

January 30, 2018

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VIA E-MAIL

Mayor Dan Holladay  
City of Oregon City Commission  
Oregon City City Hall  
625 Center Street  
Oregon City, OR 97045

RE: City of Oregon City File No. AP-17-0006(Appeal of CP-17-0002), DP-17-0003,  
and NR-17-0004); Applicant's Response to Appellant's Fee Waiver Request

Dear Mayor Holladay and Members of the Oregon City City Commission:

This office represents the Applicant. This letter responds to the Appellant's Fee Waiver Request filed with the Notice of Appeal of the above-referenced Planning Commission decision.

### 1. Introduction.

Oregon City Municipal Code ("OCMC") 17.50.290.C provides an Appellant with the ability to request a waiver to the appeal fee. The standard provides as follows:

**"Appeal fees may be waived, wholly or in part, by the City Commission, if the City Commission finds that, considering fairness to the Applicant and to opposing parties, a full or partial waiver of the appeal fee is warranted."**

Appellant requested a fee waiver in whole so that he may avoid paying the base appeal fee of \$3,258 and the actual City Attorney's fees for the City Commission's review of Appellant's appeal of the Planning Commission's decision. The remainder of this letter explains why the City Commission should reject Appellant's Fee Waiver Request and require Appellant to commit, on the record, to waiving his right to a refund of the base appeal fee and committing to paying the actual City Attorney's fees for the appeal.

### 2. Requested Procedure.

The Appeal Fee Waiver Request is separate from the appeal of the Planning Commission's approval of the applications. The Applicant requests that the City Commission consider the Appeal Fee Waiver first and as appropriate to the Appeal Fee Waiver, conduct the hearing as a *de novo* hearing. However, the City Council should state on the record that new evidence outside of the Planning Commission record received by the City Commission for purposes of considering the Appeal Fee Waiver Request may not become part of the City Commission appeal because it is an on-record proceeding.

Additionally, Applicant requests that the City Commission make a threshold determination as to whether the Appeal Fee Waiver should be granted. If the City Commission determines to grant the Appeal Fee Waiver in whole or in part, then the City Commission should proceed to consideration of the appeal. If the City Commission denies the Appeal Fee Waiver in whole or in part, then the City Commission should proceed with the appeal only in the event that the Appellant states on the record that he waives his right to recover his base appeal fee and commits to paying the actual City Attorney's fees.

### **3. Appellant has failed to justify the Fee Waiver under the applicable OCMC standard.**

OCMC 17.50.290.C establishes the standard by which the City Commission may waive an appeal fee in whole or in part. The standard is "considering fairness to the Applicant and to opposing parties"

Appellant submitted a written narrative explaining why the appeal fee should be waived. However, notwithstanding the arguments in Appellant's written statement, Appellant failed to address the issue of why waiving the Appeal Fee in whole or in part would be fair to the Applicant and to opposing parties.

The 2017 Planning Fee Schedule (effective January 1, 2017) is established pursuant to ORS 227.180(1)(c). The statute provides that the City Commission may prescribe by ordinance or regulation fees "to defray the costs incurred in acting upon an appeal from a Hearings Officer, Planning Commission, or other designated person. The amount of the fee should be reasonable and shall be no more than the average costs of such appeals or the actual cost of the appeal, excluding the cost of preparing a written transcript." In this case, the City Commission established by resolution a fee schedule to cover the actual costs of an appeal of a Planning Commission decision to be heard by the City Commission. The actual cost of the appeal includes the actual City Attorney Fees. Appellant's letter failed to explain why waiving Appellant's appeal fee in whole or in part would be fair to the applicant or to opposing parties. The City Commission should reject Appellant's fee waiver request because he has failed to address OCMC 17.50.290.C.

Additionally, the City Commission can find that waiving the appeal fee in whole or in part is unfair to the Applicant and to opposing parties for the following reasons. First, the Applicant seeks approval of its applications submitted to, reviewed by, and approved by the Oregon City Planning Commission. An appeal may reverse the Planning Commission's approval of the applications. It would be unfair to Applicant to allow an appeal to proceed without the Appellant paying the appeal fee because it would encourage frivolous appeals since Appellant would have no risk of losing his funds in the event that his appeal is rejected.

Second, an appeal prolongs the decision-making process. While the appeal process is within the 120-day permit established in ORS 227.178(2), an appeal nevertheless prolongs the process. To the extent Appellant has a "free" appeal, it is unfair to the Applicant to allow an appeal to proceed without the Appellant bearing the burden of the appeal where the Planning Commission has rejected his arguments and approved the application.

Finally, the City Commission can find that waiving the appeal fee in whole or in part is unfair to opposing parties. Allowing an appeal to be filed without paying the actual costs of the appeal prolongs the permit-approval process for opposing parties and is thus unfair to them as well.

Notwithstanding the Applicant's reasons above as to why the City Commission should reject the Appeal Fee Waiver, the City Commission can find that the Applicant's failure to justify the Appeal Fee Waiver standard is a fundamental reason for the denial of the Appeal Fee Waiver request.

#### **4. OCMC 17.50.290.D is Irrelevant to the Appeal Fee Waiver Proceeding.**

Appellant spends several pages of his Appeal Fee Waiver statement explaining why OCMC 17.50.290.B has not been adopted by ordinance. However, the fee before the City Commission in the Appeal Fee Waiver request is the appeal fee which is different from the application fee. The City Commission may find that OCMC 17.50.290.D is irrelevant to its determination whether to grant the waiver of the appeal fee either in whole or in part.

#### **5. The City is not Required to Adopt the Planning Fee Schedule by Ordinance.**

Appellant argues that the Planning Fee Schedule is unenforceable because it has not been adopted by ordinance. However, as noted above, ORS 227.180(1)(c) authorizes a governing body to adopt fees by ordinance or regulation. In other words, the City Commission may adopt, as it has done the Planning Fee Schedule by resolution. Exhibit 1 of this letter is the Oregon City 2017 Planning Fee Schedule. The first line below the title of the document states "all fees are subject to change by Resolution of the City Commission." Thus, the City Commission has clearly adopted the fee schedule by resolution which is permitted by ORS 227.180(1)(c).

The Applicant cites *Doty v. City of Bandon, 49 Or LUBA 411, 419 (2005)*, as authority for the proposition that a resolution is not a "regulation" as required by ORS 227.180(1)(c). The Appellant is incorrect. The case held that a fee resolution was not a post-acknowledgment land use regulation. The City may reject this argument.

#### **6. The City's Planning Fee Schedule is not Unconstitutional for any Reason Advanced by the Appellant.**

The Appellant argues that the Planning Fee Schedule is unconstitutional for several reasons. However, the City Commission should take official notice of the fact that every jurisdiction in the state of Oregon, pursuant to ORS 227.180(1)(c), charges the actual or average cost of Planning applications, including appeals fees. Notwithstanding this fact and the fact that such fees have been in effect for many years, Appellant cites to no state or federal court decision ruling such fees unconstitutional on any grounds. One would believe that if an appeal fee such as adopted by the City are unconstitutional, the issue would have been raised and resolved in favor of the Appellant long before now. The fact that such is not the case and fact that Appellant cites to no relevant case law supporting that argument demonstrates the fallacy of Appellant's arguments.

Appellant argues, based on *dicta* from *Bell v. City of Hood River*, 283 Or App 13, 19(2016), that not knowing the actual Attorney's Fees presents a "onerous financial burden" on Appellant. The City Commission may reject this argument for several reasons. Further, *Bell* held that Oregon Constitution Article I, Section 10 applies to courts, not administrative agencies. *Id.* at 18.

First, Appellant argues that he cannot know what the City Attorney Fees and other "consultant's" fees are. However, the relevant Oregon City Planning Fee Schedule requires Appellant to pay only the base fee and actual City Attorney's fees. No other consultants' costs are allowed to be imposed by the fee schedule.

Second, Appellant fails to define the term "onerous financial burden", or explain why not knowing the fee is an "onerous financial burden" on Appellant. Without more, Appellant cannot merely cite *dicta* from *Bell* as persuasive authority for his argument.

Third, it is very likely true that Appellant knew he would appeal a Planning Commission approval of the application. Appellant could have made his case in the record before rather than waiting until now. The failure to do so demonstrates that he was not concerned at all about the cost of an appeal fee, notwithstanding the actual City Attorney's costs.

Fourth, Appellant argues that its "perfectly impossible" to appeal without paying the appeal fees. Nevertheless, this is the situation faced by all appellants. Moreover, all applicants must pay an application fee. The land use program embodied in ORS Chapter 197 anticipates that cities and counties may recover costs of processing applications and appeals by appropriate fees.

Fifth, Appellant argues that his due process rights (without being specific as to the source of those rights) are violated by the requirement for an appeal fee. Yet, the City Commission may take official notice that virtually every administrative agency and court imposes some fees on a party to an administrative or court proceeding. In many cases, those fees are not known at the time an action is commenced, including the award of attorney's fees. Appellant's argument is backwards. It is not unconstitutionally vague to not have the amount of fees defined; it would only be unconstitutionally vague not to know that fees are required. In this case, even though the actual costs of the Attorney's fees are unknown, the fact is that the Appellant knows that the actual City Attorney's fees will be required.

Finally, Appellant's arguments amount to a procedural argument which he alleges violates his substantial rights to a full and fair hearing and an opportunity to make his case. Nevertheless, it is legal and constitutional to require Appellant to bear his costs of bringing the appeal. This is especially true in this case, which began in the summer of 2017 and will not conclude until sometime in early 2018, principally because of Appellant's opposition to the applications. While his opposition is certainly within the framework of Oregon's land use system, it is perverse for the Appellant to argue that his rights have been denied. In fact, he has been given every right to oppose and delay the application and now seeks to have the City expend City Attorney's costs without recapturing those costs.

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## 7. Conclusion

For the reasons contained in this letter, the Applicant respectfully requests that the City Commission reject the Appellant's request for an Appeal Fee Waiver in whole or in part and require Appellant to state on the record that he understands his base appeal fee will not be returned and that he agrees to pay the actual City Attorney's fees for the appeal, in order to proceed with this appeal hearing.

Sincerely,



Michael C. Robinson

MCR:gv

cc: Mr. Dan Fowler (*Via Email*)  
Mr. Alkesh Patel (*Via Email*)  
Mr. Lloyd Hill (*Via Email*)  
Mr. Patrick Campbell (*Via Email*)  
Mr. Robin Chard (*Via Email*)  
Ms. Carrie Richter (*Via Email*)  
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