

June 1, 2015

Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540



Dear Sir or Madam:

This letter is a request of an enforcement order against the City of Happy Valley for compliance with Happy Valley Land Use code 16.71.050 Class C variances.

On November 16, 2014, I sent a letter to the City of Happy Valley notifying them of my intent to petition the Land Conservation and Development Commission for an enforcement order pursuant to ORS 197.319 to 197.335. A copy was sent to the city's attorney, Beery, Elsner and Hammond.

On January 16, 2015, I received a mailing, with a post date of January 13, 2015, from the city attorney Beery, Elsner and Hammond, refuting my arguments, stating that no action would be taken, and revealing their reasoning behind that decision.

After reviewing the letter, I found that none of the arguments listed in the letter were satisfactory to justify the continued non-compliance of the code. Not only did the letter include incorrect facts, but the analysis was incomplete and incorrect.

As such, the response by the city is completely inadequate, as it failed to address the underlying problems resulting from lack of enforcement and misinterpretation of the code. As will be shown in the remainder of this letter, the reasons listed by the city are incorrect and inadequate to justify why no action will be taken by the city.

In addition to the items that were listed in the original letter, the city is currently engaging in other behavior that highlights their complete disregard for their own land use laws, public opinion, and statewide planning goals. The actions show that they are willing to pass laws designed to limit citizen involvement, and will even go so far as to pass land use code that would make their prior illegal land use decisions appear to be legal.

As can be seen in the attorneys response to my original letter as well as the actions of every entity involved in planning in Happy Valley (Planning Department, Planning Commission Board, Design Review Board, and City Council), the entire city appears to believe that they can do what they want, when they want, regardless of current land use code or support of the surrounding community. With the wording of the attorney's letters, they are so bold as to state that the LCDC has no jurisdiction over their actions.

The city is in the process of modifying the land use code in another blatant attempt to bypass the authority of the LCDC. One of the arguments in the attorney's response letter

was to suggest that the Planning Commission decisions could not be reviewed by the LCDC based on a prior case. In that case a hearings officer's decision was questioned.

After reviewing the case, it is clear that the attorney was attempting to apply the ruling of an unrelated case to this current enforcement in an attempt to convince me to drop this enforcement order.

Past violations and consequences

Although there is no requirement to show past violations in this letter, I am including them to show the behavior of the city of Happy Valley, their complete indifference to the land use code, and the extent they have gone in the past to cover up their violations.

Although some of the violations occurred back in 2009, they are very relevant to the current violations. That is because the same people that violated the code in 2009 are still working in the Happy Valley planning division, and are using the same or similar tactics to cover up their violations.

Illegal zoning during annexation

The first known violation of land use code by Happy Valley was done during the annexation of the land used for the McDonalds and bank. Although the LCDC does not have any authority to reverse the decision because it is over 3 years ago, it shows the length at which the staff, still employed with Happy Valley, will go to violate the land use code, and the length at which they are willing to go to cover up the violations.

Prior to the annexation, the northern portion of the land was zoned as R-10 (residential). Happy Valley annexed the land and converted this portion of property to MUC (multi-use commercial), despite the land use requirement that the land be converted to Happy Valley zoning of R-10 (that land use code passed just 2 months before, and was ignored).

This conversion was done without proper notification during an annexation of 10 properties. The staff went so far to cover up the illegal conversion that they made the claim in their staff report that the conversion was done because "a very small portion" of the property was residential. This "very small portion" was actually around 40% of the entire lot.

The only notification that the public received was on the last page of a several page notice, where a table listed the 10 properties along with the before and after zoning. There was no explanation of the codes shown on the chart, just that the land would be converted from OA/R-10 to MUC. Without knowing the detailed codes and what they meant, those notified could not possibly know the meaning of these abbreviations.

The conversion from residential to commercial was not noticed by the neighborhood until we received notice of a proposed bank on the residential portion of the property, four years later. By that time, the 3-year limit for land use decisions had passed, so the LCDC had no authority to reverse the decision.

More recent violations

It has taken barely one year for the city to approve 4 variances that violate land use codes, on 3 adjacent properties. The city misinterpreted or failed to enforce sections of the land use code at all phases of development. As a direct consequence, the subdivision of a lot for the bank and the McDonalds was approved when it should have been denied, which resulted in 2 out of 4 of the violations listed being needed to develop the lots.

The same process was repeated for the Walgreen and adjoining lot. Because the developer knew that they could get variances with no restrictions, they didn't even need to attempt to configure the lots to satisfy the requirements, because they knew all variances would be granted without question.

As a direct result of the city's lack of planning, these lots were reconfigured and redrawn inappropriately, and as a result, every one of the developer's desired projects in this area required at least one variance to be approved.

None of these variances would have been necessary if the city had done the proper analysis of the proposed buildings on the sites at the time the property lot lines were redrawn or when the design of the building was delivered.

In all cases, the city completely ignored alternatives to granting the variances for the lots, and allowed the land to be divided in such a way that would require Floor to Area Ratio ("FAR") variances of 72% for the bank, 64% for the McDonalds, and 24% for the Walgreens, and a retaining wall variance of 62%, all far exceeding the 20% threshold for Class C variances.

In addition to the Class C variance violations, the city also allowed the grading of property in which the Steep Slopes Development Overlay clearly applies without the studies required by the land use code. As a result, none of the surrounding neighbors was allowed to comment on the removal of tens of thousands of cubic yards of land.

On March 3, 2015, the city council held a public hearing in which they discuss replacing some of the functionality of the Planning Commission, with a hearings officer. One of the items that the hearings officer would take over is variances. You would never suspect this of happening from the meeting agenda, unless you read the entire packet.

This is just the first step of an attempt to bypass the jurisdiction of the LCDC by passing a law tailored to a prior appeals court case where a hearings officer's actions were outside of the jurisdiction of the LCDC. You have to look carefully at the packet to see it. See "*2015-03-03 Mayor and City Council - Full Agenda-1025.pdf*". On page 22 of the 114 page document, it has the following:

The Hearings Officer (instead of the Planning Commission) would hear all quasijudicial Type III cases (for example, Subdivisions/PUD's; Conditional Use Permits, Variances) etc., etc., except those with significant design or policy considerations. Appeals of these decisions could continue to go the City Council.

Consequences likely to occur without corrective action by the city

Allowing variances to be approved when other options exist will result in both immediate and long-term consequences.

As will be shown below, this problem will not only continue, but will intensify and affect enforcement of all the land use code in Happy Valley, not just the FAR and retaining wall codes mentioned in this enforcement request. With future developers knowing they don't have to comply with the codes for building size, retaining walls, parking, or other items that may not meet code, they will push for additional variances that could easily be circumvented by alternate methods.

Immediate consequences

It is likely that there will be **at least 24 Class C variance violations** in the near future. This does not include the two Class C variances that were improperly approved for the Walgreens development. Including other land use code violations related to the Chapter 32 of the Happy Valley Steep Slopes Development Overlay ("SSDO"), this number increases to well over 50 land use code violations.

This also does not include any violations that may occur associated with the 39-lot *Scouter's Meadow* subdivision or the 22-lot *Quail Hill* subdivisions that will be brought before the Planning Commission on March 10, 2015. It also does not include any land use violations that might occur with the annexation of 18 properties into Happy Valley (159 acres) that was done on March 17, 2015.

One (1) of the Class C variance violations will be for the land north of McDonalds, where the bank was originally planned. The developer will most likely apply for a FAR variance to allow a building with Floor to Area Ratio ("FAR") that is smaller than the allowed code. This is despite the fact that many other designs and building types would satisfy the FAR requirements.

Two (2) Class C variance violations will likely occur on the land to the east of the proposed Walgreens. One will be for the FAR, and another will be for the retaining wall height. The Walgreens would have fit into the lot, without the variances, if the property had not been redrawn into two separate lot that are both too small to develop individually.

The 20 remaining Class C variances will be the result of redrawing of property lines creating 3 separate subdivisions. For each of these subdivisions, the developer will not be able to build on the newly created lots, because they are not buildable according to the Steep Slopes Development Overlay, section 16.32.070, which states that the minimum buildable lot size is 10,000 square feet on land in which the SSDO applies.

Because of chapter 16.32.070, the minimum lot size of 10,000 square feet on lots that are subject to steep slopes, building any structure on the lots will either require a Class C

variance, or violation of this section of the code. For the subdivisions described below, the city of Happy Valley has shown that the SSDO applies, so there is no question on the applicability of the SSDO to these subdivisions.

Without Class C variances, the newly drawn lots will not be buildable without violating the SSDO code that requires lots to be 10,000 square feet or more to be considered buildable. Because this is an obvious case of self-imposed restrictions on the lot (the developer created the lots knowing that the new lots were unbuildable), allowing a Class C variance to build on the lots would be illegal.

There are other items in the SSDO that have already or are will require violations of the code if any buildings are put on the sites. Some of these code violations are listed briefly below. These violations are not included in this request so that this request can remain as simple as possible. A separate enforcement request will be submitted to address all the issues associated with the SSDO.

At least eighteen (22) land use violations will occur due to the improper redrawing of property lines for the *Gateway to Happy Valley* subdivision (a 20-lot subdivision, Tax Lots 3300, 3400, and 3600), approved by the Planning Commission on January 13, 2015. This includes the following:

- Chapter 16.32.050 (A) (6) - Permitted Uses restricting cut and fill to 3-foot depth (8 lots, 8 violations)
- Chapter 16.32.070 - Minimum Buildable Lot Size (6 lots, 6 Class C variance violations)
- Chapter 16.32.100 - Density and Density transfers (4 lots, 2 violations)

At least nineteen (19) land use violations on nine properties will be the result of lots created for the *Grand View Meadows* development (a 69-lot subdivision, tax lot - 13e30c 00700), approved by the Planning Commission on February 24, 2015. This includes the following:

- Chapter 16.32.050 (A) (6) - Permitted Uses restricting cut and fill to 3-foot depth (3 lots, 3 violations)
- Chapter 16.32.060 - Platting of new parcels or lots (1 to 6 Class C variance violations, depending on how strict the code is interpreted)
- Chapter 16.32.070 - Minimum Buildable Lot Size (9 lots, 9 violations)
- Chapter 16.32.100 - Density and Density transfers - maximum 2 units per acre (9 lots, only 3 allowed resulting in 6 violations)

At least nine (9) land use violations will be due to lots created for the *Pine View Meadows* (a 42-lot subdivision, tax lots - 13e30c 02000, 13e30c 02002, 13e30c 02003), approved by the Planning Commission on February 24, 2015.

- Chapter 16.32.050 (A) (6) - Permitted Uses restricting cut and fill (3 lots, 3 violations)
- Chapter 16.32.070 - Minimum Buildable Lot Size (9 lots, 9 Class C variance violations)

One land use violation will be made for the food cart development at 145th and Sunnyside. The staff member decided that he would make up his own rules for parking requirements, and ignore the existing code. When his errors were pointed out, the new calculations were ignored. Even though the number of parking spaces provided represented only 50% of those required, no variance was required by the city.

As the economy improves and development accelerates, and with the amount of steep slopes in Happy Valley, the number of violations will only increase. It is impossible to estimate the number of times this will happen in even the next 6 months, because the land use laws require only 21 days notice.

There has already been a large amount of land use code that has been ignored by the city. These are clearly intentional violations, they are not accidental. I have attended many Planning Commission meetings, Design Review meetings and even City Council meetings to point out the violations of the land use code that resulted from one or more departments approving land use decisions.

Even after being shown that there is no question that the code is being violated, the planning department refuses to acknowledge, much less change their decisions to comply with the code. Their current strategy is to accept testimony and immediately disregard it. This has been clearly demonstrated at the public meetings, and emailed responses by the planning staff. If any testimony might prevent the approval of a development, it will be ignored.

Long-term consequences

I have been involved in the land use process in Happy Valley for slightly over a year, actively attempting to get the Happy Valley planning department to enforce its own code. Throughout that time, the city has openly admitted to being pro-development. Through their action they have demonstrated their bias toward the builders by their interpretation of the laws, to the point of ignoring or not enforcing these laws, even after the violations were reported.

The city has an appeal structure in place that discourages appeals due to the excessive costs of undertaking the appeals. With the attitude of the mayor and city council, any money spent on an appeal is almost guaranteed to be lost.

In the city council meeting of 01/20/2015, I was told by the mayor during my testimony that she would support the decisions of the planning staff as much as possible. This comment suggests to me that no matter how bad a decision by the planning department can be, appeals to the city council will most likely result in the upholding of the planner's decisions.

As a result, any opposition to the planning department's interpretation of the land use laws will most likely have to be appealed to LUBA to get an unbiased interpretation of

the law. And, because all avenues for appeals must have the local appeals exhausted before they can be decided, there is a huge obstacle for Citizen Involvement.

Even if an appeal of a decision is made to LUBA, and the LUBA appeal is successful, the person will still have an out of pocket expense of thousands of dollars that cannot be recovered, because the money spent on the appeal to the city is not refunded. The city knows this, and continues to place this financial burden for all land use decisions.

As further proof of the city's bias, the city is already approving land use decisions that violate other sections of the code. Right across the street at a triplex build last year, the developer had incomplete plans approved for the building. Prior to development, the developer cut down several trees without first obtaining tree cutting permits required by the city. No fines were ever levied against the developer.

For that same triplex, the developer also started to build an illegal retaining wall on the neighbor's property. Because the wall was not complete, the city forced them to remove the wall. However, this wall was replaced with two separate illegal retaining walls that do not meet with city code, which were allowed to be kept even after being reported.

For one retaining wall, the setback was supposed to be half the height of the wall, but was put directly on the property line. The other wall was over 4-feet, and was not engineered as required by code. Rather than enforce the code and require the walls to be corrected, the city simply ignored the violations and stopped communication with me.

More recently, on the same triplex, a final landscaping plan was approved that allowed the entire lot to be covered in bark. This was in direct violation of one of the conditions of approval for the triplex that stated:

5. Landscaping shall be installed pursuant to the revised Landscaping Plan (Exhibit 4), consistent with the requirements of Section 16.42.030. Bark shall not be used as groundcover.

When I reported this violation, I received an email from Steve Koper:

Mr. Phillips –

This afternoon, in response to your recently filed "Citizen Concern" form, I personally visited the subject property.

Based on that visit, I have concluded that the subject property is in substantial compliance with the approved final landscape plan (attached).

Accordingly, no further action will be taken by the City.

Regards,

Steve Koper, AICP

Associate Planner
City of Happy Valley
16000 SE Misty Dr.
Happy Valley, OR 97086
Phone: 503-783-3845

The attached landscaping plan was approved by Mr. Koper, who totally ignored the condition of approval that required no bark to be used on the property.

Under the current patterns allowed by Happy Valley, any undeveloped land can be subdivided, or have their lot lines redrawn so that any land use code can be avoided. The developer for the McDonalds, bank and Walgreens has done this twice last year - once for the lot that has the McDonalds and bank, and once again for the lot with the Walgreens and the undeveloped lot to the east of the proposed Walgreens.

By the time the public notices these items, it is too late to legally do anything, too expensive to fight, or both. In all cases, the rights of the general public are trampled in order to satisfy the desires of the developers.

Background - attorney's attempt to misrepresent facts

Interestingly enough, the attorney began arguments in their letter against my reasons within the section labeled *Background*. With this tactic, the attorney makes statements that are not facts, with the hope that they will be taken as facts and that will not be argued because they are not included in the analysis section of the letter. In effect, throw mud at the wall and see what sticks.

Item #1: Attempt to use my wording against me

In this case, the attorney attempts to pick apart my original letter by attacking the wording I used in a single sentence, rather than attacking the actual content of the letter.

Because I am not a lawyer, I wrote the letter to be readable and convey the information to the city. The letter was never intended to stand up in a court of law. I wanted the letter to be readable to those that are currently making the incorrect decisions so they could understand what they were doing wrong. I knew I had to make my sentences as simple as possible, since the planning staff, planning commission and city attorney all have a great deal of confusion interpreting so many sections of the existing code.

The attorney pointed out that in one sentence I wrote "lot configuration", rather than "lot configuration, or other conditions of the site", and even noted "Emphasis is original". If you re-read the letter I sent, it is clear that whenever I said lot configuration, I actually meant *lot configuration or other conditions of the site*. If you make this substitution in your head when reading my original letter, you will see that my original arguments are just as valid.

The breaking down of my sentence structure shows the desperation of the attorney to find any kind of credible argument to use. As with his other arguments, the analysis of my sentence structure and grammar fail to make the attorney's argument valid.

Item #2: Incorrect interpretation of the code.

In the second paragraph immediately prior to the Analysis on page 3, the attorney argues the following:

Although HDVC 15.17.05 list six separate criteria which must be met in order to approve a variance, you have only expressed issue with the first, and as such the remaining five criteria are not addressed herein.

According to the attorney's argument, the burden of proof lies for my arguments is that I have to prove that more than one of the items listed in the code was violated in order to prove that the entire section was violated. This argument makes no sense, as shown in the text below:

B. Approval Criteria. The City shall approve, approve with conditions, or deny an application for a variance *based on all of the following criteria*:

It is clear that if we consider the text in (B), that all 6 conditions must be met to approve the variance, because 5 out of 6 cannot be considered all of the criteria. In other words, if any one of the criteria is not met, the entire section fails. As such, the only proof needed to invalidate the variance is due to the lot configuration or other conditions of the site. Because of this, the statement at the bottom of page 3 should replace with the following (corrections made in bold):

Giving effect, as we must, to all parts of the ordinance, it is clear that the variance approvals at issue **DO NOT** meet the criteria, **because they do not satisfy the condition listed under 16.71.050 (B) (1).**

Response to the analysis provided by the city attorney

Although not required for this letter, the following will show how each of the arguments made in the letter from the city attorney are invalid.

Invalid Argument - Interpretation of code is too narrow.

Under the section labeled "*1. The City Correctly Interpreted the Applicable Criteria*", the city attorney first says that my arguments are too narrow because the wording in my initial letter said "due to the lot configuration", instead of the complete text of the code, "lot configuration, or other conditions of the site". The claim is that my letter ignores the "other conditions of the site".

As shown in the explanation of the attorney's tactic under the Background section earlier in this letter, the omission of the text "*other conditions of the site*" was intended to improve readability of the text, not to limit the interpretation of the code. Again, if you mentally substitute "lot configuration or other conditions of the site" in the original letter I sent to the city, there is no narrowing of meaning, as claimed by the attorney.

Invalid Argument - Variances are necessary due to lot configuration and other conditions of the site.

For each variance in which this argument is used, the city's attorney claims that the variances were required due to the lot configuration and other conditions of the lot. As shown in the original letter I sent to the city, the variances were approved due to the desired use of the lot, not because of the lot configuration and other conditions of the site.

As can be seen in the various examples, the city and the city attorney have difficulties not just in their interpretation of the code, but also have problems in providing accurate information and relevant information. Oversimplification during their evaluation of the code has resulted in the incorrect interpretation of the code.

#1: Claims for VAR-01-13 for the Sunnyside Plaza and Bank

To back up this argument for the bank, the city attorney said that the FAR variance would require a 14,000 square foot bank, and under the city's parking code, would require 90 parking spaces. This is yet another example of incorrect information and an attempt to misrepresent the facts in this case.

Item #1: Without the FAR variance, the bank would not require the 90 stalls that the attorney claims in his letter. The staff report shows that a bank would require 60 stalls. Although this might be considered a typo, the other incorrect information in this letter indicates to me that it was an intentional exaggeration to try and help prove their point.

The attorney fails to mention that there is some leeway before a Class C variance is required; otherwise a Class A or Class B variance could be used. In this case, the FAR class C variance is required because the FAR is more than 20% from the base code. Rather than a 14,000 square foot building required to satisfy FAR requirements, the building could be as 20% smaller, or 11,200 square feet, could have been done using a Class B variance.

The attorney also fails to mention that in order to satisfy the FAR requirements of the site that the building can be more than one story tall. The building standards allow buildings of up to 45 feet high, enough to build a 3- or 4-story building. In addition, a Class C variance is required only if the code is exceeded by 20%. If the developer used the same footprint, but built multiple stories, no Class C FAR variance would have been necessary.

The maximum parking stalls is reduced significantly if you bring both items into play. Rather than 60 stalls for a 14,000 square foot building, they could build a 11,200 square

foot building that would require only 39 parking spaces, with no Class C variance required, assuming that the building had the same parking requirements. See item #2 for more information.

Item #2: The statements by the city staff and attorney assume that the only allowed use for the lot is for a drive-through bank. That is simply not true. There are many other allowed uses for this site that must be considered prior to limiting the actual use to a drive-through bank, as show in Table 16.23.010-1 Mixed Use Districts (MUC, MUE, RCMU) Permitted Uses.

In fact, during one of the public meetings for the bank, one of the Planning Commissioners stated that the surrounding neighborhood would probably not want a 2-story office building, which would have easily fit on the lot. Note that this was not a statement that any of the neighbors had made. Also note that no arguments could be made refuting the commissioner's statement because public testimony had been closed at that point. This is just another example of the city siding with the developer at the expense of the surrounding neighborhood.

If an office building was planned, rather than a bank, then no Class C variance would have been needed for parking, because the code allows for a 20% difference without submitting a Class C variance. Because of this allowance, only 21 parking spaces would have been necessary. The proposed bank had space for 21 parking spaces. With the elimination of the drive-through, there would be more than enough space to put the extra parking spaces for a 2-story office building, with room to spare.

Although a 2-story office building may not be desired by the developer, there is nothing in the Class C variance code that suggests the developer's *desires* for a specific building structure has any impact as to whether or not the variances can be approved.

Item #3: The city staff and attorney state that the site will not support the required parking stalls. This statement is not entirely correct, because once again, they are suggesting that the only allowed use of the lot is a drive-through bank. The amount of parking depends on the type of building on the site. As can be seen in Table 16.43.030-1 (Parking Standards), the parking requirements vary widely. For example, no parking spaces are required for a public park, and only 2.3 spaces are needed for office buildings.

Because a FAR variance is not required for all uses of the lot, the allowed uses are restricted to those in which a variance is not required. If the city were to allow a bank on this site, they would also have to make a comparison to make sure the FAR variance would not exceed a parking variance. In the case of the bank, the FAR variance is 72% smaller than the allowed building size.

#2: Claims for VAR-03-13 for the McDonalds at SE 119th and Sunnyside

The city's attorney once again attempts to show that the only possible use of the land is a drive-through restaurant. This demonstrates a tactic used by many politicians - repeat

something enough and people will start to believe it. As in the case of the bank, arguments used by the city's attorney are not valid.

Item #1: FAR requirement

The city stated in their response that to avoid the variance for the FAR, the building would have to be 13,000 square feet. This is simply not true. Based on the code, a Class C variance is required only if the code is exceeded by 20%; anything less would require a Class A or a Class B variance.

Using the 20% guideline, the building could have been as small as 10,400 square feet (80% of 13,000) before a Class C Variance was required.

Item #2: Parking spaces.

As mentioned earlier in this letter for the bank, the developer had many other alternative buildings to choose from as show in Table 16.23.010-1 Mixed Use Districts (MUC, MUE, RCMU) Permitted Uses. They were not restricted to building a drive-through restaurant on the lot; they had many other options for development.

In this case, the developer chose a type of building that requires the second largest number of parking spaces of all building types allowed in the MUC zone. It is the conditions of the *desired* development, not of the land, that would cause a variance on the lot, so the variance should not have been approved.

The city requires 9.9 spaces for a drive-through restaurant, far more than even the bank to the north of the property, and the second-largest amount of parking spaces per square foot of building required in Happy Valley. The only higher requirement for parking is for a restaurant without a drive-through. As with the bank, the developer chose to ignore every other use allowed in the MUC zone, and chose to pick the use that had the second largest requirement for parking of the MUC zone.

As with the bank, the developer could have built multiple story building to satisfy the FAR requirement. In this case, however, the building would have never supported the number of parking spaces for a drive-through restaurant. The only alternative would be to build a different type of building, rather than a drive-through restaurant.

An alternative use allowed by the zoning would have been a theater, which requires only 0.3 parking spaces for each 1,000 square foot of building. This would have required just 4 parking spaces.

The developer should not have been allowed to choose a building that required 33 times more parking than other uses unless the lot size supported the extra parking spaces.

Item #3: Site Layout.

The city further argues that the access to the McDonalds required a large private drive which reduced the amount of property that was buildable. However, they completely

ignore the fact that a smaller variance that would not have required a Class C variance could have been made on the property.

As shown above, a Class C variance requires a 20% or more variance from the base code. Because of that, the structure could have been as small as 10,400 square feet without requiring a Class C variance. As with the bank, the developer had the option of building up to 45 feet high, allowing a 2- or 3-story structure on the lot.

The developer could have easily built a 2-story drive-through bank, a single-story theater, or even a park on this lot with absolutely no need for any Class C variance. In fact, no variances at all (class A, B or C) would have been needed with a theater or a park.

It is the responsibility of the developer to find a use that fits on the lot. It is the city's responsibility to ensure that the laws are enforced, and that only the uses that actually fit on a property are allowed. Just because a use is allowed in a zone doesn't mean it must be allowed if it will not fit in the lot provided.

#3: Claims for VAR-02-14 for the Walgreen at 11995 SE Sunnyside Road

As with the bank and McDonalds, the city approved the Class C variance without considering alternate uses of the lot. The arguments supplied are for a specific use of the property, not for conditions of the lot.

Item #1: FAR requirement

The city stated in their response that to avoid the variance for the FAR, the building would have to be 19,500 square feet. This is simply not true. Based on the code, a Class C variance is required only if the code is exceeded by 20%; anything less would require a Class A or a Class B variance.

Using the 20% guideline, the building could have been as small as 15,600 square feet (80% of 19,500) before a Class C variance was required.

Item #2: Parking spaces.

Once again, the attorney mentions the requirements for a specific building type, and completely ignores every other allowed building type on the lot. In their own words "*The lot in this case would not support this type of building and parking configuration*". By their own admission, the lot does not support this particular type of building and parking.

The code requires that the land be used in such a manner to minimize variances. One way to do that is to build a different type of building that does not require so many parking spaces. Another way to minimize variances would be to build a 2-story building.

The staff report says "The applicant has proposed 58 parking stalls as part of the 14,500 square-foot "Walgreens" and would not have enough land area to design a 78-stall parking lot in conjunction with a 19,500 square-foot *single-story* structure..." (emphasis added). Because a 2-story structure would have easily allowed the development without

the FAR variance and without the retaining wall variances, both variances should have been denied.

Item #3: Retaining Wall

Any retaining wall over 8 feet tall requires a variance. However, because there was an alternative to a single wall (a tiered wall is even listed in the code), the variance should have been denied.

The developer claimed that they could not encroach on the neighboring property to install the necessary retaining wall. They did not discuss the fact that the retaining wall could have been tiered by moving the base of the lower retaining wall into the parking lot, rather than moving the top of the retaining wall toward the neighboring property. In other words, they only considered using the neighbor's property, not the property they actually own.

If the retaining wall variance had been denied, then the developer would have been required to submit a Class A or B variance for parking. Because both Class A and Class B variances are less severe than the Class C variance, it was an alternative that should have been used instead.

As with all the other variances that were passed illegally, no alternatives were even considered prior to passing the Class C variances. In the case of the retaining wall, the code itself included an alternative to the variance (a tiered retaining wall). This would have required an additional 8 feet of space taken from the parking lot. Although this would have reduced the number of parking spaces, the number of reduced spaces would not have required a Class C variance.

Invalid argument - No jurisdiction based on definition of "Local Government"

By far the most outrageous and ridiculous claim made in the letter from the city attorney is that the LCDC does not have jurisdiction in this matter over the Planning Commission. Once again, the city attorney mentions a section of the law that does not apply, states facts that are unrelated to the case, and hopes I would be ignorant enough to fall for these tactics.

The first tactic used by the attorney is to attempt to show that the definition of "Local Government" in ORS 197.15(13) does not apply to Planning Commission. The hope of the city attorney was that the LCDC would agree with the argument that the Planning Commission is not part of the "Local Government" and by false association, also agree that city council and planning staff are not under the jurisdiction of the LCDC.

However, the city attorney did not include the text of the "Local Government" definition in the letter because it would show that the staff of the planning department, the planning commission, and the city council, would all fit under the definition.

As shown in the definition below, the LCDC has jurisdiction over the local government, which includes the city staff as well as the mayor and city council. In addition, the Planning Commission's sole purpose is performing land use planning functions, and is therefore an "*associate of local government performing land use planning functions*". There is no question that the Planning Commission is under the LCDC's jurisdiction.

ORS 197.15(13) : "Local government" means any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use planning functions under ORS 195.025.

Another claim by the city's attorney is that the Court of Appeals has held for purposes of Chapter 186 that the term local government "*... does not necessarily refer to all levels of the government within a city, county, or special district.*" then gives the example of *Gage v City of Portland*.

The attorney fails to mention that in *Gage v City of Portland*, it was a hearings officer that was not considered part of the local government definition, and therefore that portion of the decision has absolutely no bearing on this enforcement request.

The attorney also failed to reveal in their letter was that this case was appealed to the Supreme Court, and that the decision by the Court of Appeals was not entirely upheld by the Supreme Court, which affirmed in part and reversed in part the decision of the Court of Appeals.

Even without any formal legal education, I know that the Supreme Court decisions override those of the Court of Appeals. Referencing an overridden solution is just another tactic used to try and convince me to drop this enforcement request to the LCDC.

The attorney's belief that a hearings officer's decisions cannot be overseen by the LCDC is important to keep in my with the most recent attempts by the city to move the responsibility of land use decisions from the Planning Commission to a hearings officer. As mentioned before, this is a blatant attempt to move land use decisions out of the oversight of the LCDC.

Other examples of lack of enforcement

There are only two properties near my house that have been developed over the past year that are in Happy Valley - a triplex and a McDonalds.

In the case of the triplex, numerous violations of code were present from the beginning of the project through completion of the project. The violations began when the city staff approved the building and landscaping plans submitted by the developer. The city staff did not enforce the requirements for the landscaping plans, and ignored about half of the requirements of the plans required for the design review.

Because of the incomplete plans, the developer built illegal retaining walls without required permits, cut down trees without regard to the tree-cutting code, and added

landscaping that does not comply with the code and also violates conditions of approval of the design review, and add fencing that does not comply with the code.

Rather than a triplex with a small grass lawn that matches the surrounding properties, the entire lot is covered with bark, in violation of a condition of approval that specifically prohibited the use of bark as a groundcover. Instead of a solid 10 foot buffer between the triplex and the northern property line, there is a 5 foot buffer with a path and fences illegally attached to the neighbor's fence.

In the case of the McDonald's, the city staff recommended that one of the setback requirements at the frontage of the building be allowed to be ignored with the condition that the developer enhance the bus stop in front of the McDonald's. After the McDonald's was open for business, the bus stop had not been enhanced.

When I inquired as to when the enhancements would be completed, I was told verbally that the enhancements were cancelled because TriMet requested the enhancements not be made due to the increased cost of maintenance.

Although no Class C variance may have been needed to grant the exception listed above, it is yet another example of the city ignoring not just the laws on the books, but of their own conditions added to the development process.

The city is also currently refusing to enforce the code related to the Steep Slopes Development Overlay ("SSDO"). The violations related to the SSDO are so numerous and severe that a separate enforcement request will be made to address the issues.

Summary

Class C variances can only be made if the *lot configuration or other conditions of the site* demands it, only if the variance is not used to circumvent existing code, and only if it is the minimum change that could be allowed. ***Tenant needs, property values, developer desires and market conditions are not listed as acceptable criteria for approval.***

If the variance is required due to the actions of the developer, such as selecting buildings that require more parking than other types of buildings, or redrawing lot boundary lines that create unbuildable lots, then it is a self-imposed hardship caused by the landowner, and therefore cannot be approved. In every one of these cases described in this letter, that is exactly what happened.

If any other designs can be made for the lots that do not require the Class C variance, then the least allowed variance (i.e., NO variance) is required. Therefore, if there are any other options available to the developer that do not require a variance, the variance must be denied.

If the city's argument that a variance can be approved for any use allowed by the zoning is allowed to stand, then any developer, on any lot, in any area would be allowed to do anything with any lot, no matter how small or how large the lot is.

It's one thing to approve a variance to allow development of a lot for uses that are supported by the surrounding neighbors. It's quite another to approve a variance for a development that the majority of the neighbors do not want.

In the case of the bank and McDonalds, there was significant resistance from the surrounding property owners, which was demonstrated by the signing of petitions by more than 75% of the occupied houses in the neighborhood.

The city listened to but refused to consider the opposition, or any of the testimony provided against the bank or the McDonalds. A very likely contribution to this is that only 5 of these property owners opposed to the developments were within the city limits. The remaining 25 property owners that opposed these developments were in the unincorporated Clackamas County.

The city approved the bank and McDonalds with 100% opposition of the Happy Valley homeowners surrounding the property.

The city must not be allowed to ignore land use laws. If this is allowed to continue, then it disrupts the foundation of the law, and allows the city to violate nearly every one of the Oregon Land Use Goals setup by the state.

The LCDC has authority in periodic review process to require local government to add specific language or provisions to its land use legislation to assure compliance with

statewide goals and LCDC rules. (Oregonians in Action v. LCDC, 121 Or App 497, 854 P2d 1010 (1993), Sup Ct review denied).

Despite Happy Valley's belief that they can ignore established land use code, which they have been violating since at least 2009, they must comply with the rulings of the LCDC. Rather than obey the laws as written or change the decisions that violate current land use code, the planning department is instead attempting to re-word the existing code so that the actions that violated the code in the past will now be allowed.

Re-writing the land use codes so that prior illegal actions can be done should not be allowed. With the sheer number of potential violations of Class C variances, as well as other land use decisions, a review for the compliance of the laws is required as soon as possible.

Respectfully,



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cc:

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Attachments:

- (1) Initial letter to Happy Valley
- (2) Proof of mailing
- (3) Response from Happy Valley, including attachments
- (4) Proof #1: McDonalds and Bank variances were self-imposed due to desires of the developer, not due to lot configuration or other conditions of the site
- (5) Proof #2: Walgreens variances were self-imposed due to desires of the developer, not due to lot configuration or other conditions of the site
- (6) Chapter 16.32 - Steep Slopes Development Overlay
- (7) 16.23.010 Mixed Use Commercial and Employment Districts, which includes Table 16.23.010-1 Mixed Use Districts (MUC, MUE, RCMU) Permitted Uses, which shows the permitted uses of the MUC (multi-use commercial), the base zone for the bank, McDonalds and Walgreen buildings described in this letter
- (8) 16.43.030 Automobile parking standards, including Table 16.43.030-1 (Parking Standards), which shows minimum parking spaces required for each building type