



COMMUNITY DEVELOPMENT

APPEAL APPLICATION

Contact Information

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Appeal Information

File number of decision to be appealed: PZ 18-0429, Site Plan

BDC 4.1.1110 Who May Appeal.

- A. The following may file an appeal:
 - 1. A party; or
 - 2. A person entitled to notice and to whom no notice was mailed.
- B. A person to whom notice is mailed is deemed notified even if notice is not received.

BDC 4.1.1115 Filing Appeals.

- A. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and pay an appeal fee.

APPEAL TO THE CITY COUNCIL OF THE CITY OF BEND

File Number: PZ-18-0429

Appellant: William Smith Properties, Inc. (“WSPI”)
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Matter Appealed: Site Plan Approval of Evergreen Apartments by City of Bend
Hearings Officer Will VanVactor dated March 7, 2019 entitled
“Hearings Officer Decision”

Appellant’s Attorney: Liz Fancher
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Applicant: Evergreen Housing Development Group, LLC (“Evergreen”)

Subject Property: 171 SW Shevlin-Hixon Drive; Lot 13, Replat of Shevlin Riverfront
Assessor’s Map 18-12-05BB, Tax Lot 1600

NOTICE OF APPEAL

I. Discretionary Review by Council

The appeals presents at least two issues that have significant public policy or community-wide implications.

First, the hearings officer determined that BCC Chapter 4.7 is inapplicable to land use application seeking approval of housing developments. This decision impacts all land use applications that propose housing and excuses them from the requirement to mitigate transportation system impacts caused by the developments.

Second, the hearings officer determined that the Shevlin Riverfront Master Plan cannot be applied as an approval criterion for the review of land use application to development in the master plan area because it is not, allegedly, “clear and objective.” The hearings officer also found that the requirement in the City’s site plan review criteria that development “substantially conform” to approved master plans is unenforceable. If this interpretation is applied in future cases, the master plans of master-planned communities that allow housing will be meaningless in any review of an application proposing housing.

It is necessary or desirable for the City Council to review these issues so that it may determine whether it agrees with the hearings officer's decision that eliminates key provisions of its development code for all housing projects and whether it will defend its code on appeal to LUBA. This matter cannot adequately and fairly be reviewed by the Land Use Board of Appeals because only the City Council may determine whether its own code merits a defense at LUBA against the determinations made by the hearings officer.

II. Interest of Appellant

WSPI participated in the matter being appealed. WSPI filed written comments in opposition to approval of PZ-18-0429 with City staff and the City's hearings officer. WSPI offered testimony through its representatives at the City land use hearings conducted regarding the Evergreen site plan and variance applications on January 10, 2019 and January 18, 2019.

WSPI owns real property at 15 SW Colorado Avenue, Bend, Oregon (Tax Lot 200, Map 18-12-05BB) that will be directly and adversely impacted by a City approval of the site plan and variance requested by Evergreen. The building proposed by Evergreen will be directly across the Deschutes River and clearly visible from WSPI's 15 SW Colorado property. The design and size of the proposed building are not in keeping with other mixed-use and residential buildings in the Shevlin Riverfront Master Plan area. The negative visual impact of this five-story building will be exacerbated by the unattractive design of the building and its prominent location on a bluff that rises steeply above the Deschutes River. Additionally, the development will overload the site by developing at a density far in excess of the maximum density allowed in any residential zone in the City and will provide inadequate parking by relying on on-street parking that is already oversubscribed and providing close to the minimum amount of parking required by code.

III. Summary of Issues

WSPI filed comments in opposition to approval of PZ-18-0429 and construction of 170 apartments on a 2.91 acre property for a number of reasons and has appealed the decision for the following reasons:

The proposed development violates the clear and objective requirements of the Shevlin Riverfront Master Plan (SRMP) and BDC 2.3.600.C.3 (requires new development comply with the master plan).

The hearings officer determined that the City of Bend may not require developers of housing projects to prepare traffic impact studies and to mitigate impacts to the City's street system and, therefore, failed to assure compliance with BDC 4.7.600 that requires Evergreen to mitigate impacts identified by the Transportation Impact Analysis required by BDC 4.7.500.

The approval authorizes an unsafe parking garage access onto a very steep, narrow and crowded part of Bradbury Way that fails to provide the intersection sight distance required by BDC 3.1.400.F.7.

The site plan fails to provide a stormwater drainage system between the building and adjoining streets, McKay Park and the Deschutes River to contain stormwater on-site or to direct it to a drainage facility that is part of an overall drainage master plan as required by BDC 2.3.600.7.

The site plan proposes a five-story building that will be 65 feet above the elevation of Shevlin Hixon Drive and the Deschutes River where a 45-foot height limit is imposed by BDC Table 2.3.300. The applicant incorrectly calculated building height (BDC Chapter 1.2, Definitions, Building Height) making it uncertain whether the height limit will be met by the finished building.

The hearings officer unlawfully delegated the City's right and responsibility to assure compliance with engineering and land use planning code requirements and the public's right to comment on site plan revisions needed to achieve compliance with relevant approval standards to the applicant's consultants. Additionally, the hearings officer erroneously deferred the determination of compliance with relevant approval criterion to City staff (hereinafter "deferred compliance") The hearings officer should have provided the public with notice and a right to comment or a hearing during the review of the revised plans because the reviews are land use or limited land use reviews (hereinafter "Rhyne review.") *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992); *Gould v. Deschutes County*, 227 Or App 601, 611-12, 206 P3d 1106(2009); *Patterson v. City of Bend*, Or LUBA 442, 447 (1992).

The applicant relies on on-street parking in an area where none is available; in violation of requirements of the SRMP master plan that requires all parking to be provided on-site. BDC 2.3.600.C.3.

IV. Detail Regarding Appeal Issues/Additional Issues

WSPI offers the following specifics regarding the issues it has raised above and raises additional appeal issues, below. All substantive issues in this appeal document were raised below. Challenges to the hearings officer's decision are raised here as this is the first opportunity that WSPI has to raise the challenges because the record before the hearings officer closed before the decision was issued.

1. The hearing officer erred in interpreting the SRMP requirements, including those listed above, as "not clear and objective" and, therefore, unenforceable and thereby approved a site plan that violates BDC 2.3.600(C)(3). It is clear from the law in effect in 1997 and in effect in 2018 that compliance with the SRMP master plan and its map is required and the requirement of each are plain to see on the map and read in the plan. The hearings officer correctly determined that "[t]he Code unequivocally makes the application subject to complying with the SRMP" (*Decision*, p. 15) and, therefore, was required to assure compliance with the SRMP plan map.

The Evergreen site plan and hearings officer's decision approves development that violates clear and objective requirements of the Shevlin Riverfront Master Plan and BDC 2.3.600(C)(3). In particular, the decision fails to require development to comply with the approved master plan map and text of the SRMP.

The master plan map, when approved in 1997, required proposed development to show: (a) building envelope; (b) parking area location, size and access; (c) access points to local streets and major street network; (d) pedestrian/bicycle corridors; (e) landscape areas; and (f) other open space and common areas. The relevant master plan approval criteria relied on the master plan map to achieve compliance with SRMP approval criteria and required development of the subject property to occur in compliance with the approved plan and requirements of the MR zone. Ordinance NS-1636, Section 21A (4). In 2018 when Evergreen filed its site plan application, compliance with the SRMP was required by BDC 2.3.600(C)(3). The text of the plan, also, supplies relevant approval criteria.

Compliance with the SRMP is also required as a matter of law. In *Frankland v. City of Lake Oswego*, 267 Or 452, 426-463, 517 P2d 1042 (1973), the Oregon Supreme Court held that “[o]nce approved, the developer should be bound by the [PUD] plans unless any changes are approved by the planning authorities in accordance with the PUD ordinance.” The Court found that this obligation is implicit in a local code that required a PUD applicant submit information about the nature of future PUD development, including appearance, location, height and bulk of buildings for review and approval by planning authorities. Compliance with approved master plans is also required by LUBA case law. *Dahlen v. City of Bend*, 57 Or LUBA 709, 719 (2008)(revised master plan rather than initially approved master plan controls future land use approval including as residential subdivision); *Athletic Club of Bend v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2011-030, 7/5/11), *aff'd without opinion*, 246 Or App 82 (2011)(text in “Brown Book” document that described a 200’ setback continued to control development in PUD after amendment of PUD master plan).

LUBA case law recognizes that prior planned development approvals, such as a master plan approval, may provide relevant approval criteria for housing development applications on land in a planned development area. If the plan's requirements are clear and objective, they are enforceable. *See, Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015)(a PUD master plan is enforceable unless unclear).

In the case of the SRMP, it is clear that the City of Bend approved the Brooks Resources “Preliminary Master Plan” map, text and attachments, including a grading plan, as the master plan for Shevlin Riverfront and Lot 13. BDC 2.3.600(C)(3) requires Evergreen to comply with the SRMP. The master plan supplies a site layout and plan requirements for site plans that are clear and objective, as confirmed by Section 21A(4)(a) of Ordinance No. NS-1178, the law in effect when the SRMP was approved in 1997.

Violations of the Master Plan Map

The following is a list of SRMP Master Plan Map requirements the approved Evergreen site plan map fails to meet that should have resulted in a decision of denial by the hearings officer:

Shevlin Riverfront Master Plan Map	Evergreen Site Plan
Building footprint location, size and shape	New building footprint with a different location, size and shape
Parking areas shown on the SRMP map	New, expanded parking area in different locations
Access to river side parking area from Shevlin- Hixon Drive (shown as Simpson Avenue on SRMP map); parking area provided east of building	Access to parking garage (river side) from Bradbury Way (shown as Shevlin-Hixon Drive on map); access that fails to comply with sight distance rules of BDC; no parking east of building
Construct Crowell Way to connect to Colorado Avenue as shown on the SRMP map	Parking area occupies the area shown as Crowell Way No connection to Colorado Avenue
Sidewalks and landscape strips along Crowell Way; connects Bradbury Way (shown as Shevlin-Hixon) to Colorado Avenue	No sidewalks or landscape strips for Crowell Way; no sidewalk connection between Bradbury Way and Colorado Avenue
Small pocket park with bench and bike rack amenities on Shevlin-Hixon Drive (referred to as Simpson Avenue on the SRMP map)	No pocket park, bench or bike rack provided
Property line tight sidewalk on Shevlin-Hixon Drive with small jog to join sidewalk at Colorado Street underpass	Curb tight sidewalk
Planter strip with landscaping and street trees along Shevlin-Hixon Drive between sidewalk and road	No planter strip with landscaping and street trees proposed
Hotel/mixed use building*	Apartment complex (not a “mixed use” building)

* This is the only requirement of the Master Plan map arguably altered by the 2009 modification decision.

For all of the above requirements, there is no ambiguity. The location of these areas and promised communities amenities are shown on the master plan map. Development elsewhere in the master plan area has provided the arrangement of parking areas and building footprints required by the plan.

Evergreen’s site plan makes no effort to comply with the approved plan. The building footprint proposed by Evergreen is not the same shape or size as the footprint shown on the master plan. The upper parking lot is much larger and in a different location than shown on

the SRMP map. The applicant is proposing a curb-tight sidewalk rather than the property line-tight sidewalk (with a minor variation shown on the plan), landscape strip and pocket park on Shevlin-Hixon Drive (formerly Simpson Avenue) required by the SRMP map. There is no ambiguity about whether these street and public amenities are required and the fact that the applicant is not providing them.

The upper parking lot proposed by Evergreen obliterates Crowell Way, its sidewalks and its landscape strips. Nothing approximating Crowell Way is proposed by Evergreen.

Violations of the Master Plan Text

The following provisions of the SMRP text are violated by the hearings officer’s approval of the Evergreen site plan:

Shevlin Riverfront Master Plan	Evergreen Site Plan
76,000 square foot building	168,102 square feet
Right-in/right out access to Colorado Avenue (confirmed by City’s 2009 Modification Decision)	No connection to Colorado Avenue
Hotel 3 to 4 stories adjacent to the river and 1 to 3 stories on the upper level	Apartment building 5 stories tall adjacent to the river and 4 stories on the upper level
Building height of 35 feet; conditional use approval of heights over 35 feet (2009 changed to allow a variance approval for heights over 35 feet)	Building height of 50 feet; variance for height over 45 feet
All required parking for Lot 13 must be provided on site	When properly calculated, Evergreen’s site plan does not provide all required parking on site. This is explained in more detail immediately following this chart.

Violation of the SRMP Grading Plan

The 1997 SRMP includes a preliminary grading plan that was Appendix D of the Master Plan. It shows that a cut bank is proposed in the southeast part of the subject property to create access to Shevlin-Hixon Drive (then Simpson Avenue). Evergreen’s grading plan does not grade the site as shown nor does it provide the driveway access shown on the grading plan and the SRMP map. The hearings officer erred in failing to address this argument and in failing to require the applicant to comply with the grading plan.

2. In particular, the hearing officer’s decision erred in failing to apply the following requirements of the SRMP as approval criteria as required by BDC 2.3.600.C.3:
 - A. Building size limit of 76,000 square feet is clear and objective but was not addressed in the hearings officer’s decision.

- B. The master plan plainly requires a street or driveway to be built between Colorado Avenue and Bradbury Way by depicting it on the approved master plan drawing. The hearings officer erred in excusing compliance with this requirement based on the 2009 decision that did not purport to remove the street/driveway connection from the SRMP map and due to the recommendation of the City Engineer that no access be allowed to Colorado Avenue, despite the lot and block length requirements of BDC 3.1. *See*, pp. 36-37, Decision.
- C. The hearing officer erred in finding that the requirement of a property-tight sidewalk on Shevlin-Hixon Drive (east side of property) imposed by and plainly shown on the SRMP map is, instead, an unenforceable “design guideline.” *See*, pp. 67, Decision.
- D. The hearings officer erred by failing to respond to the argument by WSPI that a pocket park is required adjacent to the Shevlin-Hixon Drive sidewalk between the walk and proposed building and by failing to require Evergreen to provide this promised master plan amenity.
- E. The hearings officer erred in approving a second access to Bradbury Way that accesses the lower level parking area. This access is not shown on the approved SRMP map. The hearings officer should have required access to lower level parking to be provided as shown on the SRMP map: from Shevlin-Hixon Drive rather than from Bradbury Way. *See*, pp. 42-43, Decision.
- F. Failed to limit the building footprint to the location, size and shape shown on the SRMP map.
- G. Erred in finding that the SRMP plan map provides a flexible plan when no such flexibility was allowed by the applicable law when the plan was approved or by BDC 2.3.600.C.3. Also, erred in allowing placement of the building in an entirely different location than shown on the SRMP map based on the developer’s statement in the text of the SRMP that the map shows the general location of the building envelope.

The plain language of the law in effect when the SRMP map was adopted in 1997 and the law in effect when it was allegedly amended in 2009 required the Master Development Plan to include maps which “shall serve as approval standards for the Master Development Plan.” Ordinance NS-1636, Section 21.A, Section 4 and BDC 2.3.600.C (2009)(p. 10, 2009 Decision). As such, once approved, the SRMP map was an approval criterion for future land use reviews. Additionally, BDC 2.3.600.C.3 imposes essentially the same requirement.

Any ambiguity on this point was removed by the City’s approval of the 2009 Decision approved the 2009 decision based upon the statements by the developer and author of the SRMP and applicant for the 2009 approval, Brooks Resources, that the SRMP included “a building footprint for Lot 13” and that no significant

changes to the “building envelope, parking area location, size and access or access point to local street and the major street network” are proposed and plans filed in 2009. The Evergreen site plan clearly does not comply with these required elements of the SRMP map so denial is required. Making this decision does not require making the subjective, value-laden determination prohibited by ORS 197.307(4).

- G. Erred in reading the text of the SRMP to allow a building of any number of stories where a range of stories is provided; particularly given the fact that Brooks Resources described the SRMP providing “[t]he proposed 3-4 story hotel building on Lot 13” and that the building approved had “a 3-4 story edifice stepping down the hill ***, with a 2-3 story building on the generally level area west of and above the slope” and was illustrated as such in the plan filed with the 2009 modification of decision application by Brooks Resources.
 - H. Failed to deny the application because it proposes a parking lot that is different from the one required by the SRMP map without making specific findings about this issue.
3. The hearings officer erred in equating unspecified instances of non-compliance with BDC 2.3.600.C.3 with a lack of clarity in the SRMP and, therefore, refusing to apply any of its clear and objective requirements. (p. 17) First, noncompliance by one property owner does not excuse compliance by others and no provision of law authorizes the hearings officer to excuse noncompliance. Second, a failure to follow the SRMP does not mean the plan is unclear. Third, the record contains evidence that clearly shows that almost every property in the Shevlin Riverfront Master Plan area is developed as shown on the approved SRMP map. Fourth, it is possible that property owners obtained approvals for minor modifications of the SRMP for their properties during site plan review. Furthermore, the hearings officer’s determination of noncompliance is based on inadequate findings and is not supported by substantial evidence in the whole record.
 4. The hearings officer failed to apply the correct legal test in determining whether the SRMP, the 2009 SRMP decision and City code criteria are clear and objective – the test set out in *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff’d* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 549 (1999). Generally, approval standards are clear and objective if they do not impose “subjective, value-laden analyses that are designed to balance or mitigate impacts.” *Warren v. Washington County*, __ Or LUBA __ (LUBA No. 2018-089, 11/14/18).
 5. The hearings officer erred in finding the SMRP did not establish the required location of buildings on the site because the text of the plan discussed an alternative site plan for Lot 13. No such alternative plan was filed with the City in 1997 and was, therefore, never approved. The 2009 amendment also confirms this fact as it relies on the approved SRMP map with the building envelope shown on the only SRMP plan approved in 1997. Furthermore, the hearings officer erred in finding that if such a plan were approved it would make the SRMP something other than clear and objective. An alternative allows the property owner to select

and then follow one of two maps that impose clear and objective development requirements for the property. Furthermore, once the subdivision was platted in 1997, it is clear from the size of Lot 13 created, that Brooks Resources selected the plan map included with the approved 1997 SRMP.

6. The hearings officer erred in finding that answering the legal question whether the SRMP and 2009 SRMP decision applies to the review of the Evergreen site plan makes the requirements of the decision and BDC 2.3.600.C.3 unclear and unenforceable approval criteria. ORS 197.307(4) requires that approval standards and procedures be clear and objective. It does not allow an applicant to avoid complying with the law by simply questioning whether clear and objective provisions of the law are applicable approval criteria.

The need to identify relevant criteria in the SRMP does not make its requirements unclear or subjective and, therefore, unenforceable. All land use decision makers must review the law to determine which rules serve as applicable approval criteria for a land use application. The hearings officer correctly determined that BDC 2.3.600(C)(3) is an applicable approval criterion. It is clear and objective. It requires the applicant to comply with the “approved MR Zone Master Development Plan,” the SRMP. The SRMP contains many clear provisions that control development on Lot 13. The findings that support BUAPC approval of the SRMP and the SRMP itself also say that the maps and descriptive text of the SRMP shall serve as approval standards for development in the Shevlin River master plan area.

The City, in all land use cases, must review its code and determine which provisions serve as applicable approval criteria. Additionally, for housing applications, the City must exercise judgment to determine which code criteria are clear and objective. A master plan, just like City code, provides relevant approval criteria. A review to determine which provisions apply to a particular application does not make all requirements subjective and unenforceable.

The Oregon Court of Appeals has made it clear that a need to interpret local code definitions and provisions does not *ipso facto* mean that a code provision is not clear and objective. *Rudell v. City of Bandon*, 249 Or App 309, 275 P3d 1010 (2012)(interpretation of definition of foredune as ending where land becomes “relatively flat” is clear and objective); *SE Neighbors Neighborhood Association v. City of Eugene*, 68 Or LUBA 51, *aff’d* 259 Or App 139, 314 P3d 1004 (2013)(lack of language defining how slope is measured and fact that different methods may render different results does not make slope requirement unclear or subjective where City instructions explained how to measure slope); *Home Builders Association v. City of Eugene*, 41 Or LUBA 370, 410-11 (2002)(determining slope is clear and objective; cited by Court of Appeals with approval in *Rudell*). According LUBA and the Court of Appeals, the kinds of standards that fail the clear and objective test are those:

“that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property be developed or (2) the adjoining properties or community.”

Rogue Valley Association of Realtors v. City of Ashland, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999) as quoted in *Rudell*, 249 Or App at 319.

The identification of the applicable law from applicable codes and plans is not a subjective, value-laden analysis designed to mitigate impacts.

7. The hearing officer erred in imposing conditions of approval that are not clear and objective as required by ORS 197.307(4)(condition must be clear and objective).¹ As the conditions are not clear and objective, they may not be enforced against the developer and, therefore, were erroneously found to assure compliance with the clear and objective approval criteria that govern review and approval of the Evergreen site plan. The conditions include:
 - A. Condition 2 – The hearings officer allows “insubstantial” alterations of approved plans. If it is found that the building footprint location cannot be enforced because it is not “clear and objective,” the entire site plan approved by the hearings officer is not a clear and objective condition and cannot be applied to the development of the subject property.
 - B. Condition 4 does not specify the location of the required walkway and does not specify what changes may be made to other required elements of the site plan, such as the parking area, to accommodate the walkway.
 - C. Condition 11 allows the applicant to disobey the clear and objective requirements of the City code, BDC 3.3.600, for bicycle parking to use non-conforming spaces but purports to limit such spaces to the “minimum necessary” – a subjective determination – given the fact the findings adopted by the hearings officer show the size of the area allotted for bicycle parking is too small to allow the applicant to provide code-compliant bicycle parking.
 - D. One possible reading of Condition 15, one that would result in a violation of BDC 3.4.200 Table B and BDC 3.4.200.A.1, is that rather than providing the improvements required by law that Evergreen may provide lesser improvements “as agreed to by the City Engineer.” If this is how the condition is read, it both imposes subjective requirements and violates BDC 3.4.200.A.1 and its Table B.
 - E. Condition 25 requires an easement “wherever needed” (not in specified locations) to assure compliance with BDC 3.4.700.
 - F. Condition 37’s requirement of “continually maintained” landscaping is not clear and objective and fails to assure compliance with BDC 3.2.300.F that requires “immediate replacement” of plantings that fail to survive.
 - G. Condition 38 and 39 both impose screening requirements without specifying how screening will be achieved and by requiring screening materials to “a material and design

¹ WSPI applies, without agreeing with, the logic of the hearings officer that approved plans must show a precise location to be clear and objective criteria for development to preserve for review in the event a reviewing body agrees with the hearings officer’s interpretation of the meaning of ORS 197.307(4).

that is visually compatible with the building, a standard that is not clear and objective. As a result, the conditions fail to assure compliance with BDC 4.2.500.D.3 and D.4, BDC 2.3.300.D.2. and BDC 2.3.600.D.5 and .6; as does the site plan that fails to provide proposed screening.

8. The hearings officer erred in allowing the applicant to widen sidewalks that adjoin parking areas to 7-feet without assuring that the landscape strip between the sidewalk and building will meet the 5' minimum width requirement of BDC 3.1.300.B.9.f. and in finding compliance with BDC 3.1.300.B.9.f. based on a finding that "on average" the five-foot minimum width would be met. The standard is a minimum; not an average.
9. The hearings officer erred in prohibiting access to SW Colorado Avenue where code authority supports the imposition of the condition and where such access is both required and allowed by the SRMP as approved in 1997 and confirmed by the 2009 decision.
10. The hearings officer erred in applying ORS 227.178(3)'s goal post rule to a 2009 decision because the changes allegedly authorized by the decision and the decision were not yet final because the City of Bend failed to provide notice of the decision to affected property owners or, in any way, assuring that if the 2009 decision is not upheld that the Evergreen site plan that relies on the amendment of uses allowed by the SRMP will not be valid. Such a decision is not final for a period of ten years from the date issued. ORS 197.830(3)-(6) As such, it cannot serve as standards and criteria applicable at the time the application was submitted that are subject to the goalpost rule. Furthermore, ORS 227.178(3) applies to standards and criteria in acknowledged comprehensive plans and land use regulations; not to land use decisions.
11. The site plan fails to comply with BDC 3.4.200.L. The hearings officer misconstrued the requirements of BDC 3.4.200.L.2 to allow him to eliminate the planter strip that is clearly required by Table B of BDC 3.4.200 and BDC 3.4.200.A.1. BDC 3.4.200.L.2 requires that a landscape strip be provided to separate the sidewalk from the street. The sidewalk is also required to be placed at the property line and the only requirement that may be adjusted "where practicable" or otherwise directed by the City Engineer.
12. The hearings officer erred in relying on garage parking to meet minimum parking requirements of BDC 3.3.300 where Condition of Approval 17 requires compliance with BDC 3.1.400.F.7 and BDC 3.1.500 and it is proven by the applicant's transportation engineer and WSPI's transportation engineer, Joe Bessman, that the sight distance required by BDC 3.1.400.F.7 is not provided by the approved site plan. The hearings officer erred in finding it feasible to meet this standard based solely on the fact the City Engineer "cited no concern" in prehearing comments. Such reliance was unwarranted where the City Engineer's comments relied on did not consider the expert opinion of Mr. Bessman that compliance would require site plan modification and where the hearings officer found the applicant had "not adequately explained in the applicant's TIA and rebuttal." Additionally, given the fact the approval does not allow any redesign of the site to provide sight distance, the site plan and/or garage access should not have been approved. The problems caused by inadequate sight distance are

exacerbated by the fact the design of the garage is such that vehicles will need to back out across the sidewalk onto this crowded street.

13. The hearings officer failed to assure compliance with BDC 3.3.300, after finding that Evergreen's site plan fails to meet parking space dimension requirements and compact space standards, by imposing Conditions 13 and 14 to revise and "update" its site plan to comply with the code without providing for a *Rhyme* review of the revised site plan or even a City staff review of the plan for compliance.
14. The appealed decision and evidence in the record fails to justify approval of the garage access as an additional point of access under BDC 3.1.400.F.4. by failing to find that the additional access will improve on-site circulation, does not adversely impact the operation of the transportation system and that the garage access is located the maximum distance achievable from an intersection or from the closest driveway on the same side of the street. The findings allegedly demonstrating compliance with this criterion address the location of the access to the upper level parking area; not to the garage parking.
15. The hearings officer erred in failing to require that bio-swales, if required by future storm water plan review, be landscaped as required by BDC 3.2.300.D.8.
16. The hearings officer erred in finding no provision of the SRMP was cited by WSPI as a basis for its position that the SRMP requires a landscape strip. A copy of the approved SRMP drawing was provided to the hearings officer by WSPI with this feature highlighted and its position was stated in written comments filed with the hearings officer. This violates BDC 2.3.600.C.3. and, if the SRMP standards do not apply, BDC 3.4.200.A.1/Table B (5' minimum planter strip required for local streets).
17. The hearings officer erred in approving the submitted site plan that proposed a building that is at least fifty feet in height while denying approval of a variance to exceed the height limit of the MR zone of 45 feet. Condition 1 of the decision requires the applicant to construct the building as depicted on plans filed between June and November 2018 which all show a building that exceeds 45 feet in height. Condition 2 requires a new application for any substantial alteration other than those required by the conditions of approval. No condition of approval requires the applicant to revise the building to comply with the 45' height limit. If required, such a revision would require a *Rhyme* review to determine compliance with design review criteria in BDC 2.1.900 and to verify compliance with the building height limit of the MR zone and/or SRMP, if found to be applicable on appeal.
18. The hearings officer erred in finding compliance with the height requirements of BDC Table 2.3.300 and BDC 2.3.300 and BDC 4.2.500.D.3 with or without approval of the variance application.
 - A. The hearings officer failed to address arguments and expert evidence presented by WSPI and its surveyor, Andrew Huston, and engineer Michael Walker that Evergreen had not correctly calculated the height of the proposed building; including by double counting the

corners of the buildings in estimating height – something plainly shown on Sheet E.1.11 – E.1.15 of the Evergreen site plan.

- B. The hearings officer should have denied approval of the site plan because the BDC 1.2, Definitions, Grade Finished and Building Height in effect in June 2018 when Evergreen filed its application (since amended) proposes a finished grade that is over four feet above or below existing grade. In such cases, the code clearly requires that the finished grade be set by a grading and/or drainage plan approved by the City; a review that is required to occur as a condition of approval. The finished grade cannot be determined until after grading/drainage plan approval and opponents are entitled to a *Rhyme* review to determine whether the building complies with the height limits once the finished grade is established. As a result, the hearings officer erred in finding the building proposed complies with the height limit of BDC 2.3.300.B.
 - C. The hearings officer erred in finding that the site plan complies with the maximum density limit of the MR zone set by BDC 2.3.300.C.4 by failing to correctly determine the building height – one of the two code requirements that, according to code, are used to set the maximum density of the MR zone.
 - D. The hearings officer erred in finding that the 45’ height limit, alone, limits the density of development allowed by the MR zoning district. As plainly stated in BDC 2.3.300.C.4, both the applicable lot coverage set by the SRMP building envelope and building height standards apply to set the density of development allowed by BDC 2.3.300.C.4. Furthermore, the SRMP effectively limits density by imposing a building size limit of 76,000 square feet that is not met by the Evergreen site plan.
 - E. The hearings officer failed to assure compliance with BDC 2.3.300(D)(2) that requires that rooftop mechanical equipment be “architecturally screened” from view by requiring removal of building features the applicant claimed would provide architectural screening and requiring, instead, that roof top elements be screened with a material and design that match the building. This condition impermissibly defers a finding of compliance without providing a *Rhyme* review. The hearings officer’s conditions also fail to assure screening will comply with BDC Chapter 2.1, Definitions, Building Height that requires that the screening be the minimum necessary.
19. The hearings officer erred in allowing the applicant to revise its site plan to provide a walkway between the building and Colorado Avenue without providing a *Rhyme* review of the revised site plan to assure compliance with mandatory approval criteria, including but not limited to required parking and landscaping requirements after the plan is revised to add this feature.
20. The hearings officer erred in failing to determine whether the building design complies with BDC 2.1.900.C.3.a., Detailed Design Menu Option the clear and objective approval criteria track and approving the design under the Design Review Option that the applicant argued may not be applied to review its project. Given the applicant’s choice to have the clear and objective standards applied, it was erroneous for the hearings officer to excuse the applicant

from said review by applying standards the law plainly states may not be applied and by finding that the subjective alternative standards are not enforceable because they are not clear and objective (not may not be applied to deny the application”). ORS 197.307(4). The hearings officer also erred in finding that the Design Review option must be applied because the site plan was reviewed as a Type III review. The code contains no such requirement.

The hearings officer’s finding, on pp. 82-83, that says the hearings officer reviewed BDC 2.1.900 and finds that with the removal of the roof element that exceeds the 45’ height limit, the architectural review standards are met is an inadequate finding as it fails to explain why this will be so or to quantify cite no factual basis of the conclusion. Additionally, as it is unknown how the applicant will revise the building to comply with the 45’ height limit, it is not possible for the hearings officer to reach this conclusion. No substantial evidence supports the conclusion, particularly given the fact the hearings officer found the building features above 45’ include a roof over a room in the building and the approved site plans indicate other roofs also extend above the 45’ height limit; not just decorative roof elements.

21. The hearings officer’s determination of compliance with BDC 2.1.900.C.3.b. was not based on substantial evidence in the whole record and misconstrued the law. The findings fail to find that the building is architecturally compatible with the surrounding neighborhood, as required and no such finding is merited where the size, shape and scale of the massive Evergreen building is many times larger and entirely different from that of any other building in the SRMP area. It also fails to find that compatibility would not reflect the purpose of the zone. While discussing the intent of the zone, the findings fail to link the building’s massive size to the intent of the MR zone.
22. The hearings officer misconstrued the law and failed to assure compliance with BDC 2.3.600.C.3 by failing to review and demonstrate compliance with the Shevlin Riverfront Facilities Plan (SRFP) which is a part of the approved SRMP. While BDC 2.3.600(B) does not require compliance with the SRFP, the SRMP and BDC 2.3.600.C.3 clearly do require. The burden of proof on this issue is on the applicant and/or City; not on opponents. To the extent the findings shift the burden to opponents, they are improper.
23. The hearings officer failed to respond to WSPI’s argument that the 2009 “Modification of Approval in PZ-09-0164 is not a relevant approval criterion because it is neither the 1997 approved MR Zone Master Development Plan or a “minor alteration to a master plan.” The hearings officer should have declined to have applied the 2009 decision as if it were a part of the SRMP.

The 2009 Modification of Approval decision was processed as a Modification of Approval rather than as a “minor alteration” and made changes to uses and building height not allowed as minor modifications. Given the fact the 2009 decision is neither the 1997 SRMP nor a minor modification, it cannot be applied to authorize construction of the Evergreen building in violation of the use and height limits of the 1997 SRMP (35’ height limit and hotel/mixed use building). Approval of an apartment complex and a building over 35 feet tall violates BDC 2.3.600.C.3 and the 1997 SRMP and allows uses not planned or accommodated by the infrastructure approved in 1997. The Facilities Plan was designed with the approved uses in

mind and street width variances were granted for adjoining streets based on the use authorized in 1997 that would provide adequate parking on-site (as required by the text of the SRMP).

24. The hearings officer erred in failing to apply the 35' height limit imposed by the SRMP, the height limit Brooks Resources described as applicable in its 2009 modification of application when seeking permission to apply for approval of a variance to construct buildings over 35 feet in height.
25. The hearings officer erred in failing to require Evergreen to provide the street/driveway and street connection to Colorado Avenue allowed by PZ-09-0165 and required by the 1997 Master Plan map (Crowell Way) based on the applicant's choice not to propose access and the City's Engineer's opposition to the approved and required access. The hearings officer erred in approving the development of a parking area rather than the street, sidewalks and landscape strip shown on the approved SRMP map. The SRMP was approved without conditions or revisions. No amendment has been approved to remove Crowell Way from the SRMP map. As a result, it is must be provided to achieve compliance with BDC 2.3.600.C.3.
26. The hearings officer misconstrued the 2009 Modification of Approval to act as an amendment of 1997 SRMP map and plan text when it was not one and erred in failing to respond to WSPI's arguments about the meaning of the SRMP after approval of the 2009 decision. In so doing, the decision failed to assure compliance of the site plan with BDC 2.3.600.C.3. The application to modify the approval did not seek to change the maps and text; it changed the design guidelines and should not have been applied more expansively to act as amendment of Plan maps and text. Additionally, the 2009 decision adopted conditions of approval and did not amend plan maps or text. As WSPI argued to the hearings officer below:

PZ-09-164 was issued in response to a request by Brooks Resources to amend design guidelines to allow office, medical office and limited retail uses to uses allowed on Lot 13, to allow variances to a building height limit of 35 feet and to confirm its right to right-in/right-out access to Colorado Avenue from Lot 13. While the Brooks Resources application sought to amend "design guidelines," the SRMP design guidelines do not regulate the uses allowed by the SRMP or restrict building height. Additionally, a use limitation is not a "design guideline." This means that the changes could not have been approved as a minor modification under BDC 2.3.600(C)(3).

Brooks Resources did not seek approval of ground floor multi-family housing in its 2009 application. Approval of its request, therefore, does not authorize ground floor multi-family housing on Lot 13.

Brooks Resources also did not seek approval to set a height limit of 45 feet for Lot 13. Instead, Brooks asked to "modify the approval such that the applicant be required to obtain the appropriate land use approval for additional building height over 35 feet at the time a building is proposed (at present, a variance pursuant to section 5.1.400.B.4, Variance to Maximum Height)."

The 2009 decision says it adds the following conditions of approval to PZ 97-101, the SRMP approval. It did not amend the master plan map, text or design guidelines for the Shevlin Center. These conditions, if relevant, must be applied as written given the fact the changes intended by the decision but not implemented in the conditions are prohibited by BDC 3.2.600(C)(3).

Condition 1

Condition 1 says that all new uses must be uses allowed by the MR zone. It does not remove the use restriction of “hotel/mixed use” that applies to Lot 13 by virtue of the SRMP and SRMP map. The uses allowed are those allowed by the SRMP and MR zone.

Condition 2

Condition 2 requires compliance with the height limit of the MR zone, unless a taller height is approved by a variance. This condition should be read to require compliance with the 35-foot height limit in effect in the MR zone in 2009 because the modification requested was, as stated in the 2009 application and decision to “[m]odify the approval such that applicant can be required to obtain the appropriate land use approval for additional building height over 35 feet at the time a building is proposed (at present, a variance pursuant to section 5.1.400.B.4, Variance to Maximum Height)” and because the 35’ height limit of the zone, without a variance, was the one considered in 2009 when the City found the approval would comply with the approval criterion of BDC 2.3.600(C)(2)(g) to reduce “to a minimum any negative impacts of proposed uses on adjacent properties and ensure the livability of residential areas when applicable.”

Condition 3

Condition 3 allows the Crowell Way access required by the approved master plan, the SRMP.

27. The hearings officer erred in failing to give effect to findings by City staff in the 2009 modification decision that state the original 1997 SRMP remains valid and that rely on that fact to find that the proposed changes would not intensify or significantly change the 1997 approval.
28. The hearings officer erred in determining that the requirements of BDC 2.3.600.D.7 will be met by finding it feasible for the applicant to retain surface water on-site based on a drainage plan that provides drainage only for the proposed parking area and not the proposed building. This conclusion is unsupported by any competent evidence and defies logic given the following facts:
 - No storm drains/swales are proposed between the top of hill/building and the Deschutes River
 - The applicant has proposed storm drainage facilities for the upper level parking area only
 - No roof drainage system is proposed

- No storm drains or swales are proposed on the steep hillsides between the proposed building and Shevlin Hixon Drive and Bradbury Way (and Colorado Avenue)
 - Water will flow off the building and hillside onto Shevlin-Hixon Drive and Bradbury Way (then to Shevlin Hixon due to grad) and Shevlin-Hixon Drive
 - The areas between the building and building and adjoining streets have not been shown to be of adequate width or grade to retain stormwater
 - The applicant offered no evidence that it would be feasible to retain water on site between the building and the streets
 - The fact an engineer prepared a drainage plan for a parking area does not provide probative evidence that the requirements of BDC 2.3.600.D.7 are or will be met by the site plan; particularly absent any evidence from the engineer that the plan was prepared for any purpose other than the one apparent on its face – to contain parking lot drainage on site.
29. The hearings officer failed to assure compliance with BDC 2.3.600.D.7 by allowing the applicant’s engineer to “provide written documentation” that the storm water drainage system that will be installed has been designed and installed to retain all drainage on the development site or directed to a drainage facility as part of an overall drainage master plan. A Rhyne review of the plan should have been provided so that those impacted would have the ability to check the work of the applicant’s engineer. This condition also unlawfully delegates the City’s duty to assure compliance with BDC 2.3.600.D.7 to the applicant.
30. The hearings officer made no finding that it would be feasible for the applicant to direct storm water to a drainage facility that is a part of an overall drainage master plan. No such system has been shown to exist. Given these facts, it was not reasonable to allow the applicant to comply with BDC 2.3.600.D.7 by claiming to route storm water to some system the engineer chooses to consider to be part of an overall drainage master plan.
31. The hearings officer’s decision violates BDC 3.1.200.D.1 that requires that streets be built as required by the approved development plan, the SRMP by failing to require the applicant to construct Crowell Way. The hearings officer errs in finding “an amendment to the Shevlin Riverfront plat” eliminated this section of Crowell Way. The evidence in the record shows that the street was not included on the final plat; not that it was “eliminated” by an amendment. The plat did not amend the Master Plan that continued to require that this street be built.
32. The hearings officer failed to assure compliance with the detailed lighting requirements of BDC 3.5.200 by failing to consider the requirements of the code and imposing a condition, Condition 6, that simply requires the filing of lighting detail and that does not provide for staff or public review as required by Rhyne.
33. The hearings officer erred in finding he may not apply the CC&Rs for the Shevlin Center because they are not approval criteria. The CC&Rs were adopted as a part of the SRMP and that require adequate off-street parking to eliminate the need for any on-street parking. Additionally, the hearings officer erred in interpreting the CC&Rs to be

inapplicable to residential development when they plainly prohibit a reliance on on-street parking to meet parking needs and the same requirement is imposed by the text of the SRMP. BDC 2.3.600.C.3.

34. The hearings officer failed to respond to WSPI's argument that the garage parking spaces adjacent to building support columns do not comply with City parking requirements of BDC 3.3.300(F) (including Table 3.3.300.E.1 and Figure 3.3.300) because:
 - The columns encroach into the required 9 x 20 area required for standard spaces making them too narrow.
 - The columns are either located in the required area of the compact space making the space narrower than the 8 foot width required (assuming the required space begins where it is striped) or behind the required space in a part of the space that functions as a drive aisle to the space but is not at least 12 feet wide as required by Table 3.3.300.E.1 (assuming the compact space begins at the wall and the narrowest drive aisle width is applied).
35. The hearings officer failed to assure that the subject property will provide required parking (BDC 3.3.300) by failing to consider the impact that changes required to the conditions of approval to meet code criteria will have on the number of parking spaces provided by the site plan.
36. The hearings officer's decision fails to assure compliance with BDC 3.2.500.D.1. by failing to either approve or deny Evergreen's request for an exception to the code requirement. Evergreen asked to be allowed to build an 8-foot tall retaining wall, in lieu of the two 4' tall walls proposed by the site plan. The code required the hearings officer to either permit or deny the request. BDC 3.2.500.D.1.a. This request was opposed by City staff.
37. To the extent the hearings officer's findings related to BDC 4.2.500.D.9. hold that the SRMP is unenforceable due to the "substantial conformance" language, they are erroneous. BDC 4.2.500.D.9. is not the controlling legal standard for review of the SRMP. It is a general standard applicable to all site plans that is enhanced by the more stringent requirements of the applicable standard set by BDC 2.3.600.C.3 that applies to master plans required by the MR zoning district. Compliance with that standard is not excused by BDC 4.2.500.D.9.
38. The hearings officer impermissibly shifted the burden of proof regarding the maximum building height set by Table 2.3.300 for buildings in the MR zone and the location of the Ordinary High Water Mark from the applicant to opponents. Opponent Kent Frame presented competent evidence that the OHWM was within 100' of the subject property that was not rebutted by the applicant or any other party.
39. If the City declines review of this application, that decision does not meet the legal standard to serve as an interpretation of city code by its the governing body;

notwithstanding BDC 4.1.1140 and the City Council should so find. As BDC 4.1.1140 does not allow any comment on this topic by any party, none is offered.

40. The hearings officer misconstrued BDC 4.7.500(A) and erred in finding it is (a) an approval criteria; and (b) is not clear and objective; and (c) makes the City's TIA requirement unenforceable. This code section does not, as found by the hearings officer, leave it to the discretion of the City Engineer to determine if a Transportation Impact Analysis is required. That is determined by the process set out in BDC 4.7.300 and BDC 4.7.400, including the requirement of BDC 4.7.400.3 that any intersection that is projected to experience net increases in site traffic volumes greater than 100 average daily vehicle trips or 15 or more pm peak hour trips per land group within a mile of the property must prepare a TIA.
41. The hearings officer erred in finding the TIA requirement subjective and unenforceable because the City Engineer may waive the requirement to study intersections if deemed unnecessary; generally due to knowledge from prior studies that certain intersections meet City operational standards. BDC 4.7.500(B)(1), like a variance, allows applicants to disregard otherwise applicable, clear and objective provisions of the City's code and therefore is not required to be clear and objective. *Linstromberg v. City of Veneta*, 47 Or LUBA 99, 108-09 (2004). As with a variance, an applicant retains the ability to proceed under the clear and objective study requirements of the code rather than to seek a waiver from the City Engineer. The City Engineer waived intersection requirements for Evergreen. The waiver did not make the clear and objective study requirements unclear. If any parties were harmed by this discretion, it was project opponents.
42. The hearings officer erred in finding all of BDC 4.7 to be unenforceable because BDC 4.7.500(B)(5) allows the City Engineer to include proposed but unapproved projects within the study area in the TIA. This provision is not clear and objective but is severable and was not imposed as a requirement of the Sandow/Evergreen study.
43. The hearings officer erred in finding all of BDC 4.7 to be unenforceable because BDC 4.7.500(B)(4) says "counts may need to be adjusted as required by the City Engineer to reflect seasonal, schools or other variations in traffic." The Sandow report made no such adjustment. This provision is not clear and objective but is irrelevant/immaterial in this case and severable.
44. The hearings officer erred, after finding intersection mitigation for the intersection of Simpson Avenue and Columbia Street is required based on the applicant's TIA, to require Evergreen to comply with BDC 4.7.600.F.5. Acceptance of payment in lieu based on a percentage of the cost of providing alternate mitigation does not satisfy the code requirement that mitigation be based on the full cost of a standard, planned roundabout.
45. The errors alleged in interpretations of the City Code detailed above provide grounds for reversal at the Oregon Land Use Board of Appeals because the decision is inconsistent with the express language of the City's land use regulations and is inconsistent with the purpose of the MR zoning district and its master planning requirements (including BDC

2.3.600.C.3); the minimum standard applicable to review of the decisions by the City Council. ORS 197.829.

46. The decision issued is inconsistent with provisions of the city's land use regulations, improperly construes the applicable law, is based on inadequate findings that fail to address substantive arguments regarding applicable approval criteria raised by project opponents, is outside the range of discretion allowed the local government under the laws that implement the comprehensive plan, and is not based on substantial evidence in the record and, therefore, should be reversed or remanded by LUBA. ORS 197.195(1); 197.828(2); 197.835(9)-(10). These errors should be addressed and corrected by the City Council.

REQUEST FOR REFUND

WSPI has paid an appeal fee in the amount of \$4,301.44 to cover the costs associated with the City Council's review of this appeal. In the likely event the City Council declines review, as has been recommended by City staff, WSPI requests a prompt refund of the filing fee less actual costs expended by the City Council to decide whether to consider the WSPI appeal.

Respectfully submitted this 19th day of March, 2019.



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