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Bend City Attorney  
710 NW Wall Street  
Bend, OR 97701

January 24, 2023

Re: Johnson appeals from a hearings officer's approval of two applications for conditional use permits: PLCUP20220284 and PLCUP20220285.

Dear Ms. Winters,

The Johnson appeals to the City Council concern approvals of applications for conditional use permits for a gas station and a drive-thru coffee shop on the same property at the intersection of Murphy and Brosterhous.

The Hearings Officer erred in recommending approval for these two auto-oriented uses because he failed to follow state law and apply the correct approval standards and criteria.

ORS 227.173(1) requires that the Bend Development Code (BDC) and the Bend Comprehensive Plan in their totality must inform the approval standards and criteria for conditional use permits. The Hearings Officer declined to do so.

Colvin Oil, LLC proposes to site these auto-oriented businesses on a property surrounded entirely by residential housing for a full one-mile radius, with Jewell Elementary School 300 yards to the north, Caldera High School (and a planned middle school) a half-mile to the south and the 37-acre Alpenglow Park 400 yards to the east.

There are six gas station/convenience stores within 1.5 miles of this site. Residents leaving or returning to this area have to drive past at least one.

Conditional use permits are discretionary. ORS 227.173(1) provides:

“Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.” (Emphasis added.)

BDC, Chapter 4 concerns conditional use permits. It provides approval standards using the terms “**applicable**,” “**adequate**” and “**appropriate**.” The code sections which reference these standards are as follows:

BDC 4.4.100: “There are certain uses, which, due to the nature of their impacts on surrounding land uses and public facilities require a case-by-case review and analysis. These are identified as “Conditional Uses” in this code. The purpose of this chapter is to provide standards and procedures under which a conditional use may be permitted enlarged or altered **if the site is appropriate and if other appropriate conditions of approval can be met.**”

BDC 4.4.400: “The City shall approve, approve with conditions, or deny an application for a conditional use or to enlarge or alter a conditional use based on findings with respect to each of the following standards and criteria:

A. *Use Criteria.*

1. The site size, dimensions, location, topography, and access **are adequate** for the needs of the proposed use, considering the building mass, parking, traffic, noise, vibration, exhaust/emissions, light, glare, erosion, odor, dust, visibility, safety, and aesthetic considerations.

B. *Site Design Standards.* Where **appropriate**, the criteria for Site Development Review approval listed in BDC 4.2.500(D), Site Plan Review Approval Criteria, shall be met.

C. *Conditions of Approval.*

The City may impose conditions that are found necessary to ensure that the use is **compatible** with other uses in the vicinity, and that any negative impact of the proposed use on the surrounding uses and public facilities is minimized.”

The problem is that **appropriate, adequate and compatible** are not defined by Bend code. Unless there is some way to parse their meanings for more specificity, any application of these standards will be arbitrary and entirely subjective.

ORS 227.173(1) addresses this problem by requiring that such standards be based on consideration of the purpose of the site’s zone, whether the proposed uses are appropriate to the site, whether they can be made compatible with adjacent uses, and whether they advance the purposes and goals of the Bend Development Code and Bend Comprehensive Plan permits.

The Hearings Officer refused to consider other sections of the Bend code or the Comprehensive Plan in his analysis of these applications. The result is a series of findings such as: that the design standard was “adequate” or that a particular condition of approval would make the use “compatible” with surrounding uses. But he failed to analyze why it was adequate or compatible. In short, he used his own judgment, which makes his decisions arbitrary and

subjective. This is the inevitable consequence of failing to consider the meanings of these terms in the context of all Bend's development ordinances and comprehensive plans.

For example, Appellant Johnson argued BDC 2.2.200, which defines the purposes and types of businesses allowed in the Convenience Commercial zone, set the approval criterion of "need." Referencing Convenience Commercial zones, BDC 2.2.200 provides:

"This is adjacent and connected to the Residential District(s) it is intended to serve. Convenience Commercial uses are larger in scale and area than neighborhood commercial areas and provide for frequent shopping and service needs of nearby residents. The zone is intended to provide locations for a wide range of small and medium sized businesses and services as a convenience to the neighboring residential areas. New convenience commercial nodes shall develop as commercial centers rather than a commercial strip and be limited in size up to 5 acres." (Emphasis added.)

Appellant Johnson argued that whether these two auto-related uses would provide shopping and service needs at this particular site were approval criteria which had to be considered.

For example, Colvin says that these auto-oriented businesses will be patronized by nearby residents, who will pull into the complex to buy gas or coffee while leaving or before returning to their homes. Appellant Johnson argued they will not serve the purpose of the Convenience Commercial code because the only "convenience" they offer is that residents will be able to buy gas or coffee two minutes sooner than they could at identical facilities on 3<sup>rd</sup> Street or Reed Market.

The Hearings Officer ruled that BDC 2.2.200 only described "generally" the characteristics of each zone, that its terms could not be approval standards.

But this decision is contrary to the very purpose of zoning laws, which is to set standards and criteria for the kind of uses that will be allowed in each particular zone. One cannot site a factory in a residential neighborhood because the building must be for residential uses. Necessarily, "residential use" is an approval criterion for residential zones.

The interpretation and application of Bend code is something that only the City Council should do. If the Council declines to consider these appeals, the Hearings Officer's interpretation will become law, and that law will not conform to ORS 227.173(1). Accordingly, I am requesting that you recommend that the City Council accept my appeals for review.

Sincerely,

  
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