Citizen's request letter

Initial letter to Happy Valley notifying them of my intent to petition the Land Conservation Development Commission for an enforcement order

November 16, 2014

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

Beery Elsner & Hammond
1750 SW Harbor Way, Suite 380
Portland, OR 97201-5106

Dear Sir or Madam:

As required by *ORS 197.319 Procedures prior to request of an enforcement order*, I am hereby notifying you of my intent to petition the Land Conservation and Development Commission for an enforcement order pursuant to ORS 197.319 to 197.335.

Requestor:

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

Affected Local Government:

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

This petition will be based on ORS 197.320 (6), which states:

> *A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions;*

Statement of facts

The City of Happy Valley has approved several Class C variances that should not have been approved. The variance requests were due to self-induced hardships from the developer caused by ignoring alternatives to their designs and focusing on tenant needs for the proposed buildings, not from the conditions of the lots.

Rather than follow the restrictions of *the lots* as required by the land use codes, the developer chose a design based on tenant needs. Although used as arguments for each of the Class C variances, the code makes no mention of tenant needs as being an acceptable criteria for approving Class C variances. In each case noted below, it is obvious that the Class C variances could be entirely avoided by using a different design.

The purpose of land use codes is to control development, and prevent specific undesirable development. By allowing the developer to submit a Class C variance merely because they want to develop for a particular tenant, or want to avoid building some other structure that would comply with the code violates the intent of the code. The code specifically states that the variance is required due to the conditions *of the lot*, not due to a developer's design to build a specific structure, or based on any future tenant needs.

The developer decided to design buildings and retaining walls that they knew did not comply with the code, based on future tenant requirments, then later submitted variances to get around their self-induced hardships based on tenant needs. This is clearly not the intent of the Class C variances, as shown in the code below.

16.71.050 Class C variances.

A. Applicability. Class C variance requests are those that do not conform to the provisions of Sections 16.71.030 and 16.71.040 (Class A and Class B), and that meet the criteria in subsections (B)(1) through (5) below. Class C variances shall be reviewed using a Type III procedure, in accordance with Chapter 16.61.

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

1. The variance requested is required due to the lot configuration, or other conditions of the site;
2. That the condition requiring the variance has not been intentionally created to circumvent the Land Development Code;
3. That the variance, if granted, will not alter the essential character of the neighborhood or district in which the property is located, or substantially or permanently impair the appropriate use or development of adjacent property;
4. That the variance, if granted, is the minimum variance that will afford relief and is the least modification possible of the development provisions which are in question;
5. The variance will not result in violation(s) of any other adopted ordinance or Code standard; each Code standard to be modified shall require a separate variance request;
6. In granting the variance, the City Administrator or appropriate and designated body or agent may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this title.

(Ord. 406 § 1, 2010; Ord. 389 § 1(Exh. A), 2009)

The purpose of *Section 16.71.050 - Class C variance*, as shown in the code above, is to approve only if the variance is required due to *the lot configuration*. A Class C variance cannot be approved simply because the developer wants to build something that meets a tenant's needs but violates the code, or wants to avoid building something else that does not require a variance. This code is intended for true limitations *of the lot*; it is not designed to accommodate self-induced hardships based on tenant needs.

In the following cases, Class C variances were approved in violation of *Section 16.71.050 - Class C variances*. Both the planning department and the Planning Commission allowed these variances. These variances were not required due to the condition of the lot but were needed only to satisfy the developer's desire to build a specific building on

the site - for a specific tenant's needs. Alternative structures that could easily avoid the variance were available to the developer in each case. In all cases, the developer simply chose to ignore the available options.

Specific cases where *Section 16.71.050 - Class C variance*s was abused are listed below. In all cases, there were alternatives to the design that would have avoided using the Class C variance. Because there were alternatives to each design, none of the variances were required by the conditions of the lot. All of these variances were self-imposed hardships based solely on the developer's future tenant needs, and should have been denied.

- **10/14/2014 - *VAR-02-14 WALGREEN - 11995 SE Sunnyside Road***
  Two variances approved in violation of 16.71.050 (B) (1), (2) and (4).
  - FAR variance approved when other buildings would comply with FAR requirements.
  - Retaining Wall variance approved when alternative retaining wall could have been built on site to avoid the variance.
- **02/11/2014 - *VAR-03-13 MCDONALDS – 119th & SUNNYSIDEVAR-03-13***
  FAR variance for McDonalds approved in violation of 16.71.050 (B) (1), (2) and (4). Lot supported other buildings that would comply with FAR requirements.
- **09/24/2013 - *VAR-01-13 SUNNYSIDE PLAZA/BANK 122ND & SUNNYSIDE***
  FAR variance for bank approved in violation of 16.71.050 (B) (1), (2), (3) and (4). Item (3) was violated in this case because no consideration was given to surrounding neighbors that opposed the bank.

Approvals of the FAR variances were not close to meeting code. In all cases, many other buildings and many other uses could have been made for the lot. The variances were needed only because a specific use was desired on the lot for a specific tenant; there are no items in the law that state Class C variances are allowed because of specific desired designs, tenant needs, property values or market conditions

In the case of the bank on 09/23/2013, a member of the Design Review board even made a comment that the developer had the ability to build a 2-story office building, but that the surrounding property owners would probably rather see a 1-story building. From this comment alone, it is clear that the Class C variance was not required because an alternative structure could be put on the lot.

In the case of the Walgreens on 10/14/2014, I testified to the Planning Commission during the variance meeting, and stated that the variances were not legal. I quoted the code of *Section 16.71.050 - Class C variance*s, stating that no variance is allowed if any other option is available on the lot. I said that the variance violated parts (1) and (2) of the code and should be denied. At the end of my prepared testimony, I gave my personal reasons for not wanting the Walgreens.

When I was done with my prepared testimony, the Planning Commission completely ignored the legal arguments I presented, and instead focused their questions and comments on my personal reasons for not wanting the Walgreens. They stated that they could not dictate whether a Walgreens is allowed or not. Despite my efforts to try and

refocus their attention on *Section 16.71.050 - Class C variance*s, they continued to focus on my personal reasons, not the legal arguments that I gave. They completely ignored that portion of my testimony, and approved the variance.

Corrective Action Sought

The following four corrective actions should be put in place to prevent non-compliance of *Section 16.71.050 - Class C Variances*. Whether intentional or not, the Happy Valley Staff and the Happy Valley Planning Commission have already allowed non-compliant Class C variances to be submitted and approved due to a mis-interpretation of the code. In each of the cases above, the code was applied to a specific design that was submitted. The intent of the code is to apply variances based on the conditions *of the lot*, not to the conditions of the submitted design or any tenant requirements or existing property values.

Corrective Action #1: Training to explain how to interpret and comply with *Section 16.71.050 - Class C variances*. The Happy Valley Staff and the Happy Valley Planning Commission made mistakes in testing for compliance of the code in the above examples, and in particular the variances approved for the Walgreens, due to their incorrect interpretation of the code.

In order to provide the proper enforcement of this code, the staff and board must be made aware that Class C variances in *Section 16.71.050 - Class C variances* are based on the conditions *of the lot*, not of the design submitted for the lot, tenant needs, property values or market conditions.

The mistake that was made was that the code and questions asked were based on the submitted design, not on the existing lot conditions. Although the variances that were approved were the minimum variances required for the submitted plans, they were not in compliance with *Section 16.71.050 - Class C variances* because they were not the minimum variance required for *the lot*.

When a design is submitted that does not comply with the code, if there are any other designs available that do not violate the code (whether or not the tenant wants them), then this is a self-inflicted hardship. All Class C variances that are requested for a self-inflicted hardship must be denied as soon in the process as possible.

Corrective Action #2: The Happy Valley Design Review Board and the Happy Valley Mayor and City Council need to be instructed to the interpretation of *Section 16.71.050 - Class C variances*, in case the subject is brought up to the Design Review Board or City Council. If any evidence shows that the variances do not comply with the code, the Design Review Board and City Council must consider the evidence.

In no case shall the Design Review Board or City Council be allowed to say that the variances are not part of the Design Review criteria. There are many items within the design review process that rely on the validity of any Class C variance. To consider these items unimportant goes against the intent of the land use code.

Corrective Action #3: In addition to the training above, additional questions need to be added to existing documents (such as the Class C variance request) to prevent this from happening in the future. Questions must be asked and answered at each step in the approval process to prevent non-compliant Class C variances from flowing through the process.

Although the current process of listing each individual item under *Section 16.71.050 - Class C variances* is intended to provide compliance with the code, the questions are not being asked appropriately to actually provide compliance. The current questions are being answered as if the code is based on the submitted design only. However, the code is based on the *lot conditions*, not the submitted design, so the current process is not testing the validity of the Class C variance as intended by the land use code.

Before any Class C variance can be accepted by the staff, the following questions must be asked about the variance requested. This will ensure that the *lot configuration*, not the submitted design, is the controlling factor behind the Class C variances. These questions must be included in the staff report submitted for the Class C variance when brought before the Planning Commission, as well as the design review submitted to the Design Review Board.

1. Can any other design (allowed in the current zoning of the lot) be used on the lot that will not require the Class C variance requested? If yes, then the variance must be denied because it is a self-imposed hardship, not a limitation of the lot configuration.
2. Does the site support any other designs (allowed in the current zoning of the lot) that do not require the Class C variance? If yes, then the variance must be denied because it is a self-induced hardship, not a limitation of the lot configuration.

If these questions are not included in the Class C variance request, or they are not included in the staff report to the Planning Commission when the variance is heard, or if they are not included in the design review submitted to the Design Review Board, or if the answers to any of these questions do not allow a Class C variance, then there is no choice but to deny the variance, and deny any design that relies on the Class C variance.

These questions must be asked when the Class C variance is submitted to the Planning Department staff, must be included as part of the documentation that will be submitted to the Planning Commission if a Class C variance is to be considered by the Planning Commission, and must be included as part of the documentation that will be submitted to the Design Review Board.

If the questions cannot be answered proving that the Class C Variance is appropriate for the lot, the variance shall be denied as early in the process as possible to eliminate the costs of attempting to approve a Class C variance that should not be passed and to avoid requiring the public to file appeals to decisions that should not have been allowed in the first place.

Corrective Action #4: For the properties that have been approved but have not yet been built, the variances that have been incorrectly approved must be invalidated, and any Design Review that has passed must be invalidated as well. The variance and design for the Walgreens must be invalidated immediately because the variances do not comply with the code. No action can be done for the McDonald's variance, because the building is complete and open for business. Although the developer has said that the bank is no longer going to be built, the variance and design review for the bank must be invalidated.

Pattern of non-compliance

The following facts indicate the pattern of non-compliance of the code. Segments from the staff reports in which the decisions were based are attached.

(a) In all 3 cases, the pattern of non-compliance began with the Planning Staff's acceptance of the Class C variance, and continued with the Planning Commission's approval of the variances.
(b) As shown above, at least 3 violations of the code occurred.
(c) These violations occurred over a time period of slightly over 1 year.

Summary

Class C variances can only be made if the *lot configuration* 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 and market conditions are not listed as acceptable criteria for approval.***

If any other designs can be made for the lots that do not require the 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.

Please take care of this matter as soon as possible. The continued non-compliance of this code cannot be allowed to continue.

Respectfully,

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

Attachments:

(1) Walgreens variance approval criteria (pages 40-42 of Planning Commission Packet of 10/14/2014 - http://www.happyvalleyor.gov/Archive.aspx?ADID=1067)
(2) McDonalds variance approval criteria (page 443-445 of Planning Commission Packet of 02/11/2014 - http://www.happyvalleyor.gov/Archive.aspx?ADID=969)
(3) Bank variance approval criteria (pages 13-15 of Planning Commission Packet of 09/24/2013 - http://www.happyvalleyor.gov/Archive.aspx?ADID=836)

Proof of mailing

Proof of mailing of the Citizen's Request letter to the City of Happy Valley and to the city's attorney.
Beery Elsner & Hammond

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Sent Beery Elsner & Hammond
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