

August 10, 2015

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

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LAND CONSERVATION
AND DEVELOPMENT

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 16.32 Steep Slopes Development Overlay ("SSDO") and other related land use code.

On December 14, 2014, I sent a letter to the City of Happy 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.

I received a letter dated February 12, 2015 (with a postage date of February 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.

Since I have become very familiar with the Happy Valley land use code, I had to laugh when I read the letter. I didn't think that any experienced attorney would attempt to use arguments that would never stand up to scrutiny by the LCDC.

As it turns out, they put their least experienced attorney on this case, Ashley O. Boyle. A quick look on LinkedIn shows that she had only 4 months of experience as an Associate Attorney for Beery Elsner & Hammond at that time (was this her first land-use case?). The only other experience as an attorney was 2 years practicing in an entirely different area of law (as a Labor Attorney).

The letter from the attorney included the same tactics as those by the city planners, manufacturing meaning from code that does not exist to justify the actions, and ignoring pertinent land use code in their arguments. The arguments sound complete, but are not (nearly any argument may be won if facts are ignored). This letter and associated attachments will show that the city planners did not just ignore the text of the code, but that they ignored the intent of the code as well.

The letter failed to address the underlying problems resulting from misinterpretation of the code. As will be shown in the remainder of this letter and with the attachments, the reasons listed by the city are incorrect and inadequate to justify why no action will be taken by the city.

Arguments made by the city's attorney

The arguments made by the city are beyond belief. I expect that whoever reads the attorney's letter will experience several different emotions. Joy and laughter because the arguments made by the attorney are so bad; disbelief that anyone would even try to use such poor arguments; shock that the law firm would give this case to an attorney with no land use experience; or anger due to the dismissive tone of the letter, that states - literally, in writing - that the Oregon Statewide Planning Goals do not apply to Happy Valley land use code.

False claim #1 - State Planning Goals are Not Applicable

I find it hard to believe that any attorney, even one that has only 4 months experience with land use code, could even suggest that Statewide Planning Goals are not applicable to land use decisions.

It is my understanding that the LCDC purpose is to ensure that the land use codes are enforced, which includes making sure that they comply with the Statewide Planning Goals. As a city within the state of Oregon, these apply to all the land use decision in all cities. Happy Valley is within the state of Oregon. Therefore, Statewide Planning Goals are applicable to EVERY land use decision in Happy Valley.

The argument that the LCDC approved a comprehensive plan in 1980, 35 years ago, does not mean that review of the land use codes can never be done. If that were true, there would be no procedure for enforcement from the LCDC. The simple fact of the matter is that this entire procedure was created so that the LCDC can enforce the land use code when they are not being adhered to.

The city's stance that the Statewide Planning Goals are not applicable in this case supports my belief that the city has no intention of adhering to ANY of the Statewide Planning Goals. I suggest that the LCDC not limit their inquiries to the SSDO code, but expand their investigation and do a comprehensive review of EVERY land use decision made by the city of Happy Valley over the past 3 years. This would show the extent of the problems.

The changes made to the SSDO code in the most recent amendments of June 2, 2015 (underlined and in bold) are shown below. The fact that Goal 7 is listed in the text is proof that the city must comply with the Statewide Planning Goals.

16.32.010 Purpose.

Slope constrained lands are regulated by the steep slopes development overlay (SSDO). The purpose of the SSDO is to:

A. Contribute to compliance with Statewide Planning Goal 7 (Areas Subject to Natural Disasters and Hazards). For Goal 7, **with exceptions**, the SSDO specifically minimizes seismic and landslide hazards and soil erosion associated with development on steep or unstable slopes.

The second paragraph states that there are no Statewide Planning Goals listed under ORS 193.320 (6), and indicates that this regulation is for referencing patterns of behavior that violate acknowledged comprehensive plans or land use regulation. The implication is that violation of Statewide Planning Goals can only be done during the creation of the laws, and violating the existing code is what must be done to warrant an enforcement order.

Actually, by violating the land use code, the city is violating the Statewide Planning Goal, and in particular, Goal 7 - areas subject to natural hazards. The land use code adhered to the Statewide Planning Goals, and by violating the code, the city allowed the violation of the Statewide Planning Goals.

Which brings up another item - the city has violated Statewide Planning Goal #7 (areas subject to natural hazards) with the amendments to their land use code. The changes ignore the fact that man-made slopes - and in particular those created from the excavation from the Walgreens - actually increased the hazards to the public.

Before the grading, the maximum slope was nowhere near as steep or as extensive as the current slope of the land. Prior to the excavation, if someone fell where the steepest slope existed, they could be injured, but would most likely survive. With the man-made slopes introduced with the Walgreens excavation, this low probability of injury has been replaced with the high probability of death.

False claim #2 - The SSDO does not apply to man-made slopes

There were exactly 4 exclusions to the steep slopes at the time that the letter was written to me. Man-made slopes did not exist in any of the code at that time.

16.32.045 Exceptions.

- A. An activity that avoids conservation slope areas and transition slope areas.
- B. The following activities, regardless of location:
 1. An excavation that is less than three feet in depth, or which involves the removal of a total of less than fifty (50) cubic yards of volume;
 2. A fill that does not exceed three feet in depth or a total of fifty (50) cubic yards of fill material;
 3. New construction or expansion of a structure resulting in a net increase in ground floor area of less than one thousand (1,000) square feet that does not involve grading;
 4. Emergency actions required to prevent an imminent threat to public health or safety, or prevent imminent danger to public or private property, as determined by the public works director;

On June 2, 2015 - 4 months *after* the attorney sent me the letter - the SSDO land use code was amended in response to my inquiries into steep slopes. Even with the amendments, the fact that there are man-made slopes on the lot does not automatically exclude the SSDO from applying to the lot, as shown in the highlighted text below:

16.32.045 Exceptions.

- A. An activity that avoids conservation slope areas and transition slope areas.
- B. The following activities, regardless of location:
 - 1. An excavation that is less than three feet in depth, or which involves the removal of a total of less than fifty (50) cubic yards of volume;
 - 2. A fill that does not exceed three feet in depth or a total of fifty (50) cubic yards of fill material;
 - 3. New construction or expansion of a structure resulting in a net increase in ground floor area of less than one thousand (1,000) square feet that does not involve grading;
 - 4. Emergency actions required to prevent an imminent threat to public health or safety, or prevent imminent danger to public or private property, as determined by the public works director;
 - 5. Any land use or activity that does not require a building permit or grading permit, or land use approval; or
- C. Development of employment, industrial or commercial uses on Employment, Industrial or Commercial designated lands that are not otherwise encumbered by the City's Natural Resource Overlay Zone (NROZ) and that abut an existing or planned Collector or Arterial roadway as illustrated within the City's Transportation System Plan (TSP).
- D. Transition or conservation slope areas that are "man-made" or caused by past soil fill/removal and grading activities so long as required special studies and reports have been prepared in accordance with Section 16.32.080, evaluating the site conditions and determining that the slope area can be safely developed.**
- E. An activity that is determined by the planning official to be reasonably similar to the exceptions listed in this section. (Ord. 474 § 1, 2015; Ord. 389 § 1(Exh. A), 2009)

The argument that the city gave was that the slopes could have been made by dumping material on the lot, or caused by the construction nearby on a road. Because these man-made slopes were not the result of nature, they should be excluded. In those cases, they said, the SSDO would not apply because the changes to the land were not "natural".

The problem with this argument is that man-made slopes can actually be far more dangerous than the natural slopes. The perfect example of this is the excavation for the Walgreens. Prior to the excavation, the land had a natural slope that met the minimum requirements for steep sloped lands.

Now, after the excavation of this "man-made sloped land" - which was done without the Type II review and studies as required by the SSDO - there are now thousands of square feet of extremely and dangerously sloped land, with a 13-foot drop-off due to the retaining wall (which also exceeds the Happy Valley maximum height retaining wall).

The Walgreens development has changed the land to such an extent that it is now unlikely that even sure-footed animals would not be able to walk on the edges of the property, or even come close to the edge of the property, without risking life and limb. The development changed the land from a rolling hill to a deep excavation with extremely steep edges. The development actually increased the risks associated with the

property

I attended several meetings where they discussed the man-made slopes. In one of the meetings, I testified that someone could remove 3 feet on a section of the lot (the minimum movement of land allowed on lands with sloped land without applying the SSDO), and the exclusion would apply. They could then come back and say that the slopes were man-made, and as a result, could always avoid application of the SSDO due to that exception. As a result of my testimony, the amendments that were originally made excluding all man-made slopes were not sent to the City Council for approval.

In the case of the Walgreens excavation, no Type II review was made, even though it was required at the time. The so-called "man-made" slopes were actually leveling of the natural slopes in order "to build houses in the 50's or 60's", according to the testimony of Justin Popelik when asked why the SSDO did not apply to the lot. If the houses had not been built, the slope of the land would still have met the requirements for steep slopes.

A statement was included in the letter from the attorney - numbered, indented and italicized to appear that it actually exists in the code: "*1. The City Council announced in the purpose section that the SSDO should only apply to naturally occurring slope*".

The problem is, no such statement exists in the purpose section of the code. That statement lacks any trace of truth.

The entire SSDO code will be attached to this letter as well. Two versions will be included - the version that existed when the attorney first wrote their response to me, and the version that the City Council adopted on June 2, 2015.

Below is the complete text of 16.32.010 and 16.32.020, which states the purpose and applicability of the SSDO. This is the version that was in effect until June 2, 2015. The amendments made at that time don't significantly modify the meanings below. As you can see, the attorney focused the arguments on section D, and completely ignored sections A, B and C.

16.32.010 Purpose.

Slope constrained lands are regulated by the steep slopes development overlay (SSDO). The purpose of the SSDO is to:

A. Contribute to compliance with Statewide Planning Goal 7 (Areas Subject to Natural Disasters and Hazards). For Goal 7, the SSDO specifically minimizes seismic and landslide hazards and soil erosion associated with development on steep or unstable slopes.

B. Regulate development and provide special protection on lands within "conservation slope areas" and "transition slope areas" as follows:

1. Except as exempted pursuant to Section 16.32.045, development activities on conservation slope areas are prohibited. Except as allowed by Section 16.32.040(D)(1), conservation slope areas include:

a. Slopes twenty-five (25) percent and greater (for designation as conservation slope area, the minimum contiguous extent for slopes twenty-five (25) percent and greater shall be one thousand (1,000) square feet);

b. Potentially Hazardous Analysis Areas (lands within twenty-five (25) feet of the top or toe of slopes twenty-five (25) percent and greater);

- c. Areas containing potentially rapidly moving landslide hazard areas mapped by the Oregon Department of Geology and Mineral Industries (DOGAMI).
2. Within transition slope areas, conservation and development are balanced. Except as allowed by Section 16.32.040(D)(2), transition slope areas include: Slopes 15 to 24.99 percent (for designation as transition slope area, the minimum contiguous extent for slopes 15 to 24.99 percent shall be one thousand (1,000) square feet and the land must not be otherwise designated as a conservation slope area).
- C. Limit the potential residential density and facilitate transfer of development away from slope constrained lands. Within conservation slope areas and transition slope areas, a maximum density of two dwelling units per acre applies.
- D. Slope constrained lands in Happy Valley require special protection because they:
1. Are generally more difficult and expensive to serve with urban infrastructure as compared to less steep lands;
 2. Provide wildlife habitat, tree canopy, and other environmental benefits;
 3. Are located at the headwaters of watersheds that provide clean drinking water to downstream users, including Happy Valley residents;
 4. Contribute to the scenic landscape of Happy Valley which is a strong part of the City's identity and livability;
 5. Are often adjacent to regulated natural resource areas and/or public green spaces; and
 6. Can, if developed, cause harm to persons and/or structures via stormwater runoff, landslide, mudslide, tree windthrow and other natural actions that may pose a hazard to the public health, safety and welfare.
- (Ord. 389 § 1(Exh. A), 2009)

16.32.020 Applicability.

The regulations of the steep slopes development overlay shall apply to any existing lot of record with slopes greater than fifteen (15) percent (with a minimum contiguous extent greater than one thousand (1,000) square feet), potentially hazardous analysis areas, and/or DOGAMI landslide hazard areas except as allowed by Section 16.32.040(D). This section shall apply only to activities and uses that require a building, grading, tree removal and/or land use permit and per ORS 92.040, shall not apply to parcels or lots created within ten (10) years of April 21, 2009 but shall apply to all existing lots of record and parcels or lots created more than ten (10) years prior to April 21, 2009.

The steep slopes development overlay will be overlaid on any and all applicable parcels within the City limits at the time of development application and, upon being overlaid, will take precedence in density calculations over the base zoning district illustrated on the City's Comprehensive Plan map/zoning map, and actual site specific conditions shall take precedence over any aerial topography mapping or other nonsurvey specific datum.

(Ord. 427 § 1, 2012; Ord. 389 § 1(Exh. A), 2009)

In the case of the Walgreens excavation, the steep slopes that existed before the excavation may have been man-made. However, the slopes in the land due to the housing did not increase the slopes, it actually smoothed them out so that the houses could be built. The fact is that the grading to build the houses (that were tore down over 10 years ago) did not create the slopes; it actually reduced the slopes of the land.

Response to "3. The City is required to apply the code provisions effective at the time of the original application for development."

It is interesting that the attorney included this argument, because it actually goes against

them. The amendments to the land use code that list "man-made" slopes did not exist at the time the letter was written. Those amendments were added later because the man-made argument had been used to defend the grading of the Walgreens development.

The attorney states that any properties that were subdivided between April 21, 1999 and April 21, 2009 are exempt from the SSDO. However, the subdivisions were not created during that time; they were created in 2014 when the application was submitted to the city for the developments (i.e, a replat). Although properties subdivided at that time are exempt, that fact is not relevant to these properties because the actual subdivisions were not created at that time, they were created much more recently.

The attorney also attempts to bring in arguments relating to Measure 37, which states that land use code changes imposed after you own the property are exempt from the rules. This law applies only if the land use code was passed AFTER the current owner bought it. The attorney fails to show that the people that currently own the property also owned the properties prior to 2009. Without the most recent purchase dates listed for the properties, none of the arguments can be supported.

I do not know when each of the properties was sold to the current owners, but I do know that that the McDonalds property was sold in 2013, well after the SSDO was approved. The same goes for the Walgreens - it was sold in 2014. The argument that the grading was done before the McDonalds was built is nonsense.

The attorney then tries to say that the SSDO didn't apply to the McDonalds (and Walgreens) because the grading had already been done. That argument goes against the code, which states that the SSDO must be applied for any "activities and uses that require a building, grading, tree removal and/or land use permit...".

The excuse for not applying the SSDO to the McDonalds lot was because the land was already graded. That excuse actually supports the fact that they didn't apply the SSDO when required (prior to grading), and performed the grading without regard to the SSDO. If this were to be an allowed circumvention to the SSDO, the SSDO would never apply. The developer would always grade the lot prior to submitting any design review so they could avoid the extra costs associated with the studies required for sloped lands.

So, using a combination of these facts, we have the following: (1) the subdivision applications were submitted in 2014, (2) the SSDO existed during that time, (3) there is no proof that the SSDO was created while the current developers owned it, and (4) man-made slopes were not exempt from the SSDO until June 2, 2015. The only possible conclusion is that the SSDO applies to every one of the developments.

Response to: "4. Failure to Demonstrate Decision(s) Violate Acknowledged Land Use Regulations"

This section of the attorney's letter highlights the lack of experience and knowledge of land use laws. The attorney assumes that the LCDC can only review decisions that are

appealed to LUBA. Since no appeals have been made to LUBA that have reversed any of the land use decisions, the argument goes, there has been no errors by the city planners.

With this argument, the attorney attempts to show that citizens do not have any rights to ask the LCDC to intervene and that the Planning Commission and City Council have the right to ignore all the laws, not just the SSDO, because nobody can contact the LCDC unless they first appealed the decisions to LUBA, and that it is the citizen's responsibility to appeal to LUBA every single instance of an incorrect handling of land use code before the LCDC can even look at the behavior of the city.

As you know, there are no requirements that LUBA be involved in order to request a compliance order from the LCDC. Adding such a requirement would make it impossible for anyone to request enforcement from the LCDC.

The costs to request LCDC intervention would be prohibitive if a LUBA appeal was first required. In order to appeal to LUBA, the citizen must first exhaust all other appeals to the local government. This first requires an appeal of a decision by the Design Review to the City Council (\$3,500). Only after the appeal has been made, can an appeal to LUBA be made.

In the case of the Triplex, the appeal process is even more expensive. The first appeal would go to the Planning Commission (\$2,000), followed by an appeal to the City Council (\$3,500). In this case, even though the development is not nearly as large or complex as the other developments (McDonalds, Walgreens, etc.), the total cost of appeals is \$5,500.

In the case of the Walgreens grading, no public notice was given before the grading began, even though a Type II review is required for lands with steep slopes. Had I noticed this prior to the grading, the appeal process would have been first to the Planning Commission (\$2,000), then to the City Council (\$3,500). Even if the appeal had gone to LUBA after the grading, it would have lost. The grading was already finished, so LUBA would have considered the arguments moot and dismissed the case. \$5,500 spent for nothing.

The SSDO has been ignored repeatedly, and on a consistent basis. That is the only requirement for filing a petition for enforcement. The LCDC determines whether or not violations occurred. That is actually the entire purpose of this process.

Response to: "5. ORS 197.32 Applies to a Decision of the "Local Government"".

This is where the lack of experience really shines for the attorney. The argument is essentially that the LCDC does not have jurisdiction over the Planning Commission decisions, and cites an example from the Court of Appeals.

The letter cites a case from the Court of Appeals - Gage vs. City of Portland to support

the argument that the Planning Commission is not "local government", so the LCDC does not have the authority to review this case.

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 because they were enforcing the land use code - not creating it - 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 court decision is just another tactic used to try and convince me to drop this enforcement request to the LCDC.

What is interesting is that the city is also looking into what it would take to move the responsibility of land use decisions from the Planning Commission to a hearings officer.

This is just another blatant attempt to move land use decisions out of the oversight of the LCDC.

Response to: "6. Applicable Legal Standard"

This is the attorney's attempt to get me to quit by listing some of the legal requirements for appealing to LUBA, assuming that I do not know the difference between LUBA and the LCDC.

As shown above, I am well aware of the differences between LUBA and the LCDC. I know that attempting to appeal multiple incorrect decisions to LUBA is far too expensive for the average citizen to pursue, and that the Oregon Legislature provided the oversight of the LCDC to correct recurring problems. To do so for just the cases listed in this document would cost \$24,000 or more.

Other tactics used to discourage citizen involvement

In addition to the violations described earlier, the city has engaged in behavior intended to restrict or limit involvement from citizens, with much of the behavior directed at me in particular.

In one case, prior to the final appeal to the City Council for the Triplex, Michael Walter attempted to violate state law by refusing to satisfy an information request. After I contacted the City Council, he was forced to provide the information, but then tried to bill me for the information request without first providing an estimate for the expense. Since doing so would have been illegal, I was not required to pay.

After the Triplex case appeal ended, Mr. Walter also attempted to bill me for attorney time that was unrelated to the appeal. In fact, the attorney time billed was AFTER the appeal had completed. The money was eventually refunded.

For the last part of 2014 and first part of 2015, the city stopped posting notices to the Happy Valley website. This limited the information provided to the public who relied on the Happy Valley website to obtain the information. I had to request at least two Planning Commission packets via email because they were not posted to the Happy Valley website. While I can't prove that this was intentional, it didn't start happening until I began asking questions concerning the application of the SSDO.

At the Planning Commission meeting to discuss the land use code changes, the agenda listed two items. The order of the agenda listed the land use code amendments, followed by a presentation by a cell phone company describing cell phone tower improvements. The order of the agenda was changed, and I was forced to sit through an hour long presentation. Although there is no proof that this was done because I attended the meeting, it sure is suspicious.

I attended the design review for a food cart development, and testified against it because the parking was inadequate. Because I was involved in the meeting, I was legally bound to receive a notice of decision. The notice of decision stated that I had 21 days from the posted date of the letter to appeal the decision. The letter was dated March 3. The postmark on the envelope was March 19. I received the letter on Saturday, March 21. I can't prove that the letter was held intentionally, but it doesn't seem likely that they waited almost 3 weeks to send everyone notice of the decision.

In addition, requested recordings have been "lost" due to various reasons. ..

The bulk of the audio from the McDonalds design review was lost. The recording I requested does not begin until a recess was held at the end of the meeting, where the board members met with the developer to iron out details behind closed doors (is that even legal?).

The entire audio from my appeal to the Planning Commission was "lost". The meeting was held in a conference room designed for 12 people (more than twice that number attended), and the assistant planner recorded the meeting on her Apple phone. When I requested the audio, I was told it was not available because the assistant's child had "upgraded the phone" and lost the recording during the upgrade.

The portion of the audio from the Planning Commission meeting in which I asked about the applicability of the SSDO to the Walgreens lot was "lost". The recording begins after the question was answered by Justin Popelik. Fortunately, because of the prior losses to audio files, I recorded the discussion myself.

Other problems with the current enforcement of the SSDO

The problems with the city's application of the SSDO continue even when the SSDO is applied to the lots.

I attended the public meetings for several properties in which the city applied the SSDO. In every case, the staff report ignored at least one element of the SSDO code, allowing the developer to build additional buildings and exceed the density calculations. Despite my testimony showing these shortcomings, the design reviews were all approved by the design review board with no restrictions.

On February 10, 2015, I attended a meeting to discuss the design review for two properties - Grand View Meadows and pine View Meadows. Both properties had steep slopes, and the SSDO was applied to each.

The problem is all elements of the SSDO were not applied to either of the properties. The lot sizes were all less than 10,000 square feet, the density calculations were not done correctly, the density of the housing on the lots exceeded 2 houses per acre, and one development had a lot that consisted entirely of conservative slopes, which is specifically prohibited in the code.

This shows that even when the SSDO is applied, it is not applied correctly.

Consequences likely to occur without corrective action by the city

The consequences of Happy Valley ignoring the SSDO are numerous and widespread, and will likely affect most, if not all, new development within the city limits. The majority of the flat "easy" lots within the city limits have already been developed. What remains is the development on the land that consists of hills and steep slopes.

The SSDO isn't just intended to preserve the scenic beauty of the region; it is also intended to protect the environment and safety of those living in the region. Overdevelopment on slopes can result in loss of habitat, adversely affecting the surrounding wildlife. It can also affect the safety in the region. Removing all the vegetation on a muddy hill can cause mudslides.

Mother Nature is not forgiving when developing on steep slopes. A few years ago after some heavy rains in the Portland area, a mudslide was caught on video. The video showed the mudslide pushing a pickup truck sideways down a windy road at close to 20 miles an hour. In the video you can hear the tires of the truck being pushed sideways squealing against the asphalt. As the mudslide continued, you can then hear the person taking the video shouting to the driver to go faster because the mudslide was getting closer to the truck.

If the city wants to repeat the landslides to give the residents the opportunity to post on YouTube, ignoring the SSDO should do the trick. It may not happen right away. It could

take time for the water to find its way under the structures. When it does happen, you can thank the city planners for ignoring the SSDO and allowing over-development on the land.

There have already been several developments in which the SSDO was applied that are not mentioned in this letter. In all but one of these cases, the SSDO was not applied consistently, and was not applied correctly. In almost every case, sections of the SSDO code relating to lot size and building density were completely ignored.

So far, luck has held and rainfall has been low for the last year. However, with the number of developments currently taking place, luck is running out.

As soon as we get a major downpour (it hasn't happened since these properties were developed), there's no telling what will happen to the current lots that in which the SSDO was not applied.

What will happen to the compacted land under the McDonalds held up by a 13-foot retaining wall? Will the retaining wall hold? Will the McDonalds sink?

What will happen to the triplex sitting only 4 feet from an unsupported 5 foot drop-off (with no retaining wall)? Or the illegal retaining wall built using cinder blocks holding up the next door neighbor's garage port roof? Or the un-engineered retaining wall built on top of the sloped driveway? Will the damage be limited to the triplex, or will it affect the neighbor's property? Will the damage be limited to property, or will someone be injured or killed?

What will happen to the newly exposed slopes on the Walgreens development when the rainy season begins? Will the retaining wall be sufficient to hold back a small mountain of clay and mud? Or will it fail, burying cars and people under tons of mud?

There's no way to know what will happen in any of these cases, because the studies required by the SSDO were never made. No soil samples were taken, no estimates of erosion were made. No verification that the land was safe to build on.

I will tell everyone I know to avoid the Walgreens during the rainy season. There's simply no way to know whether or not the hill will stay in place. All of the vegetation that held the hill in place prior to the development was removed. Tens of thousands of cubic yards of soil was removed, leaving an extremely steep slope, far greater than before, and a deep pit.

The simple fact of the matter is that nobody - not the city, not the developers, not even the longtime local residents - knows if the hill is stable. There is no way to know what the impact of removing over an acre of dense vegetation - deep rooted trees, bushes and other vegetation - an digging down 30 feet will have on the stability of the hill above the new Walgreens.

Who knows if the soil above the retaining wall is stable enough without further stabilizing measures, or even if the retaining wall is sufficient to hold back the soil? Nobody knows for certain. There is simply no way to know how unstable the land could be because the SSDO studies of soil quality were never made.

Summary

The arguments included by the city attorney suggest that the SSDO's sole purpose is to protect the natural environment and scenic beauty of the region. That is simply not true. The SSDO was also setup to provide safe development of steep slopes to prevent property damage, injury, and even loss of life caused by unsafe overdevelopment on sloped land.

The SSDO was ignored for the triplex. As a result, an unsafe retaining wall was built on top of the existing sloped driveway with no studies to determine the impact of the wall. No engineered retaining walls were used on the site, despite a drop of more than 4 feet on the neighbor's property, and despite code requiring that any retaining wall over 4 feet be engineered. No property damage or injuries have resulted... yet.

There already has been shifting of soil associated with the grading for the Walgreens, even though there hasn't been any large continuous amount of rain since the grading was done. Because the newly exposed hill was eroding, it was necessary for the developer to lay black plastic on the slopes during the winter, held in place by sandbags. Recently a retaining wall was built to hold back a fraction of the bottom of the excavated hill. No property damage or injuries have resulted from this development... yet.

Earlier this year runoff from the McDonalds development was going over the sidewalk, forcing the developer to rip up one section of the sidewalk and provide drainage. The drainage problem was not discovered earlier during planning because the SSDO was not properly applied, so the studies that would have shown the problem were not done.

Today I walked past the McDonalds, and there is a large hose going from a hole in front of the McDonalds, across the sidewalk, and ending in a holding tank (about the size of a semi's trailer) placed in a no-parking zone on the nearby side street. A section of sidewalk on Sunnyside is blocked off, and there are two large pieces of plywood with handwritten text saying there is a hole under the plywood. Could whatever is forcing them to pump water have been avoided if the SSDO studies have been performed? No injuries have resulted from the blocked sidewalk or hose crossing the sidewalk... yet.

Conclusion

The city must be required to enforce the land use code. All properties that have steep slopes as defined by the SSDO code be checked to ensure they are safe to develop. This includes all the properties mentioned in this document as well as all others in which man-made steep slope applies but were not applied.

The city recognized that just because the slopes are man-made that development on them still requires special studies to ensure that the development is safe to proceed. In fact, when they modified the code to exclude man-made slopes, they included text that requires the studies to be performed to ensure the property is safe to develop.

With that in mind, it seems reasonable to expect that the city require the properties listed in this document to do the studies required by the SSDO.

Even when the city does apply the SSDO, it does so inconsistently, ignoring large sections of the code. I have attended several public meetings in which the density calculations are ignored (maximum 2 lots per acre), and in one meeting with two different developments, both had the SSDO applied, and both ignored sections of the code (minimum lot size and maximum density), and one had one lot completely enclosed in conservative slopes.

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 have final say on all land use decisions and can ignore established land use code, they must comply with the rulings of the LCDC. With the sheer number of SSDO violations, as well as other land use decisions such as variances, a review for the compliance of the laws is required as soon as possible.

Because Chapter 16.32 - Steep Slope Development Overlay is very short (about 8 pages), I encourage you to read the code in its entirety in order to have a full understanding of the code.

Thank you for taking the time to read this letter. I look forward to hearing from you.

Respectfully,



James Phillips
11800 SE Timber Valley Drive
Clackamas OR, 97086
503-698-4895

City of Happy Valley
16000 SE Misty Drive
Happy Valley, OR 97086

Attachments include:

- (1) Citizen's Request Letter - Original letter to city
- (2) Citizen's Request Letter attachments (5)
- (3) Proof of mailing
- (4) City's Response letter, including photocopy of envelope showing actual mail date
- (5) City's Response letter attachments (3)
- (6) Happy Valley Chapter 16.32 - SSDO land use code, prior to June 2, 2015 amendments
- (7) Happy Valley Chapter 16.32 - SSDO land use code, including amendments made June 2, 2015 (includes revision marks)
- (8) Example of violations when SSDO is applied - includes map showing conservative and transitional slopes
- (9) Example of violations when SSDO is applied - includes map showing size of lots
- (10) Urban Growth Management Agreement between Happy Valley and Clackamas County
- (11) Notice of Decision for Food Cart Development showing discrepancy between date on letter and actual mailing date