

**BEFORE THE CITY COMMISSION
FOR THE CITY OF OREGON CITY**

In the matter of an Appeal (City file no. AP-17-0006) by James J. Nicita of applications approved for development of property located at 415 17th Street, Oregon City, Oregon and specifically described as tax lots 601, 900, 1000, 1100, 1200, 1300 and 1301 of Clackamas County assessors map no. 2-2E-29CA (City file nos. CP-17-0002, DP-17-0003, and NR-17-0004).

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER**

I. INTRODUCTION

Hackett Hospitality Group, LLC, (the “Applicant”) proposes a new mixed-use development project in two phases on approximately four acres of real property zoned Mixed Use Downtown (“MUD”) and generally located north of 17th Street and west of Washington Street (Map Nos. 2 2E 29CA Tax Lots 601, 900, 1000, 1100, 1200, 1300, and 1301) (“Property”). Phase 1 will be a 99-room hotel and Phase 2 will include 131 multi-family residential units and 9,500 sq. ft. of retail space (the “Project”).

On November 13th, 2017, the Planning Commission voted to approve the following applications for the Project: CP-17-0002 (General Development (Concept) Plan), DP-17-0003 (Detailed Development Plan) and NR-17-0004 (Natural Resources Overlay District Verification) (together, the “Application”).

On November 11, 2017, James J. Nicita (the “Appellant”) filed a timely appeal (the “Appeal”) of the Planning Commission’s decision on the Application (the “Decision”). These findings respond to Appellants’ arguments raised in the Appeal and adopt the Planning Commissions’ decision by reference.

II. PROCEDURAL HISTORY

On July 24, 2017, the Planning Commission, with a quorum present, opened the initial evidentiary hearing on the Application and, at the Applicant’s request, continued the hearing to August 14, 2017.

On August 14, 2017, the Planning Commission reconvened and conducted a continued hearing. A quorum of the Planning Commission was present at the meeting. The Planning Commission made the required announcements, heard testimony, and continued the public hearing to September 11, 2017.

On September 11, 2017, the Planning Commission reconvened and held a public hearing. At this hearing the Planning Commission heard the applicant's request for two additional

adjustment requests from development standards in addition to the previous four adjustments through the General Development Plan adjustment process in OCMC 17.65.070. Following additional testimony, the Planning Commission continued the public hearing to September 25, 2017.

The Planning Commission reconvened on September 25, 2017. The Applicant presented its final oral rebuttal. The Planning Commission held the written record open for three seven-day periods.

On October 23, 2017 the Planning Commission reconvened to deliberate to a tentative decision on the application. The Planning Commission continued the decision to November 13, 2017 for adoption of final findings.

On November 13th, 2017, the Planning Commission voted 6-0 to recommend that the City Commission approve the application, subject to the conditions recommended in the Staff Report, as amended by the addition of Conditions of Approval 17, 32 and 45, as detailed in the substantive findings adopted by the Planning Commission. The Planning Commission thereafter adopted the decision.

The City gave timely notice of the Planning Commission's decision, mailing the Notice of Decision on November 15th, 2017.

On November 28, 2017, the Appellant filed (1) a request to the City Commission for a full waiver of fees to appeal the Planning Commission's approval to the City Commission, pursuant to Oregon City Municipal Code (OCMC) 17.50.290(C); and (2) a request to the City Commission to review the Planning Commission's approval pursuant to its call-up authority under ORS 227.180(1);

On November 29th, 2017, the Appellant filed a timely appeal of the Planning Commission decision, citing 15 grounds for appeal, which are the substantive issues addressed herein.

The City Commission convened to hear the appeal on February 7, 2017. The City Commission first held a de novo hearing on the appeal fee waiver request. Following the appeal fee waiver hearing, the City Council conducted a de novo hearing on the appeal substantive issues. No person raised any procedural objections to the conduct of the hearing. No person made any challenges to the City Commissions' jurisdiction over the matter or any City Commissioners' ability to hear the matter.

At the end of the appeal hearing The Appellant raised a procedural objection to the Mayor's alleged personal bias against Appellant. When the Mayor was asked by the Deputy City Attorney whether he intended to vote on the matter based on the applicable law and facts, the Mayor answered "yes." The City Commission finds this exchange cures the alleged personal bias challenge.

As explained below, the City Commission rejected the appeal and adopted the Planning Commission's decision.

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III. DECISION

The Appeal is denied.

The Decision of the Planning Commission approving the Application with Conditions is affirmed.

IV. RELEVANT FACTS

The Property is not within an historic district.

The Property is property zoned for the proposed use.

Prior to submittal of the Application, on April 24, 2017, the Oregon City Historic Review Board (HRB) approved by a vote of 3-0-0 to conditionally approve a reduction to the landmark size of the Hackett House property. The HRB decision is part of the record. The letter of Voting Decision states “Instead of recognizing the entire site as a Historical Landmark, the Hackett house and the green space directly surrounding the house are now only recognized as a Historical Landmark, and not the parking area on the site. This change primarily enables the property owner to make alterations to the western portion of the property without seeking Historic Review Board approval.”

The proposed hotel site is located near the End of the Oregon Trail Center that is visible from I-205, based on the End of the Oregon Trail Plan at pg. II.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The City Commission accepts, adopts, and incorporates within these findings, by reference, the February 7, 2018 Staff Report (the “Staff Report”) and the Planning Commission Final Findings in this matter adopted by the Planning Commission on November 13, 2017 (the “Decision”), in their entirety and including all exhibits attached thereto and recommended conditions of approval set forth therein, except to the extent that such incorporated documents conflict with these findings of fact and conclusions of law. In such event, these findings shall control.

A. Compliance with Applicable Criteria.

As explained above, the City Commission hereby adopts the Planning Commission’s Decision and the exhibits thereto. In order to explain how the Application satisfied the applicable approval criteria, the Planning Commission adopted and incorporated by reference the following documents: (1) the City staff report to the Planning Commission dated August 7, 2017, which is entitled “Type III-Master Plan and Detailed Development Plan Staff Report and Recommendation;” and (2) the City staff report to the Planning Commission dated September 1, 2017 and presented to the Planning Commission on September 11, 2017, which is entitled “Type III –Master Plan and Detailed Development Plan Supplemental Findings for Additional Adjustments Staff Report and Recommendation”. These documents are included in the record for this matter.

The City Commission specifically adopts and incorporates these documents as the City's findings regarding the applicable criteria and finds that these documents are properly incorporated as findings because they are written in the nature of findings and specifically address whether the Application meets the approval criteria.

B. Appeal scope of review.

The scope of review in an appeal before the City Commission is set forth in Oregon City Municipal Code ("OCMC") 17.50.190.F:

"Appeal Hearing—Scope of Review. Appeal hearings shall comply with the procedural requirements of Section 17.50.120. Appeal hearings shall be conducted by the city commission, planning commission or historic review board, as applicable. The decision shall be on the record and the issues under consideration shall be limited to those listed in the notice of appeal."

The City Commission based its decision upon the record in this matter, which includes all argument placed before, and not rejected by, the City Commission during the course of its proceedings as well as any evidence submitted before the record was closed before the Planning Commission. Under OCMC 17.50.190.D.2, the City Commission is only obligated to consider arguments raised during the City Commission appeal and not arguments raised in the Planning Commission hearing that were not also included in the notice of appeal. *Miles v. City of Florence*, 190 Or App 500, 504–507 (2003).

C. Additional findings on preserved appeal issues.

1. Request for reconsideration.

APPELLANT'S ARGUMENT: The Planning Commission erred in denying Appellant's request for reconsideration as untimely.

FINDING: The Planning Commission tentatively approved the Application on October 23, 2017. The findings in support of this decision were adopted on November 13, 2017 and staff mailed notice of the decision on November 15, 2017. At the Planning Commission hearing on November 27, 2017, the Appellant requested that the Planning Commission reconsider the approval under OCMC 17.50.260, which provides as follows:

"Under this section, parties with standing may seek reconsideration of a final decision rendered pursuant to a Type II, Type III, or Type IV process. Reconsideration is warranted where the city's decision indicates the decision-maker failed to understand or consider certain relevant facts in the record or misinterpreted the application in some material way. Any request for reconsideration must be received by the planning division within ten days of when the decision in question was rendered and must specifically describe the alleged misunderstanding or misinterpretation. A request for reconsideration shall not stay the effectiveness of the city's final decision, nor shall it affect any applicable appeal deadlines to the land use board of appeals. If the request is granted, the community development director shall notify all affected parties that the decision will be

reconsidered. Any request for reconsideration by the applicant shall be deemed a waiver of the one hundred-twenty-day deadline under Section 17.50.070.” Emphasis added.

In support of the request for reconsideration, the Appellant expressed concerns that staff inappropriately influenced the Planning Commission’s decision-making process. These remarks were made during the public comment portion of the public hearing and were not part of the appeal request.

The Planning Commission concluded that the reconsideration request was untimely because the request was made more than 10 days from when the decision was rendered and more than 10 days from the date the Decision was as mailed. The Appellant argued that this deadline should be calculated based on a state statute governing how time is counted with regard to “civil and criminal procedure statutes” rather than calendar days. The Planning Commission rejected this approach, noting that land use regulations are not “statutes” and that in all cases dealing with land use, deadlines are calculated in calendar days. For example, OCMC 17.50.070(C) states that pursuant to ORS 227.178, the city will reach a final decision on an application within one hundred twenty *calendar* days from the date that the application is determined to be or deemed complete unless the applicant agrees to suspend the one hundred twenty *calendar* day time line or unless State law provides otherwise.

The City Commission did not identify a reason to reverse the findings of the Planning Commission on this issue. Moreover, any procedural error resulting from the actions of staff with regard to the Planning Commission’s Decision or its failure to reconsider the Decision have been resolved through this Appeal.

Further, the City Commission finds that the Appellant failed to follow OCMC 17.50.260 by addressing the Planning Commission instead of making the request to the Planning Division staff.

This appeal issue is denied.

2. Applicability of the Downtown Community Plan, End of the Oregon Trail Master Plan and End of the Oregon Trail Design Guidelines.

2.1 Failure to comply with the height limit and material requirements prescribed by the End of the Oregon Trail Design Guidelines (1991).

APPELLANT’S ARGUMENT: The Project does not comply with these guidelines, which have been incorporated by reference into the Downtown Community Plan, an ancillary plan of the Oregon City Comprehensive Plan and which implement the 1990 End of the Oregon Trail Master Plan, adopted by the City in 1990. The proposed hotel includes, but is not limited to, a 2.5 story height limitation and the requirement for an exterior of natural wood, as prescribed by the mandatory building standards of the Primary Historic Area.

FINDING: The City Commission finds that neither the Oregon City Downtown Plan (the “OCDP”) nor the End of the Oregon Trail Master Plan the (“EOT Plan”) contain approval criteria that are relevant and applicable to the Application. The End of the Oregon Trail Master

Plan Design Guidelines (the “EOT Guidelines”) were never adopted by the City Commission as approval criteria for a land use decision, as is indicated in the record. Also, the statements on the OCDP, EOT Plan, and EOT Guidelines themselves do not indicate that they were ever intended to be adopted or applied as part of the Comprehensive Plan, as explained by the Applicant in its September 22, 2017 letter at page 2:

“[The] Plan at page 15 lists only the Oregon City Downtown Community Plan (1999) as an ancillary document to the Plan. Neither EEOT Plan is listed as an ancillary document in the Plan. The Downtown Community Plan (1991) at page 45 lists only the “End of the Oregon Trail District Guidelines, 1991” as incorporated by reference. Therefore, the 1996 EEOT Plans are not a relevant approval standard.”

In support of its findings that the City did not adopt the EOT Plan, or the EOT Guidelines as a component, ancillary or otherwise, of the Comprehensive Plan or land use regulations, the City Commission specifically adopts the following passage from the Planning Commission’s Decision:

“The City must approve or deny the applications based upon approval criteria set forth in the OCMC. ORS 197.763(5)(a); ORS 227.173(1). The City has not set forth the Master Plan and Design Guidelines in the OCMC, either directly or by incorporation.

Although a number of citizens argued that the City Commission “effectively” or “constructively” adopted the [EOT] Master Plan and Design Guidelines on December 19, 1990, the Planning Commission denies this contention for two reasons. First, the law does not recognize “effective” or “constructive” adoption; the City Commission must follow specific procedures to adopt a document, and if that does not occur, the City Commission has not adopted the document. The citizens do not contend that the City Commission followed its formal procedures to adopt the Master Plan or Design Guidelines. Second, the meeting minutes for the December 19, 1990 City Commission meeting have not been submitted into the record. The minutes were not submitted from the public and the City Recorder also did not locate any record that the City Commission has adopted these items. Therefore, there is no basis to conclude that the City Commission adopted the Master Plan and Design Guidelines.”

As stated in an October 2, 2017 email from Senior Planner Christina Robertson-Gardiner to Planner Pete Walter with the subject line “Evidence of City Commission Adoption of Design Guidelines”, which was entered into the record.

‘...As the planner involved with historic preservation issues with the City for many years, I was asked to look back through the City’s files to provide greater context for the End of the Oregon Trail. I have gone back through the historic land use planning files, during the period from 1988-1995, searching for additional information relating to the End of the Oregon Trail as a National or local historic district. In 1988, the County completed a historic survey for the Barlow Road, which was further refined in 1992 and 1993 with

additional context statements. The City adopted a view corridor for the Barlow Road in the Park Place area in the mid-1990s. The Oregon Trail-Barlow Road Historic Corridor OCMC 17.40.060(H) is a 30 foot wide view corridor which terminates near the intersection of Highway 213 and Holcomb Blvd.

It may be the 1991 End of the National Historic Oregon Trail Historic District Design Guidelines were created as part of that effort but there is no indication that these Guidelines were ever adopted by the City Commission. In the 16 years I have been with the City, we have never reviewed an application for compliance with these 1991 Design Guidelines.”

Two additional points support the City Commission’s decision on this issue. First, the copy of the EOT Guidelines in the record is labeled “draft,” indicating that the guidelines were never adopted in a final form. Second, Planner Robinson-Gardiner’s October 2, 2017 email states that the City has never used the EOT Guidelines as approval criteria, as noted above.

Additional evidence in the record, including Planning Commission and City Commission meeting minutes, also do not indicate that the guidelines were ever adopted by the City Commission.

This appeal issue is denied.

2.2 Failure to identify Phase 2 of the development as a Festival Market Place on the site under OCMC 17.65.050(B)(1)(c).

APPELLANT’S ARGUMENT: The development proposal for Phase 2 conflicts with the 1990 End of the Oregon Trail Master Plan, which shows the Plan’s Festival Market Place on the site of Phase 2 of the proposed Master Plan.

FINDING: OCMC 17.65.050(B)(1)(c) is a submittal requirement for preparation of a Master Plan application narrative statement that includes: “A description, approximate location, and timing of each proposed phase of development, and a statement specifying the phase or phases for which approval is sought under the current application. May also reference submitted maps or diagrams.” Submittal requirements are not approval criteria. *See, e.g. Frewing v. City of Tigard*, 47 Or LUBA 331, 367 (2004).

Also, as explained above, the City Commission finds neither the OCDP, EOT Plan, nor the EOT Guidelines contain applicable approval criteria or development standards.

This appeal issue is denied.

2.3 Failure to dedicate lands for the Abernethy Road Realignment as set out in the 1990 End of the Oregon Trail Master Plan under OCMC 17.62.050(A)(2)(k).

APPELLANT’S ARGUMENT: The proposed development does not provide a dedication for the Abernethy Road Realignment as envisioned in the 1990 End of the Oregon Trail Master Plan, and for which the City has already expended substantial taxpayer funds.

FINDING: As explained above, the City Commission finds neither the OCDP, EOT Plan, nor the EOT Guidelines contain applicable approval criteria or development standards.

The City Commission also finds that OCMC 17.62.050(A)(2)(k) does not constitute an independent basis to require the additional dedication for Abernethy Road requested by the Appellant. OCMC 17.62.050(A)(2)(k) provides that “parcels larger than three acres shall provide streets as required in Chapter 12.04. The streets shall connect with existing or planned streets adjacent to the site.” OCMC 12.04 includes standards for new and improved public streets. Appellant failed to identify anything in that chapter that requires a dedication for the Abernethy Road Realignment, and the City Commission finds that there are no standards in that chapter which would require such dedication.

This appeal issue is denied.

2.4 Failure to consider whether the proposed adjustments “better meet” the 1991 End of the Oregon Trail Master Plan Guidelines under OCMC 17.62.015.A.

APPELLANT’S ARGUMENT: None of the proposed adjustments/modifications have been evaluated as to whether they “better meet” the applicable 1991 End of the Oregon Trail Master Plan Design Guidelines.

FINDING: For approval of modification requests, the OCMC requires that the “modification will result in a development that better meets design guidelines.” OCMC 17.62.015.A. As explained above and incorporated by reference herein, the City Commission finds that the OCDP, the EOT Plan, and the EOT Guidelines do not contain applicable approval criteria or development standards.

2.5 Failure to comply with the neighborhood association meeting requirement of OCMC 17.50.055;

APPELLANT’S ARGUMENT: The Applicant did not place into the record evidence that it had sent a certified letter to the chair of the Citizen Involvement Committee (CIC) pursuant to OCMC 17.50.055(2). The Applicant met with one individual member of the Two Rivers Neighborhood Association TRNA, which does not constitute a meeting with the Association but rather with an individual, and indicates that the TRNA either is inactive or does not exist (indeed the letter submitted to satisfy this requirement was headed “Two Rivers Homeowners Association”); therefore the Applicant was required to request a meeting with the CIC pursuant to OCMC 17.50.055(4), but did not, even though City staff specifically recommended a meeting with the CIC at the pre-application conference on this matter.

FINDING: The subject site is within the boundaries of the Two Rivers Neighborhood Association. Substantial evidence in the record demonstrates that the Applicant met with the Two Rivers Homeowners Association on January 25, 2017 and with the McLoughlin Neighborhood Association on February 2, 2017. OCMC 17.50.055(2) also provides that “other communication methods may be used if approved by the neighborhood association.” An applicant may communicate with a neighborhood association through means other than a

certified letter, such as email, phone calls, or other means, if the neighborhood association agrees.

The record includes a letter from Bryon Boyce, Chair of the Two River's Neighborhood Association, from which the following pertinent details are excerpted:

“On Jan. 25th of this year, the Chair of Two Rivers Neighborhood met with Mark Foley of Hackett House Hospitality Group and Lloyd Hill of Lloyd Hill Architects, who had requested that meeting. This was our normal quarterly meeting date. Details of that meeting are included in the attached document “20170125-signed.doc”. In accordance with the below code, the Two Rivers Neighborhood Association accepted emails to communicate with Mark Foley in setting up the meeting. Communications were initiated with an email by Dan Fowler on December 9th, 2016 and continued by Mark Foley.

The Two Rivers NA President approved “other communication” besides a certified letter, return receipt requested, as allowed by OCMC 17.50.055.A.2.: “The applicant shall send, by certified mail, return receipt requested letter to the chairperson of the neighborhood association and the citizen involvement committee describing the proposed project. Other communication methods may be used if approved by the neighborhood association.”

OCMC 17.50.055(2) is met. This section neither requires nor provides guidance as to how many people in a neighborhood association are required to attend a particular meeting. Mr. Boyce's letter, which is in the record, indicated that he communicated the details about the project to several members of the neighborhood association, and that the neighborhood association is indeed active. The Appellant does not contest the Chair's ability to allow a different communication method. Therefore, the City Commission finds that OCMC 17.50.055 is met.

Moreover, as neighborhood involvement requirements are not approval criteria, the City Commission finds that even if the City failed to provide the required notice pursuant to OCMC 17.50.055, any such failure would be harmless error. Also, because that section does not indicate a procedural defect if it is not followed, and failure to do so would not be a reason to deny the Application. Finally, the City Commission finds that the Appellant has failed to explain why a failure to send a certified letter to the neighborhood association prejudiced their substantial rights in this proceeding.

This appeal issue is denied.

2.6 Failure to give notice to the applicable tribal representative as required by OCMC 17.62.040(H)(2).;

APPELLANT'S ARGUMENT: Neither the Applicant nor the City has demonstrated adequate notification to the applicable tribal cultural resource representative of the Confederated Tribes of the Siletz, Confederated Tribes of the Umatilla, Confederated Tribes of the Warm Springs or the Confederated Tribes of the Yakama Indian Nation.

FINDING: Substantial evidence in the record demonstrates that a copy of the pre-application proposal was forwarded to SHPO, the Confederated Tribes of the Grand Ronde, Confederated Tribes of the Siletz, Confederated Tribes of the Umatilla, Confederated Tribes of the Warm Springs and the Confederated Tribes of the Yakama Nation requesting comments. *See* Applicant’s October 2, 2017 letter at pg. 4 and 5. Comments were received from the Confederated Tribes of the Grand Ronde recommending that subsurface archeological investigations be conducted prior to ground disturbance. A standard comment letter from SHPO was received advising the applicant of applicable state laws protecting cultural resources under ORS 358.905 and ORS 97.74. A copy of the planning staff transmittal email to all of the tribes listed above was provided in the record on September 25, 2017.

Moreover, as notice requirements are not approval criteria, the City Commission finds that even if the City failed to provide the required notice, such failure would not be a reason to deny the Application. Finally, the City Commission finds that the Appellant has failed to explain why a failure to provide notice to tribes prejudices their substantial rights in this proceeding.

This appeal issue is denied.

3. Design Standards

3.1 Failure to “utilize materials and a design” that matches the Hackett House under OCMC 17.62.050(A)(3)(a);

APPELLANT’S ARGUMENT: The proposed Abernethy Place Hotel abuts the historic landmark Hackett House but does not “utilize materials and a design that incorporates the architecture of the subject building as well as the surrounding district or abutting Historic Landmark,” as required by this provision.

FINDING: This code section does not require materials that match the Hackett House, although the applicant has proposed similar materials, as documented in the record. OCMC 17.62.050(A)(3)(a) provides as follows:

“Alterations, additions and new construction located within the McLoughlin Conservation District, Canemah National Register District, and the Downtown Design District and when abutting a designated Historic Landmark shall utilize materials and a design that incorporates the architecture of the subject building as well as the surrounding district or abutting Historic Landmark.”

The relevant portion of the standard above requires “materials and a design that incorporate the architecture of the subject building,” not “materials that match the subject building.” Further, for this standard to be applicable, the Applicant site must be both within one of three historic districts and abut an historic landmark. Because the Property is not within an historic district, the standard is not applicable.

On September 25, 2017 the Planning Commission heard testimony and considered graphics and a five-page memorandum from the Applicant’s Architect detailing the proposed design compatibility of the building with the Hackett House and the End of the Oregon Trail

Interpretive in accordance with OCMC 17.62.050.A(2) and (3). The Planning Commission found that the proposed building adequately incorporated architectural elements of the historic building and location and the City Commission agrees with this result.

The Historic Review Board (HRB) found, separately, prior to, and independent of the Planning Commission, that the proposed site of the hotel and requested reduction in size of the original landmark parcel to accommodate the hotel as would not impact the historic importance of the Hackett House, pursuant to OCMC 17.40. The HRB did not require the use of specific matching materials as a condition of approval. The Planning Commission, in turn, found:

“3. With the proposed conditions of approval, the proposal will be compatible with the Hackett House and the End of the Oregon Trail.

Given that the Hackett House is a designated historic landmark and the End of the Oregon Trail are identified as a recreational resource providing tourism opportunities within the Comprehensive Plan, the Planning Commission feels that it is important to consider whether the hotel proposal will detract from the tourist benefits realized by these resources. First, the Planning Commission finds the testimony submitted by the End of the Oregon Trail Board of Director’s compelling in noticing that siting the hotel perpendicular to Washington Street leaves a critical view corridor from Hwy 217 to the “wagon hoops.” With regard to historic compatibility, the Planning Commission appreciated the fairly simple, and understated hotel design rather than an approach that mimicked the Eastlake style of the Hackett House.

The use of a traditional architectural form with a clearly delineated base, shaft and top, incorporating natural materials, wood siding, and simple rectangular, symmetrical punched windows are all reminiscent of historic structures in downtown Oregon City.

The planting of large deciduous and evergreen trees in the area between the Hackett House and the rear of the hotel will emphasize and frame the Hackett House, as well as mitigate for aesthetic impacts resulting from the adjustment for additional building height. To ensure this result, the Commission amended condition 32 to require the planting of large caliper deciduous and evergreen trees. The Planning Commission urges the selection of trees that will provide a dense screen within six months of planting.”

The above finding, which the City Commission expressly adopts, was adopted following extensive supplemental testimony from the Applicant’s architect Lloyd Hill, which included numerous graphic renderings of all of hotel facades, a table indicating the specific square footage and percentages of the various building materials used in each façade, and a detailed memorandum addressing OCMC 17.62.050.A.3 as that standard relates to the Hackett House. Mr. Hill’s memoranda also explains how the Hackett House is not affected by the Project.

Thus, the City Commission finds that substantial evidence demonstrates that the Application satisfies OCMC 17.62.050.A.3 by minimizing the impact of the hotel on the Hackett House

through materials on the hotel, modifications to the hotel architecture, and additional landscaping between the Hackett House and the hotel. In making this finding, the City Commission recognizes that the Planning Commission heard testimony in support of the project design from members the End of the Oregon Trail Board, the Oregon City Historic Review Board, and the general public in support of the Project.

This appeal issue is denied.

4. Failure to require variances rather than modifications or adjustments and related appeal issues.

4.1 Failure to require a variance rather than an adjustment to the building height requirement.

APPELLANT’S ARGUMENT: The proposed hotel will exceed the 45-foot height limitation for property within 500 feet of the End of the Trail Interpretive Center. The hotel is not eligible for an adjustment. It must go through the variance process of OCMC 17.60.020.

FINDING: The plain language of OCMC 17.65.070 clearly allows for the use of the Master Plan adjustment process to allow the Project to deviate from dimensional standards:

A. Purpose. In order to implement the purpose of the city's master plan process, which is to foster the growth of major institutions and other large-scale development, while identifying and mitigating their impacts on surrounding properties and public infrastructure, an applicant may request one or more adjustments to the applicable development regulations as part of the master planning process. These include, but are not limited to, items such as: dimensional standards of the underlying zone, site plan and design review criteria, residential design standards, and standards for land division approval.

B. Procedure. Requests for adjustments shall be processed concurrently with a general development plan. An adjustment request at the detailed development plan review shall cause the detailed development plan to be reviewed as a Type III application.

C. Regulations That May Not be Adjusted. Adjustments are prohibited for the following items:

- 1. To allow a primary or accessory use that is not allowed by the regulations;**
- 2. To any regulation that contains the word "prohibited";**
- 3. As an exception to a threshold review, such as a Type III review process; and**
- 4. Any exception to allow a use not identified as a permitted or conditional use in the underlying zone.” OCMC 17.65.070 (emphasis added).**

As evident in the excerpt above, an applicant for a Master Plan may request—and the City may approve—a deviation from any applicable development standard. Such adjustment requests are processed concurrently with and under the same Type III procedures as the Master Plan itself.

The 45-foot height limitation is set forth in OCMC 17.34.060.D.2, within the Section of the Mixed Use Downtown zone entitled “Dimensional Standards”. Therefore, the Commission finds that it is a dimensional standard susceptible to an adjustment pursuant to OCMC 17.65.070.A. Furthermore, the City Commission finds that the criteria for the Adjustment are satisfied based on substantial evidence, as explained in the August 7, 2017 Staff Report.

In summary, the City Commission finds that the adjustment to building height was properly approved as an adjustment in conjunction with a Master Plan and that the adjustment meets the applicable criteria.

This appeal issue is denied.

4.2 Failure to require a variance, rather than an adjustment, for relocation of the primary entrance.

APPELLANT’S ARGUMENT: The primary entrance does not face Washington Street. The proposed hotel does not qualify for an adjustment. It must go through the variance process of OCMC 17.60.020.

FINDING: As explained above, the City may approve an adjustment to a development standard through a Master Plan process. OCMC 17.62.055 includes “Institutional and Commercial Building Standards” which require that “the primary entranceway for each commercial or retail establishment shall face a major street.” The adjustment process is available for a number of development standards. “These include, but are not limited to, dimensional standards of the underlying zone, site plan and design review criteria, residential design standards, and standards for land division approval. OCMC 17.65.070. As the requirement for a primary entranceway facing the major street is similar to a design review criterion and residential design standard, the City Commission finds that this regulation is susceptible to an adjustment under OCMC 17.65.070, and that a variance is not required.

Furthermore, the City Commission adopts the decision of the Planning Commission, which found that the Application met the criteria for adjustment.

This appeal issue is denied.

4.3 Failure to obtain a variance rather than a modification in cases where the block length is exceeded under OCMC 12.04.195.

APPELLANT’S ARGUMENT: The block upon which the proposed hotel would be built runs from 17th Street all the way to Highway 213, and from Washington Street to Main Street. Therefore, the Applicant must provide bicycle and pedestrian connectivity. The Applicant has not shown justification for the requested modification pursuant to OCMC 12.04.007. It must go through the variance process of OCMC 17.60.020.

FINDING: OCMC Chapter 12.04 implements the City Transportation System Plan and applies specific standards for public streets to all development. That chapter provides a specific set of criteria for a modification, set forth in OCMC 12.04.007, “Modifications”:

“The review body may consider modification of this standard resulting from constitutional limitations restricting the city’s ability to require the dedication of property or for any other reason, based upon the criteria listed below and other criteria identified in the standard to be modified. All modifications shall be processed through a Type II Land Use application and may require additional evidence from a transportation engineer or others to verify compliance. Compliance with the following criteria is required:

- A. The modification meets the intent of the standard;**
- B. The modification provides safe and efficient movement of pedestrians, motor vehicles, bicyclists and freight;**
- C. The modification is consistent with an adopted plan; and**
- D. The modification is complementary with a surrounding street design; or, in the alternative;**
- E. If a modification is requested for constitutional reasons, the applicant shall demonstrate the constitutional provision or provisions to be avoided by the modification and propose a modification that complies with the state or federal constitution. The city shall be under no obligation to grant a modification in excess of that which is necessary to meet its constitutional obligations.”**

As is clear on the face of the above language, OCMC 12.04.007 allows a modification from the standards set forth in OCMC Chapter 12.04. The block length and road spacing standards applicable to the Application are set forth in OCMC 12.04.195. Therefore, the Commission finds that it is a dimensional standard susceptible to a modification under OCMC 12.04.007.

Furthermore, the City Commission finds that the criteria for the Adjustment are satisfied, as explained in the August 7, 2017 Staff Report:

“The block length along Washington Street is exceeded. The applicant has stated that the existing railroad right-of-way justifies modification to the block length standards, as there are no opportunities to provide connection to the street system west of the tracks. The proposed on-site circulation provides vehicular, bicycle, and pedestrian access between Washington Street and 17th Street for Phase 1 and for Phase 2. The proposed on-site circulation therefore meets the intent of the standard, provide safe and efficient movement of vehicles, freight, pedestrians and bicycles, and are consistent with surrounding street patterns. The modifications were not sought due to constitutional reasons. To ensure adequate public access in accordance with the intent of this standard, a public access easement shall be recorded over the existing access road serving the adjacent parcel to the northeast.”

Also, on September 25, 2017, the applicant's architect provided additional evidence in the form of a memorandum responding to the Appellant's statements regarding bicycle and bicycle access through the site. The Planning Commission discussed the issue at length and determined that the proposal for pedestrian and bicycle access through the site was adequate, provided that Condition of Approval 45 was modified to clearly stipulate that the public access easement for pedestrian and bicycle connection would provide access between all of the properties onsite as well as with the adjacent train station and 17th Street. The modified condition was adopted by the Planning Commission on November 13, 2017 and is affirmed in this Appeal.

In summary, the City Commission finds that the modification to block length was properly processed as a modification under OCMC 12.04.007 and that the modification meets the applicable criteria.

This appeal issue is denied.

4.4 Failure to provide pedestrian/bicycle accessways where the block length and depth are exceeded under OCMC 12.04.199;

APPELLANT'S ARGUMENT: The Applicant has not provided pedestrian/bicycle accessways pursuant to this standard, even though the block width and depth exceed 330 feet.

FINDING: For the reasons set forth in the City Commission's response to the appeal issue above, this appeal issue is denied.

5. Stormwater management.

5.1 Failure to comply with the state water quality standards including ORS 468B.025, ORS 468B.050, Oregon City NPDES MS4 Discharge Permit, OAR 340-41-035(3)(d), OAR 340-41-0350(7)(a).

5.2 Failure to Comply with OCMC 13.12.050(C) – Stormwater Management Applicability and exemptions.

APPELLANT'S ARGUMENTS: The Applicant has not demonstrated compliance with OCMC 13.12.050(C), or the Public Works Stormwater Grading and Design Standards or Three Basin Rule referenced therein.

Neither the Applicant nor the City has demonstrated that they are discharging in compliance with state water quality standards, including ORS 468B.025, ORS 468B.050, Oregon City NPDES MS4 Discharge Permit, OAR 340-41-035(3)(d), OAR 340-41-0350(7)(a) and the standard for toxics, or have instituted a monitoring and water quality evaluation program for the new discharges from the hotel site, into the City's storm water system, and thence into Clackamette Cove and the Clackamas River.

FINDING: As an initial matter, the City Commission finds that the above state water quality rules and statutes are not approval criteria or development standards because they have not been incorporated, either expressly or by reference, into the Comprehensive Plan or the OCMC. In

making this finding, the City Commission specifically adopts the following statement from the Planning Commission findings on the Decision:

“The City has not incorporated these statutes into its local approval criteria, and the statutes themselves do not state that they must be addressed as a prerequisite to issuing a local land use permit. Therefore, they are not mandatory approval criteria that the City must address with this review. Because these permit standards are a matter of state law, they will apply (or not apply) based upon their own terms. A City determination that they will apply or not apply is not required and will not override state law. Accordingly, the City is not required to adopt findings of compliance or non-compliance with these statutes in its decision.”

For the above reasons, the City Commission finds that state water quality standards are not approval criteria, that there is no evidence in the record that the project cannot comply with such standards if they apply, and that even if such evidence existed, it would not be a reason to deny the Application because such rules and statutes apply independent of the City’s Decision.

The Appellant also argued that the Applicant must demonstrate that there will be no toxic discharges from parking lot stormwater runoff. In response, the Applicant’s civil engineer, Tom Sisul, P.E., submitted a letter explaining that the City has adopted Stormwater and Grading Design Standards, that compliance with these standards will ensure that the project will not release toxic discharges, and that it is feasible for the project to comply with the Stormwater and Grading Design Standards. The Applicant’s letter also explains that Mr. Sisul has over 30 years of experience designing stormwater drainage systems, so the City Commission finds that he is well-qualified to address this issue. A copy of this letter is in the record.

Finally, City engineering staff reviewed the preliminary drainage plans for the development proposal and determined that compliance with the standards in Chapter 13.12 – Stormwater Management are feasible in the August 7, 2017 Staff Report:

“13.12.080 - Submittal requirements...”

...Finding: Complies as Proposed. The applicant has submitted preliminary drainage plans, drainage reports, and design flow calculation reports demonstrating compliance with this section.”

“13.12.090 - Approval criteria for engineered drainage plans and drainage report.

Finding: Complies as Proposed. The applicant has submitted preliminary drainage plans, drainage reports, and design flow calculation reports demonstrating that this criteria will be met with engineered plans to be submitted with construction plans.”

“13.12.120 - Standard construction specifications. [...]

Finding: Complies as Proposed. The proposal appears to be in accordance with the Stormwater and Grading Design Standards adopted August 18, 2015, which are in effect at time of application, and all other applicable standards.”

Thus, the City Commission finds that the Application can meet all applicable City stormwater standards as proposed and with applicable conditions of approval.

These appeal issues are denied.

5.3 Failure to utilize a watershed scale assessment under Oregon City Comprehensive Plan Policy 5.4.12 and there is no Goal 5 analysis of storm water impacts to Clackamette Cove.

APPELLANT’S ARGUMENT: The City and the Applicant have not utilized a watershed-scale assessment in reviewing the plan for this development. The proposed hotel will be discharging storm water into Clackamette Cove, which is a Goal 5 resource. There is no Goal 5 analysis of impacts of storm water discharges into Clackamette Cove.

FINDING: The City Commission finds that the Appellant has not identified a requirement for a “watershed-scale assessment” in the City’s stormwater standards (OCMC Chapter 13.12.). Moreover, the City Commission finds that the Project can meet all applicable stormwater standards. As explained above, the Applicant’s civil engineer, Tom Sisul, P.E., submitted a letter explaining that the City has adopted Stormwater and Grading Design Standards, that compliance with these standards will ensure that the project will not release toxic discharges, and that it is feasible for the project to comply with the Stormwater and Grading Design Standards. The February 7, 2018 Staff Report also explained that City Engineering staff has reviewed the Sisul letter and determined that compliance with these standards is feasible. Review of a final stormwater report in compliance with Chapter 13.12 is a standard requirement of Public Works Department engineering review following land use approval, and is assured by Condition 8 of the Decision.

Additionally, the City Commission finds that Clackamette Cove is not a Goal 5 resource. Further, Plan Policy 5.4.12 is not directly applicable to the Application because it is implemented by OCMC 13.12.050, which governs stormwater treatment.

The City Commission also finds that the City’s Stormwater Master Plan and Stormwater and Grading Design Standards are already determined to be in compliance with Goal 5 through their status as ancillary documents to the adopted and acknowledged Oregon City Comprehensive Plan. No further Goal 5 analysis is necessary because the City has in place standards and procedures to apply the Stormwater Master Plan through the development standards, set forth in OCMC Chapter 13.12.

This appeal issue is denied.

VI. CONCLUSION

Based upon the parties’ arguments and evidence in the whole record, the City Commission finds that the Application meets all applicable criteria and rejects Appellant’s contrary arguments, as explained above.

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VII. ORDER

The Appeal is denied. The Decision of the Planning Commission approving the Application is affirmed.