAXIMUM 5' TALL
- WALL PACK MOUNTED ON BUILDING
- LOCATION OF ELECTRICAL SEPARATION WALL
- MAXIMUM 1:12 SLOPE ON SIDEWALK END RAMP
- 6 BICYCLE SPACES.

RM2 MULTI FAMILY:
36 TOTAL APARTMENT UNITS
24 TYPE "A" 2-BD, 3-BA (952 S.F.) UNITS
6 TYPE "C" 1-BD, 1-BA (728 S.F.) UNITS
6 TYPE "D" 3-BD, 2-BA (1204 S.F.) UNITS

CR MULTI FAMILY:
291 TOTAL APARTMENT UNITS
135 TYPE "A" 2-Bd, 3-Ba (952 S.F.) UNITS
36 TYPE "B" STUDIO (549 S.F.) UNITS
60 TYPE "C" 1-Bd, 1-Ba (728 S.F.) UNITS
24 TYPE "D" 3-Bd, 2-Ba (1204 S.F.) UNITS
36 TYPE "E" 2-BD, 2-BA (1162 S.F.) UNITS

RM2 MULTI FAMILY:
121 TOAL PARKING STALLS
53 STANDARD STALLS
63 COMPACT STALLS
5 HADICAP STALLS
6 BICYCLE SPACES (1 RACK)

CR MULTI FAMILY:
411 TOTAL PARKING STALLS
355 STANDARD STALLS
38 COMPACT STALLS
11 HANDICAP STALLS*
7 GARAGES (1 HANDICAP)
30 BICYCLE SPACES (5 RACKS)

3 LOADING ZONES
9 STORAGE UNITS
1 COMMUNITY BUILDING
1 TRASH COMPACTOR / RECYCLE
1 SWIMMING POOL (42'x16')
1 U.S. MAIL BOX AREA

(* 1-MARKED "WHEELCHAIR USE ONLY")

ADA HANDICAP ACCESSIBILITY NOTES:

1. ALL ON-SITE WALKWAYS, PEDESTRIAN CONNECTIONS TO THE PUBLIC SIDEWALK AND ROUTES TO BUILDING ENTRANCES ARE ACCESSIBLE WITH RUNNING SLOPES LESS THAN 5% AND CROSS SLOPE LESS THAN 2% MAX. LANDINGS AT BOTTOM OF STAIRS AND EXT. FACE OF ENTRANCE DOORS SHALL HAVE A SLOPE IN THE DIRECTION OF TRAVEL NOT TO EXCEED 2%.
2. HANDICAP PARKING STALLS AND ACCESS AISLES ARE TO HAVE SLOPES IN ANY DIRECTION OF LESS THAN 2% MAX. GRAPHIC MARKINGS & SIGNAGE FOR HANDICAP AND VAN ACCESSIBLE STALLS WILL BE PER OSSC 2010 CHPTR. 11 AND ORS. REQUIREMENTS.
3. HANDICAP ACCESSIBLE CURB RAMPS SHALL HAVE A RUNNING SLOPE NOT TO EXCEED 1:12 MAX. AND A CROSS SLOPE NOT TO EXCEED 1%.
4. THE COMMUNITY BUILDING & ON-SITE LAUNDRY FACILITIES WILL BE FULLY HANDICAP ACCESSIBLE IN ACCORDANCE WITH ANSI A117.1 AND CHAPTER 11 OF THE 2010 OSSC.
5. 2% OF THE LIVING UNITS OR (3) UNITS WILL BE TYPE 'A' HANDICAP ACCESSIBLE. THESE INCLUDE A 1, 2 AND 3 BEDROOM UNIT AS INDICATED ON THIS SITE PLAN. THE BALANCE OF THE GROUND FLOOR LIVING UNITS WILL BE TYPE 'B' ADAPTABLE UNITS IN ACCORDANCE WITH ANSI A117.1.

SITE PLAN OPTION #3

EAST PARK APARTMENTS

NO CHANGES, MODIFICATIONS OR REPRODUCTIONS TO BE MADE TO THESE DRAWINGS WITHOUT WRITTEN AUTHORIZATION FROM THE DESIGN ENGINEER.
 DIMENSIONS & NOTES TAKE PRECEDENCE OVER GRAPHICAL REPRESENTATION.

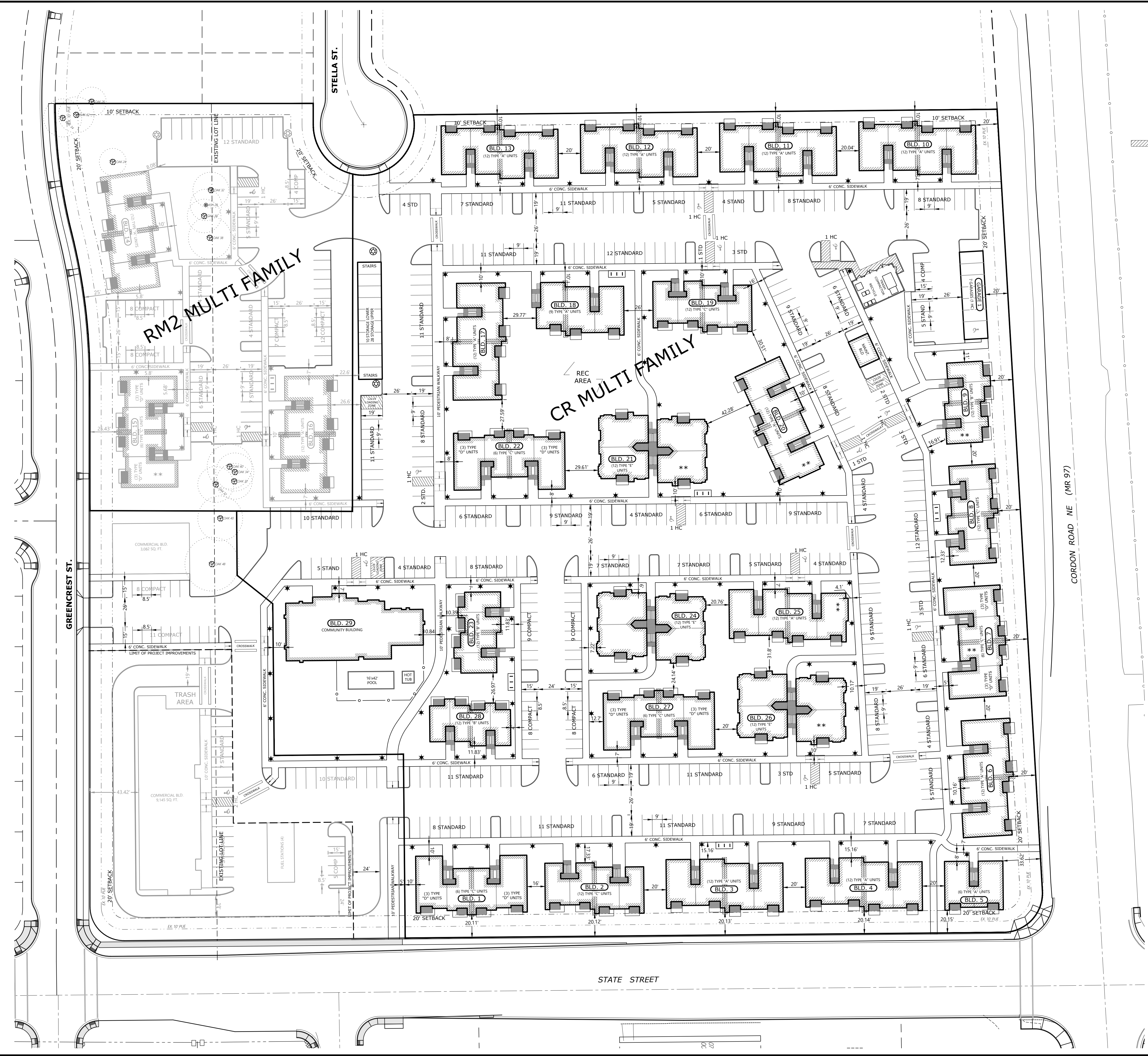
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 Drawn: T.M.S.
 Checked: J.J.G.
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 Scale: AS SHOWN

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OREGON
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 MARK D. GREINZ
 EXP. RES. 06/30/2023

JOB # 6789

SDR3





SOUTH ELEVATION (TYPE A UNITS)
SCALE: 1/8" = 1'-0"
BLD. 5



EAST ELEVATION (TYPE A UNITS)
SCALE: 1/8" = 1'-0"
BLD. 5



NORTH ELEVATION (TYPE A UNITS)
SCALE: 1/8" = 1'-0"
BLD. 5



WEST ELEVATION (TYPE A UNITS)
SCALE: 1/8" = 1'-0"
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BUILDING ELEVATIONS

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Renew date June 30, 2023



REAR ELEVATION (TYPE A UNITS)
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BLD. 18



END ELEVATION (TYPE A UNITS)
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BLD. 18

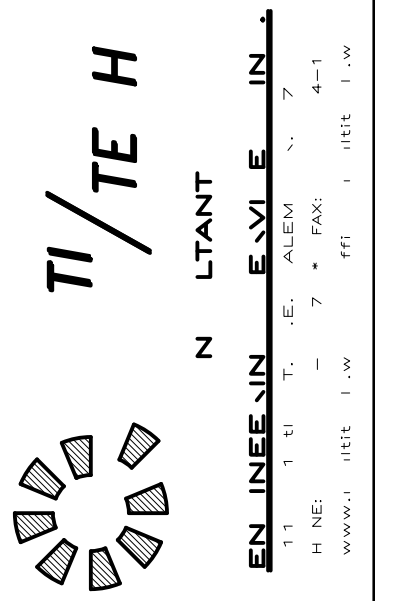


FRONT ELEVATION (TYPE A UNITS)
SCALE: 1/8" = 1'-0"
BLD. 18

EXHAUST VENT 3'-0"
CLEAR OF OPERABLE
WINDOW AREA TYP.



END ELEVATION (TYPE A UNITS)
SCALE: 1/8" = 1'-0"
BLD. 18



BUILDING
ELEVATIONS

EAST PARK
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NO CHANGE IN MATERIALS OR FINISHES UNLESS SPECIFICALLY NOTED OTHERWISE IN THE CONTRACT DOCUMENTS.

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BUILDING ELEVATIONS

EAST PARK APARTMENTS

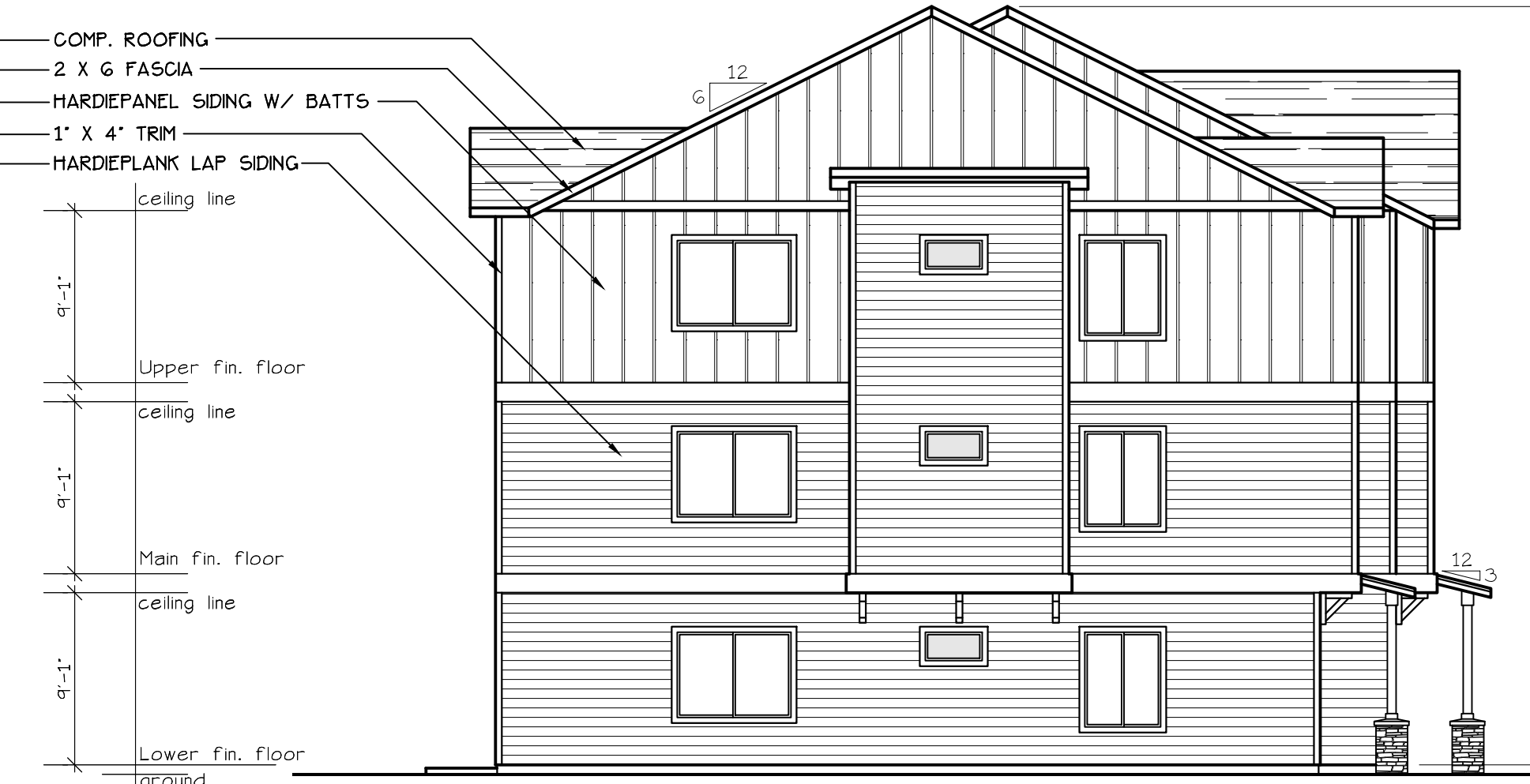
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 Renew date June 30, 2023



REAR ELEVATION (TYPE A UNITS)
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 BLD. 3.4.6.10-14.16.17.20+25



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 BLD. 3.4.6.10-14.16.17.20+25



FRONT ELEVATION (TYPE A UNITS)
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EXHAUST VENT 3'-0" CLEAR OF OPERABLE WINDOW AREA TYP.

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 HARDFANEL SIDING W/ BATTS
 1" X 4" TRIM
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 10'-8"
 ceiling line
 9'-1"
 40'-0"
 Upper fin. floor
 ceiling line
 9'-1"
 Main fin. floor
 ceiling line
 9'-1"
 Lower fin. floor
 ground

ridge line
 10'-8"
 ceiling line
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 40'-0"
 Upper fin. floor
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 9'-1"
 Lower fin. floor
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REAR ELEVATION (TYPE B UNITS)
SCALE: 1/8" = 1'-0"
BLD. 9, 23+28



SIDE ELEVATION (TYPE B UNITS)
SCALE: 1/8" = 1'-0"
BLD. 9, 23+28

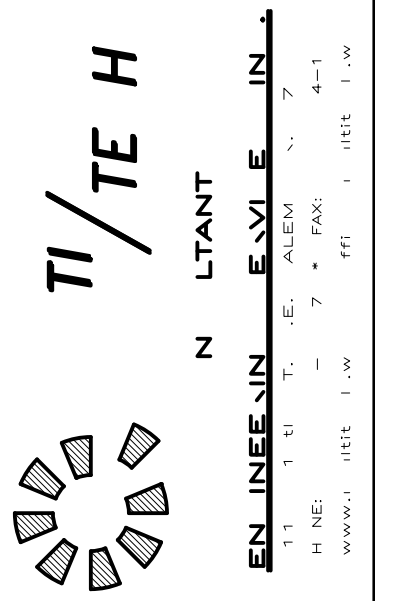


FRONT ELEVATION (TYPE B UNITS)
SCALE: 1/8" = 1'-0"
BLD. 9, 23+28

EXHAUST VENT 3'-0"
CLEAR OF OPERABLE
WINDOW AREA TYP.



SIDE ELEVATION (TYPE B UNITS)
SCALE: 1/8" = 1'-0"
BLD. 9, 23+28



BUILDING
ELEVATIONS

EAST PARK
APARTMENTS

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FOR INFORMATION
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DATE: 06/30/23
BY: M.G.
PROJECT: EAST PARK APARTMENTS
SHEET: A4.90

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MARK D. GRENZ
Renew date: June 30, 2023

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BUILDING ELEVATIONS

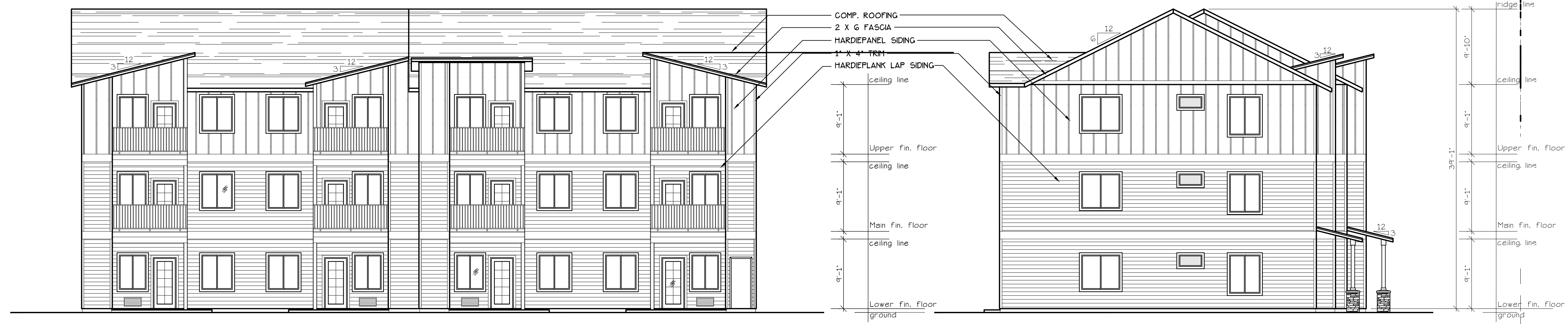
EAST PARK APARTMENTS

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 THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL JURISDICTION
 THE CONTRACTOR SHALL BE RESPONSIBLE FOR VERIFYING THE EXISTING CONDITIONS AND UTILITIES PRIOR TO COMMENCEMENT OF WORK
 THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROTECTING ALL ADJACENT PROPERTIES AND UTILITIES DURING THE COURSE OF CONSTRUCTION
 THE CONTRACTOR SHALL BE RESPONSIBLE FOR MAINTAINING ACCESS TO ALL ADJACENT PROPERTIES AND UTILITIES AT ALL TIMES
 THE CONTRACTOR SHALL BE RESPONSIBLE FOR CLEANING AND RESTORATION OF ALL ADJACENT PROPERTIES AND UTILITIES AT THE END OF CONSTRUCTION
 THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY INSURANCE COVERAGE
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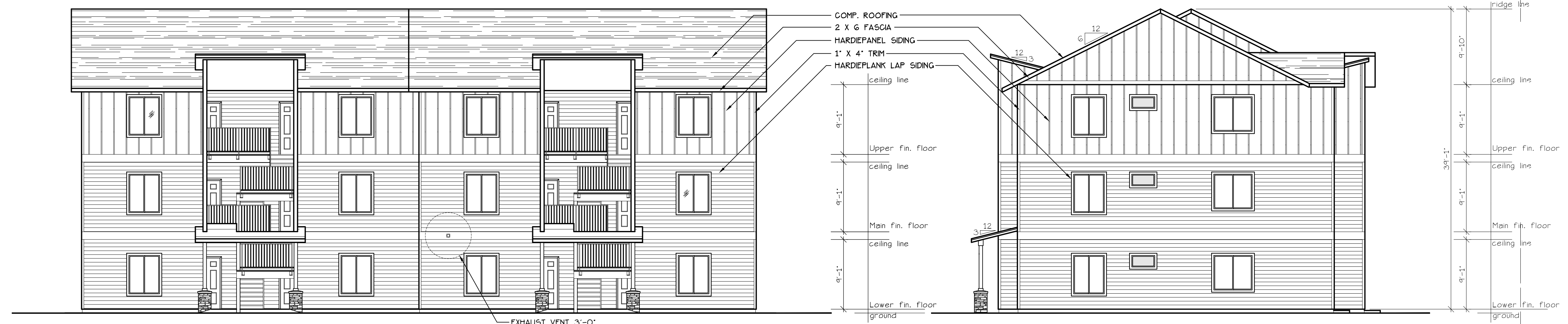
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 MAY 14, 1978
 MARK D. GRENZ
 Renew date: June 30, 2023

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REAR ELEVATION (TYPE C UNITS)
 SCALE: 1/8" = 1'-0"
BLD. 2.8+19

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 SCALE: 1/8" = 1'-0"
BLD. 2.8+19



FRONT ELEVATION (TYPE C UNITS)
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BLD. 2.8+19

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**BUILDING
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 APARTMENTS**

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 MARK D GRENZ
 Renew date June 30, 2023

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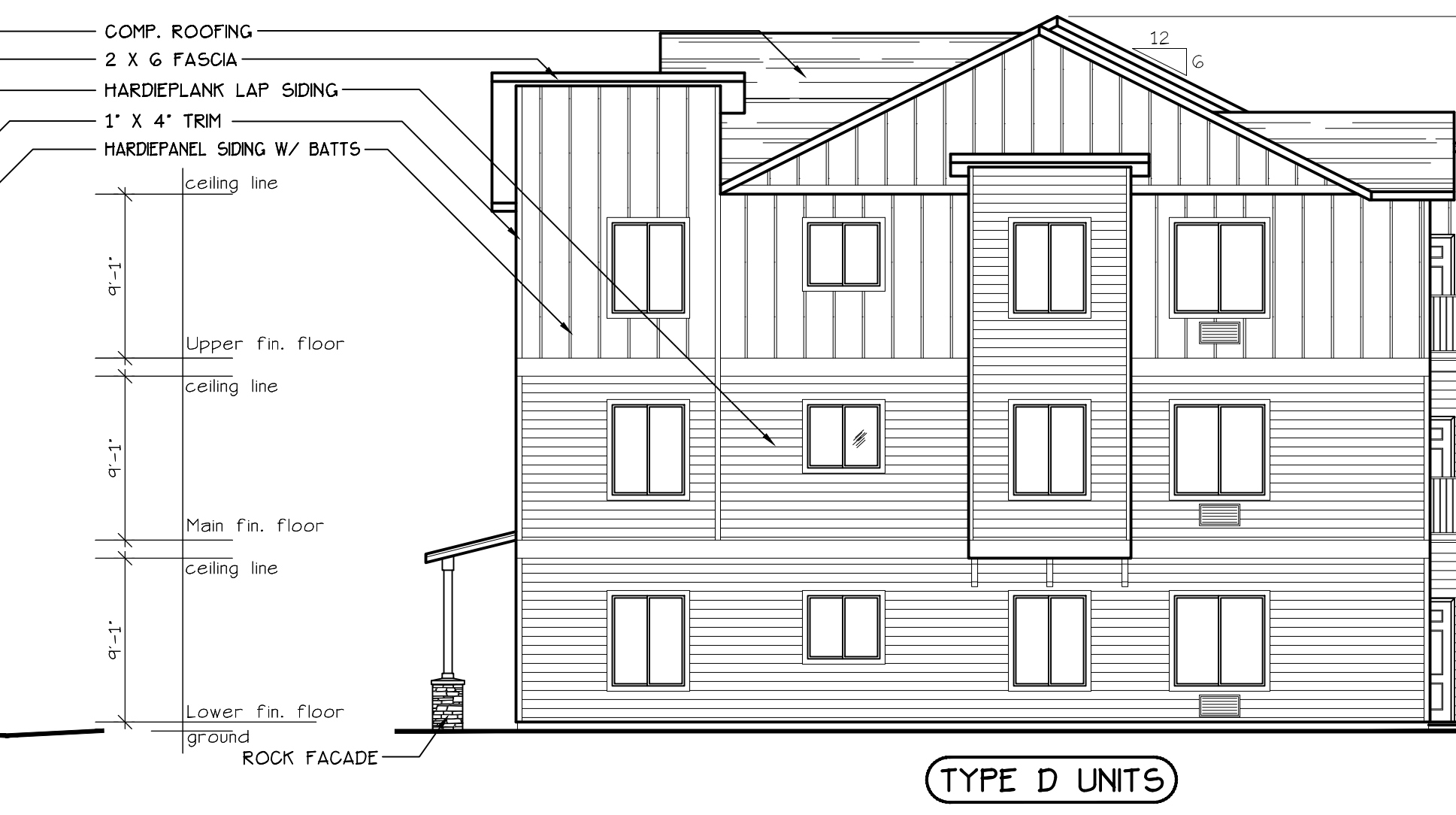
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END ELEVATION (BLD. 1.7.15.22+27)
 SCALE: 1/8" = 1'-0"



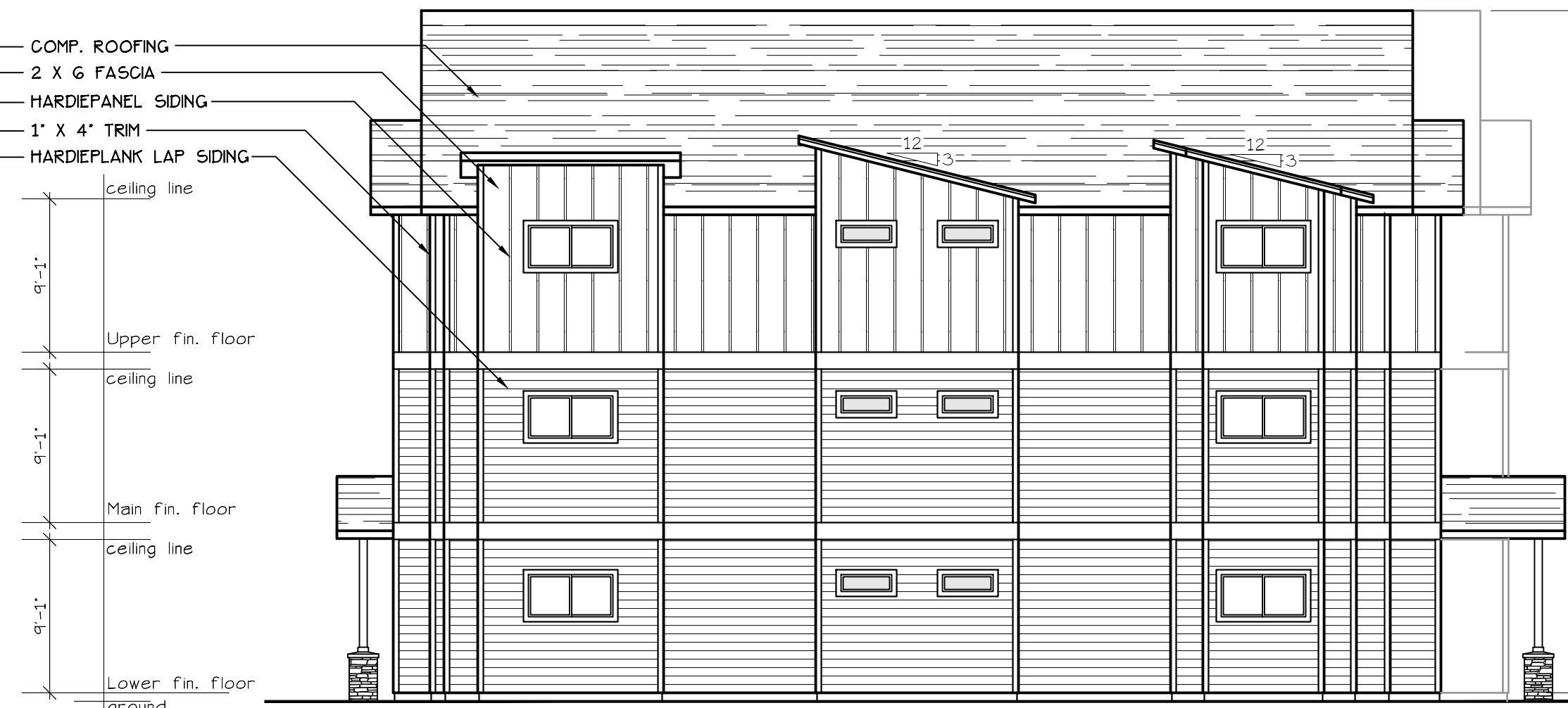
FRONT ELEVATION (BLD. 1.7.15.22+27)
 SCALE: 1/8" = 1'-0"



END ELEVATION (BLD. 1.7.15.22+27)
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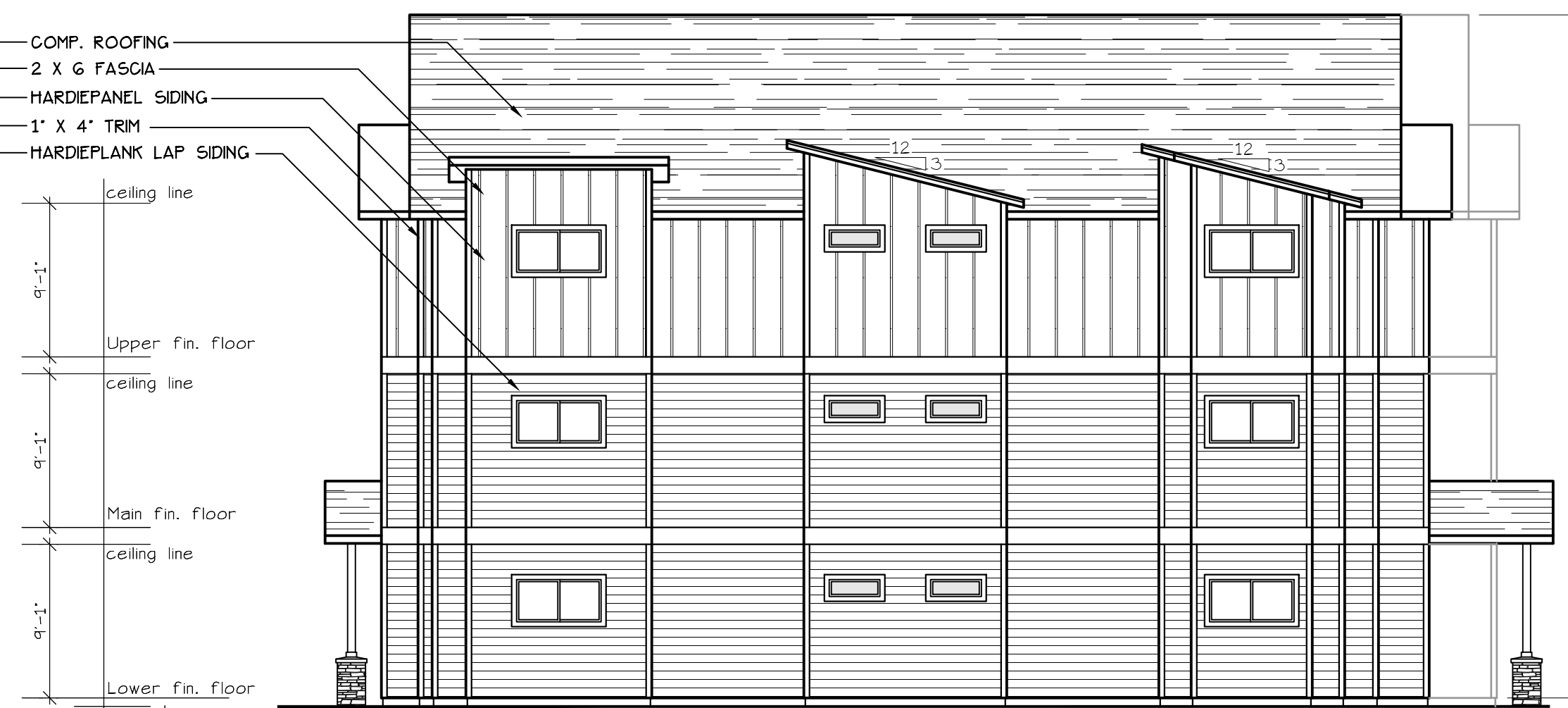
WEST ELEVATION (TYPE E UNITS)
 SCALE: 1/8" = 1'-0"
 BLD. 21. 24+26



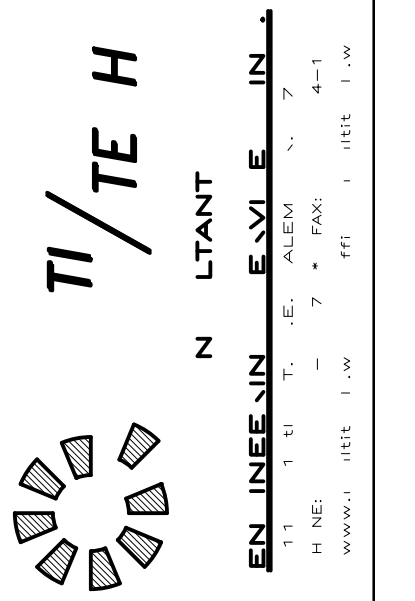
SOUTH ELEVATION (TYPE E UNITS)
 SCALE: 1/8" = 1'-0"
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EAST ELEVATION (TYPE E UNITS)
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 BLD. 21. 24+26



NORTH ELEVATION (TYPE E UNITS)
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 BLD. 21. 24+26



BUILDING ELEVATIONS

EAST PARK APARTMENT COMPLEX

NO MORE INFORMATION
 TO BE TAKEN FROM THIS SET
 WITHOUT THE WRITTEN
 PERMISSION OF THE ARCHITECT

DATE: 07/13/19
 DRAWN BY: L.M.
 CHECKED BY: J.M.
 PROJECT: A1-1
 SHEET: A7.80

7
 REGISTERED PROFESSIONAL ENGINEER
 9654
 OREGON
 JULY 14, 1978
 MARK D. GRENZ
 Renew date: June 30, 2023

A7.80



Edward H. Trompke
ed.trompke@jordanramis.com
Direct Dial: (503) 598-5532

Two Centerpointe Dr., 6th Floor
Lake Oswego, OR 97035
T (503) 598-7070
F (503) 598-7373

January 26, 2022

Via E-mail Only

Aaron Panko
apanko@cityofsalem.net

Re: East Park Apartments - CONDITIONAL USE / CLASS 3 SITE PLAN REVIEW / CLASS 2 ADJUSTMENT / CLASS 2 DRIVEWAY APPROACH PERMIT / CLASS 1 DESIGN REVIEW CASE NO. CU-SPR-ADJ-DAP-DR21-05 4900 BLOCK OF STATE STREET - 97301 AMANDA NO. 21-117429-ZO, 21-117432-RP, 21-117433-ZO, 21-117435-ZO & 21-121189-DR

Dear Aaron:

This letter is submitted on behalf of East Park, LLC the owner and developer of the East Park PUD, which includes the area of the subject application. Please send this letter and the enclosures to the hearings officer, enter them into the land use record, and confirm by email that they are in the record.

We received the December 22, 2021 staff report and were disappointed to read how the city thinks the application fails to meet the approval standards and criteria for development of this needed housing. The application, as modified in the attached site plan (which has been submitted already), does satisfy all the approval standards and criteria. Please also note that many of the applicable criteria are not clear and objective, and, therefore, as a matter of state law, they cannot be applied to this application. ORS 197.307(4).

Enclosed with this letter is new evidence that demonstrate the standards and criteria are satisfied. The first is the revised site plan, which eliminates the State Street driveway and changes the circulation and buildings in the southwest portion of the site, such that the shared driveway and property line issues are resolved. The site plan also adds a sidewalk next to Buildings 23 and 28 which was inadvertently omitted from the prior site plan. New elevation drawings for Buildings 1-8, 10, 14-20, 22, 25, and 27 illustrate new windows in the end walls.

There are three letters from expert professionals regarding the unsuitability of the site for retail development, and listings of vacant retail space in SE Salem. There is a memo from traffic engineer Todd Mobley, which explains why this application reduces traffic volume and improves traffic flow around the site, as compared to the conceptual site plan from the annexation. These letters are expert evidence that the city's preference for retail development is unrealistic on this site and would not be a benefit to the neighborhood. More specific responses to the criteria are below, and then the statutory needed housing issue is explained.

Conditional Use Criteria

SRC Chapter 240.005(d) includes criteria for a conditional use permit:

Criterion 2:

The reasonably likely adverse impacts of the use on the immediate neighborhood can be minimized through the imposition of conditions.

The staff report notes: “While this criterion requires an analysis of the proposed apartments against the immediate use, it is important to note that there would be adverse impacts on the apartment complex from the proposed adjacent retail and gas station use shown on the site plan (but which are not part of this application).” In other words, the staff report does not apply the criterion as written, it applies the criterion based on potential future conditions which do not exist. That is legal error, because it is contrary to the express text of the criterion. Moreover, staff contradicts itself by insisting on more commercial, and then criticizing the adjacency of retail and residential.

Second, “staff recommends that a condition of approval be placed requiring a minimum six-foot tall wall be constructed along the Cordon Road NE frontage in order to reduce noise and visual impacts.” Because the criterion on which this condition is based, is not clear and objective, it cannot be applied, and provides no legal basis for the proposed condition. The criterion is not clear and objective because “reasonably likely adverse impacts of the use on the immediate neighborhood” requires a subjective, value-laden analysis that cannot be performed objectively. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158, *aff'd*, 158 Or App 1,970 P2d 685, *rev den*, 328 Or 594 (1999).

Criterion 3:

The proposed use will be reasonably compatible with and have minimal impact on the livability or appropriate development of surrounding property.

The apartments are an allowed residential use in the zone. The staff report concludes that the apartments “could be made consistent with the goals and policies of the Salem Area Comprehensive Plan if appropriate separation from the commercial uses was proposed.” However, the determination of “appropriate separation” again requires a subjective analysis which is prohibited.

The staff report alleges the loss of commercial land is not consistent with the comprehensive plan provisions on siting neighborhood and community shopping. Those plan provisions are likewise not clear and objective. For example they require retail to be (in the staff’s words) “scaled and consistent with the character of surrounding and nearby residential development.” That phrase is another subjective and value-laden requirement that cannot be applied. Nor are the comprehensive plan provisions capable of being applied only in an objective manner, as required by ORS 197.831,

because reasonable land use decision makers could easily disagree on whether a project is “consistent with the character.”

Conformance to the Conceptual Plan

SRC 260.090 includes four criteria for conformance.

- (1) Is consistent with the character and intent of the conceptual plan;
- (2) The impacts from the development, including, but not limited to, noise, vibration, dust, odor, or fumes, detectable at the property line will not exceed the maximums typical for the categories of uses proposed in the conceptual plan;
- (3) The number and types of vehicular trips to and from the site will not exceed the maximums typical for the categories of uses proposed in the conceptual plan; and
- (4) That the amount and types of outside storage, loading, and parking will not exceed the maximums typical for the categories of uses proposed in the conceptual plan.

Criterion 1 is satisfied because the concept plan was intended to provide for adequate neighborhood commercial uses. As the attached expert letters and for lease advertisements describe, the demand for retail uses has fallen in recent years, and thus the 9145 square feet provided is adequate. In other words, there is no shortage in the marketplace, and nearby residents have adequate retail shopping opportunities that do not require new brick and mortar retail buildings at this location. The 9145 square foot retail development will be developed adjacent to this site, as shown on the site plan.

More specifically, commercial broker Graham Taylor of CBRE wrote that:

“The leading disadvantage with this site; the vast majority of needed customers will simply never drive past the site, it’s not a destination location. Similar vacant space already exist within the SE Salem market area, with far greater commercial appeal, and to my knowledge, there is virtually no new demand forecasted for the next several years.”

Broker Tyler Bruss of Urban Works Real Estate wrote that:

“The space is not a destination commercial location, but rather a neighborhood convenience space, and in this location, most tenants will correctly assume that customers will not stop and instead continue to their end location. Therefore, the developer correctly proposes smaller scale convenience commercial spaces to serve the needs of nearby residents, not the larger market area.

The current state of the commercial market is Amazon has eroded or eliminated completely the demand and need for larger commercial retail spaces, and anything built will likely remain vacant for some time. Similar vacant space exists

within the SE Salem market area, and to my knowledge, there is limited demand forecast for the next few years.

In my professional opinion, this location is not appropriate for the commercial development as shown on the concept plan that was prepared more than eleven years ago for the annexation.”

Finally, the developer marketed the site to commercial users for several years, without any interest from a large user. It wrote:

“East Park, LLC and its affiliates have developed over 500,000 square feet of retail in various Northwest cities in the last fifteen years. Since acquiring the East Park project, we have made our customary efforts to market the property for retail commercial use, with very limited success.

* * * *

At East Park, we have been marketing the current proposed space for over 2 years. To date, we have had one tenant express any interest, and as such, have designed the space specifically for their needs. If we modify it, they will likely decline to move forward. If there had been any interest, of course we would have developed more commercial.”

All of this evidence leads to the conclusion that the proposed 9145 square feet of commercial space is adequate to serve the neighborhood consistent with Criterion 1. The Annexation Conceptual Plan is simply outdated and no longer relevant to neighborhood needs.

Criterion 2 is satisfied because the impacts from the apartments will be lower than from the large scale commercial shown in the concept plan. The Mobley memo confirms that traffic will be reduced; including truck delivery traffic, and the Cordon Rd access will not be constructed. That access would interrupt the pedestrian path on Cordon, and the county and city traffic engineer’s do not want the access. The staff report acknowledges this fact on page 16, where it notes the “access limitations on Cordon Road.” Second, the lighting from apartments will be less than from the typical brightly lit commercial buildings and parking lots. Third, the back of retail spaces, with truck loading and trash containers, will no longer face the adjacent residential. For these reasons, the apartments will reduce impacts at the property line as compared to the commercial development in the conceptual plan.

The Mobley memo also confirms a substantial reduction in vehicle trips, so Criterion 3 is easily satisfied. The commercial uses on the Annexation Conceptual Plan will add 4690 additional daily trips, which have not been accounted for in any prior traffic study. (11,084 less 40% for pass-by trips less 1960 for the apartment trips). The memo is substantial evidence of both a reduction in traffic, and an improvement is the neighborhood generally that results from the reduced traffic. Similarly,

elimination of the retail reduces “amount and types of outside storage, loading, and parking” and therefore Criterion 4 is satisfied.

In addition, these criteria are not clear and objective, and ORS 197.307(4) prohibits their application to this project. Determining what is “consistent with the character and intent” requires a subjective, value-laden analysis. As noted above, the applicant understands the intent was to provide adequate local retail for the neighborhood. The record is clear that at the time of the staff report, no critical comments had been received from any neighbors. And no critical verbal comments were received at the earlier neighborhood meeting. This is further substantial evidence that the neighborhood does not need the retail space. The neighborhood representatives understand there is no such need. The record lacks any contemporaneous evidence of a retail need, only outdated, pre-pandemic assumptions.

Even if there were a generalized need for retail in the City, there is no evidence in the record that locating retail at the very edge of the UGB is necessary or appropriate. Judgments about the location of retail spaces are subjective and value-laden, and therefore staff’s judgment that retail is needed on this site cannot be applied to this application, ORS 197.307(4), especially where market experts say otherwise.

SRC 806.040 – Driveway Development Standards

The shared driveway from State Street has been eliminated. The enclosed site plan illustrates the new design. The rows of parking on the residential property that the staff report objected to are now either eliminated, or on the commercial property because the boundary between the residential and commercial uses has been moved north and east.

SRC 806.060(a)(1) – Bicycle Parking Development Standards

On the prior site plan, one of the bicycle parking pads with required bicycle parking spaces was located between buildings 20 and 21, more than 50 feet from a primary building entrance, and therefore not in compliance with SRC 806.060(a)(1). That pad has been shifted toward the west on the new site plan, to be less than 50 feet from the Building 20 entrance. This standard is satisfied.

SRC 702.020(c)(1) Site safety and security.

This provision requires windows on each wall in habitable rooms that face common open space, parking areas, and pedestrian paths. Previously, the habitable rooms at the end elevations for Buildings 1-8, 10, 14-20, 22, 25, and 27 did not include windows. The revised elevations are enclosed, and demonstrate this standard is met.

Needed Housing Summary

Many of the criteria described above are not clear and objective, and therefore cannot be applied to housing, including needed housing. ORS 197.307(4). ORS 197.303 defines needed housing as “all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes[.]”

The proposed apartments are needed housing under ORS 197.303 because, as noted in the staff report, the City’s Housing Needs Analysis (HNA) documents a 207 acre deficit of multifamily land (2,897 dwelling units) in Salem’s portion of the urban growth boundary (UGB) by 2035. The HNA also noted that the price of single family housing is increasing faster than rents. As a result, more households are likely to rent instead of purchase. It even recommended rezoning more land for multifamily use to meet that need. This project is needed housing, and several legal effects follow.

Even if the application does not meet the definition of “needed housing”, ORS 197.307(4) still applies, because it applies to “the development of housing, including needed housing.” This means that it is not limited to needed housing.

A denial of this application would exceed the City’s discretion, because ORS 197.307(4) prohibits application of the subjective criteria that staff believes are the basis for denial of the application. See ORS 197.835(10)(a); *Legacy Development, LLC v. City of the Dalles*, ___ Or LUBA ___ (LUBA No. 20-099, February 24, 2021, slip op at 21-22; *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37, 57 (2014).

Furthermore, in subsequent appellate reviews, the burden shifts to the City to “demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner.” ORS 197.831. Our view is that the flexibility inherent in these City code provisions means the City cannot meet that legal burden. Finally, please note that if the applicant successfully appeals the City decision under these circumstances, the City is at risk of being ordered to pay the applicant’s attorney fees. ORS 197.835(10)(b). LUBA applies this attorney fee provision.

In summary, LUBA and the Court of Appeals rigorously apply the needed housing statutes, because the Oregon legislature has been emphatic that land use applications for housing cannot be denied for subjective reasons. Reasonableness, appropriateness, livability, compatibility, and character are among the subjective, value-laden concepts that the staff report applies. State law is clear those concepts cannot be applied. The City needs to update its code to remove them, and in the interim, it must approve this application.

Aaron Panko
January 26, 2022
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Conclusion

The Conceptual Plan from the long ago annexation is outdated and unresponsive to current and future neighborhood needs and market conditions. The applicant's expert evidence demonstrates that there is no need for a large amount of retail in this location. The neighborhood itself is fine with the apartments. And the traffic evidence is uncontroverted: traffic will be reduced, which is an obvious benefit to the surrounding area.

As revised, the application satisfies all of the standards and criteria, even the subjective ones that, as a matter of state law, cannot be applied to the application. The hearings officer should approve the application, and we look forward to promptly constructing this needed housing.

Sincerely,

JORDAN RAMIS PC



Edward H. Trompke
Admitted in Oregon

cc: East Park, LLC
Multitech Engineering

Enclosures