HATHAWAY LARSON

Koback · Connors · Heth

February 7, 2018

VIA HAND DELIVERY

City Council
City of Portland
c/o Council Clerk
1221 SW Fourth Avenue, Room 140
Portland, OR 97204

Re: Appeal of LU 16-213734

Dear Mayor and Commissioners:

We are writing on behalf of Riverview Abbey Mausoleum Co. ("Riverview"), to address a few statements included in the February 5, 2017 letter Appellant's attorney submitted to Council. Appellant's counsel's letter contains numerous inaccuracies, but many of them are likely due to the fact that she had no involvement in the proceeding prior to preparing her letter. Most of the inaccuracies are revealed in our February 5, 2017 letter and the exhibits to which we cite.

Counsel's letter includes a few misstatements that we are compelled to address. The most serious misstatement is on page 13 of her letter, where counsel states that that an applicant representative contacted Appellant's consulting firm and "threatened the firm with a lawsuit for libel and slander should the firm complete this work." Stephen Griffith was at a SBNA meeting because Riverview is a member of the Association. A consultant revealed that he had been on the property without making any request or obtaining permission. Mr. Griffith heard untrue and derogatory comments about the work performed by Riverview's consultants. After reciting his observations of the presenter's statement and action, Mr. Griffith wrote: "I <u>request</u> you cease and desist in your efforts to misrepresent our development." (Emphasis added.) That statement cannot, under any version of reality, be characterized as a threat of a lawsuit. It is irresponsible for a participant in these proceedings to so grossly misrepresent the evidence.

Counsel represented that Riverview placed 500 pages of documents in the record at the evidentiary hearing, suggesting a plan to unduly pressure the decision maker. Aside from the fact that the purpose for holding an evidentiary hearing under ORS 197.763 is to allow all parties to present evidence, her statement is not correct. Her client previously states that Riverview submitted over 200 pages, which is close to being accurate. Riverview submitted approximately 200 pages of material at the evidentiary hearing. Exhibits H-49 through H-55 will bear that out. More importantly, 96 pages of the approximate 200 pages Riverview submitted at the public hearing

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consisted of two prior land use decisions where the City approved development in environmental zones with much less protection and much greater disturbance. Counsel failed to mention that Riverview provided those decisions to Appellant at least two years before the hearing. Ex. H-105. She certainly would have known that.

Lastly, counsel represented that there is no evidence the hearings officer found that Riverview's final mitigation plan was sufficient to mitigate for the detrimental impacts caused by the overall disturbance limits in the first instance. February 5, 2017 Letter, p. 8. That is not accurate. The hearings officer discussed in detail the final mitigation plan. Ex. H-100b. On page 83 of his decision, the hearings officer imposed a condition that "Applicant shall satisfy the requirements of the Mitigation Plan (Exhibit H-100b)." To impose that condition, the hearings officer had to have found that the mitigation plan adequately compensated all unavoidable detrimental impacts.

Thank you for your consideration of this matter.

Very truly yours,

HATHAWAY LARSON LLP

Christopher P. Koback

CPK/mo

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Re: Appeal of LU 16-213734

Dear Mayor and Commissioners:

We represent Riverview Abbey Mausoleum Co. ("Riverview"), the applicant in the City decision approving an application for environmental review and land division in the above referenced land use file. The City decision, which is 100 pages long, reflects a thoughtful and detailed evaluation of substantial testimony and evidence. For the reasons we will discuss in more detail below, we respectfully request that Council deny the appeal and uphold the City decision.

I. Introduction.

The property that is the subject of the application consist of 14 acres. The Griffith family has owned it since 1945. Virtually all of the property is in either an Environmental Preservation ("EP") or Environmental Conservation ("CP") zone. Because the most important and sensitive resources are within the EP zone, the City code restricts development significantly in EP zone. The code allows development in EC zones. The environmental regulations have a threshold for triggering environmental review. If an applicant elects to restrict development in an EC under the threshold, they can avoid review. However, if it is not possible or practicable to restrict development of a site under the threshold, the code has standards that allow development consistent with the environmental regulations.

The primary purpose for environmental regulations is to protect the most important resources on a site while allowing responsible urban development. In its October 6, 2017 report, the Bureau of Development Services ("BDS") staff made the following observations:

> Environmental overlay zones ("c" or "p") protect environmental resources and functional values that have been identified by the City as providing benefits to the public. The environmental regulations encourage flexibility and innovation in site planning and provide for development that is carefully designed to preserve the

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> site's protected resources. They protect the most important environmental features and resources while allowing environmentally sensitive urban development. (October 6, 2017 Staff Comments, Pages 5 and 6) (*Emphasis supplied*).
>
> Overall, the applicants indicate that the primary intent in their preferred alternative is to cluster development on smaller lots away from the streams and steep slopes on the site and to protect a majority of the site in an environmental resource tract. So, the applicants' approach is basically consistent with the environmental regulations, since development can be consolidated into a smaller portion of the resource area, which can help to limit the overall area of disturbance and which can also help to reduce the cost of roads and water and sewer lines. (October 6, 2017, Staff Comments, Page 5) (*Emphasis supplied*).

The property has three resources recognized as most important: Stephens Creek, Ruby Creek and the northern 1/3 of the forested site. There is a failing stormwater outfall in the Ruby Creek Canyon east of Ruby Terrace. That is a public facility. There is also a failing sanitary sewer line that runs along Ruby Creek. All over the property, and particularly in the Ruby Creek area, there are non-native invasive plants detrimental to the native vegetation.

Riverview's proposal, that the City hearings officer, Melvin Oden-Orr (now a Circuit Court Judge), approved with conditions, satisfied the environmental regulations and provided significant benefits as follows:

- It confined development to 4 acres of the total 14 acre site, which is slightly more than 29% of the site;
- 15 of the 21 lots are below the minimum lot size in the R10 zone and the average lot size of all lots is less than 6,000 square feet;
- It permanently preserved 10 acres of property with environmental resources, which is more than 70% of the site. (Riverview offered to give that property to the City and has a meeting scheduled to pursue that donation);
- It protects all of the most important resources completely.
- It includes rebuilding a failing public stormwater outfall in Ruby Canyon at Riverview's expense. (The only development within the three significant resources is a temporary disturbance associated with repairing the existing outfall near Ruby Terrace and creating a new stormwater outfall at Ruby Creek, and possibly, limited work associated with abandoning the failing sanitary line);
- It relocates a significant portion of the failing sanitary sewer line along Ruby Creek in the P zone, rerouting it out of the P zone through the proposed development;
- It enhances the existing resource area by removing non-native invasive plants and planting new native species.
- It provides improved access to transit with a new bus stop built to TriMet's standards;
- It provides additional housing.

- It provides a secondary route for emergency vehicles that access the neighborhood west of the development.

II. Griffith Family & Property History.

The majority of the Property has been owned by the Griffith family since 1945, when Willard Griffith acquired it. The Griffith family also owns and operates Riverview Abbey and Mausoleum on adjacent property. Willard Griffith developed residential lots on SW 2nd Avenue and Ruby Terrance in the 1940's and resided there the rest of his life. It was a long time goal to develop the Property for residences. He passed away before being able to see that goal through.

As Robert Griffith details in his letter to Council, the Property has been an important to the Griffith family since Willard Griffith acquired it. They have been be good stewards of the land, appreciating its natural beauty. After about 70 years of paying taxes on the land, the Griffith family decided about six years ago to sell it. The family has devoted significant time and money to develop a responsible development that is respectful of the natural features on the Property.

III. Application History.

Contrary to the Appellant's suggestion, the land use process that led to the hearings officer's approval did not begin in October 2017. It began more than four years ago. Over the course of four years, in an attempt to develop a proposal that satisfied the environmental regulations and respected neighboring property owners, Riverview had numerous meetings with City staff and the neighbors. In total, Riverview evaluated 12 different alternative development concepts. The density permitted on the site is 52 residential units. Early on, Riverview had one alternative that included 46 lots, some in the area where the lots are currently approved and some on the north side of Ruby Creek. Over time, Riverview refined its concept to reduce significantly the number of lots to the current number of 21. Riverview considered alternatives that had different access configurations, different lot configurations and different housing types. The neighbors flatly rejected all high density, multi-family concepts.

Riverview's commitment to developing an environmentally sensitive proposal that responded to neighbors' concerns to the extent possible took so long that an initial land use application expired. On or about January 30, 2017, Riverview submitted a revised application[1] that the hearings officer approved. In March 2017, Riverview received requests for additional information for various city bureaus. Riverview submitted responses to those requests on August 30, 2017. Subsequently, BDS scheduled a hearing on the application for October 16, 2017.

IV. Hearing Process.

Contrary to the Appellant's claim, Riverview did not strategically wait until the hearing to submit additional material. The consideration of Riverview's application proceeded under the same rules that apply in all land use hearings. On October 6, 2017, BDS issued its staff report. Staff found the proposal consistent with the environmental regulations, but noted where it felt Riverview

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[1] Riverview first submitted the second application on August 3, 2016. In September 2016, BDS staff issued a letter of incompleteness and Riverview responded with the revised applications.

needed to supply more information before staff could fully support the proposal. Riverview worked diligently to evaluate staff's comments and work on additional material to address them. Prior to the October 16, 2017 hearing, Riverview reached the conclusion that, to best address some of staff's questions and comments, it should make minor revisions to the proposal, eliminating two lots and creating more permanently protected resource land. Thus, Riverview requested and received a continuance of the hearing to October 30, 2017.

As detailed in Riverview's December 14, 2017 final written argument to the hearings officer, between October 25, 2017 and October 30, 2017, Riverview submitted to staff a revised site plan and material responding to the staff report. (Ex. H-120). Among other material, Riverview included copies of all 12 alternatives Riverview considered over the course of the four year application process, a narrative discussing why those rejected were rejected, revised plan sheets reflecting the latest alternative that removed two lots, a construction management plan for work in the Ruby Creek basin, and a tree protection plan accounting for the revision to the proposal. (Ex. H-107n.)

On page 4 of its final written argument, Riverview detailed the material it submitted at the October 30, 2017 continued hearing. The very purpose of having an evidentiary hearing is so the parties can submit evidence and testimony on the application. In its October 30, 2017 material, Riverview responded to questions and comments from all involved City departments and demonstrated how the public improvements would be constructed within the disturbance areas depicted on the plans. Significantly, Riverview submitted two prior land use decisions on other applications to divide property within the R10 zone and where the entire property is within environmental zones. In those cases, the city approved environmental review where the disturbance areas were 47% and 76%. The area in each site that was protected was 53% and 24%. (Ex. H-52). That stands in stark contract with Riverview's proposal that protects over 70% and disturbs only about 29% of the site.

The hearings officer left the record open for written submissions. Riverview discussed the open record process on pages 4 and 5 of its final written argument. The important point is that staff continued to instruct Riverview on what it needed to do to satisfy staff's remaining questions and concerns. Riverview heeded staff's advice and continued to supply additional and refined material to address staff's comments.

Riverview expressed in its November 6, 2017 submission (Ex. H-100), that it believed it was responding to all remaining issues. Staff had a final opportunity on November 13, 2017, to advise Riverview if it felt that there were remaining deficiencies in the evidence. Staff did not make any final submission and Riverview perceives that this was because it had adequately responded to all remaining issues.

On November 13, 2017, in its rebuttal submission, Riverview responded to the additional comments and evidence from the neighboring property owners. (Ex. H-105). Riverview included its final construction management plans, development plans, a technical memorandum confirming that public improvements can be constructed within the disturbance area, a technical memorandum from the geotechnical engineers related to site grading, and a final memorandum from the project environmental consultant. Significant to a number of issues in this appeal, the environmental consultant's memorandum included the following conclusions:

After reviewing the 12 development alternatives formulated over the last 4 years, including Alternative 4 and the new Preferred Alternative 4A and upon review of the revised Environmental Review Construction Management Plan (including the revised temporary disturbance limits) submitted by the applicant in response to staff comments, we reach the following conclusions:

- The boundaries of the disturbance area have been reasonably defined for purposed of environmental review including the outfall areas near Ruby Creek in the environmental protection zone
- The preferred alternative (Alternative 4A) has fewer detrimental impacts on identified resources and functional values than other practicable alternatives
- That effective measures have been provided to protect resources outside the proposed disturbance area from damage
- That adequate mitigation has been provided for unavoidable impacts to site resources.

V. Hearings Officer Decision.

As summarized above, and fully explained in Riverview's final written argument, the hearings officer had a significant amount of evidence, most of which was from Riverview to demonstrate compliance. Neither the staff nor any opponent raised any issues over what criteria is applied, nor any interpretation of it. Thus, the hearings officer's decision-making process required that he examine the record and decide whether Riverview provided substantial evidence in the record to demonstrate compliance with the criteria.

The hearings officer properly performed his required analysis. His 100-page decision informs that he carefully examined the evidence, often reciting segments from the submissions. He concluded that the substantial evidence submitted by Riverview demonstrated compliance with all applicable approval criteria, or that with feasible conditions, the criteria could be satisfied.

VI. Response to Issues Raised in Appeal.

A. Burden on Appeal.

Riverview met its burden before the City hearings officer to demonstrate that the development actions it proposed in its application met, or with feasible conditions will meet, all applicable approval criteria. As detailed above, within the process recognized under state law and the City code, Riverview presented a substantial volume of evidence in the form of expert reports, drawings and analysis, to demonstrate how its proposal satisfied the relevant criteria. The City hearings officer, the person designated with the authority to decide Riverview's application (before being appointed by the Governor to the bench), evaluated all of the parties' evidence and found that Riverview's evidence demonstrated compliance. In this appeal, the Appellant bears the burden of demonstrating specifically how the hearings officer erred in evaluating the relevant evidence to reach his decision.

B. Final Disturbance Area.

In its first grounds for appeal, the Appellant appears to be challenging the hearings officer's finding that Riverview demonstrated compliance with the environmental review standards. The code section that was the focus of most of the evidence and discussion was PCC 33.340.250.A.4.c. That provision requires an applicant to demonstrate that:

> There are no practicable arrangements on the proposed lots, tracts, roads or parcels within the same site, that would allow for the provision of significantly more of the building sites, vehicular access, utility service areas and other lands outside the resource areas of a conservation zone.

The Appellant raises three specific arguments related to the above criteria. It argues that Riverview: (1) did not present sufficient alternatives for evaluation; (2) that the approved site plan does not depict the final disturbance area; and (3) that, to protect the identified resources at the rear of Lots 3 through 8, Riverview is required to place that area in a tract and cannot use an easement.

The evidence in the record that the hearings officer evaluated included 12 different alternative proposals that Riverview considered as the development process proceeded. (Ex. H-107n.). There is an explanation for why it rejected those alternatives not used in the final submittal and why Alternative 4A was the final proposal. Staff concurred that Alternative 4A was the alternative consistent with the environmental review standards. Staff never presented any other alternative that resulted in greater protection of resources. Staff raised questions in the hearing process related to specific issues that it felt Alternative 4A did not address. In response, Riverview submitted revisions and additional expert evidence to address staff's questions and comments. As the hearings officer in File No. LU-09-116765 LDS ENM explained, an applicant does not have to demonstrate that there is not some theoretical alternative possible that may result in greater protection. (Ex.H-52a.). The hearings officer made the correct decision based upon substantial evidence in the record. The Appellant has not provided any basis for Council to reject the hearings officer's findings.

The hearings officer correctly found that Riverview demonstrated the disturbance area to the degree necessary to find compliance with the environmental review regulations. Staff questioned whether the final disturbance areas for the repair and construction of the outfalls and related retaining walls at Ruby Creek were sufficient. Riverview, in response to staff's comments, made revisions to the temporary disturbance area and then, updated all reports on protection and mitigation impacted by the revision. (Ex. H-100 and H-100L.).

Staff raised an issue over whether the public improvement plans were far enough along to demonstrate the final disturbance area. Riverview addressed that issue with revised drawings responsive to BES's last comments. Riverview's engineer verified that the improvements could be constructed within the designated disturbance area. (Ex. H-105d.). The fact that the hearings officer noted that the final disturbance area cannot be determined reflects reality and is not a basis to modify his decision. The absolute final disturbance area in any development cannot be determined until the improvements are actually constructed. Here, the approved development plan

calls for the construction of public improvements. The plans have been reviewed twice by the City staff. They are to the point where the hearings officer could find that the ultimate final disturbance area is appropriate under the regulations. As he notes, as the final plans are completed and even during construction, there may be minor deviations in the disturbance area. But, even with any conceivable increase in disturbance area, the overall percentage of disturbance area will still be so low that the proposal satisfied the criteria. There will be no changes to the approved lot layout or the location of any public improvements. Any changes in the disturbance area will be minor in nature.

Under the Appellant's apparent argument, the City could never approve any application for development that must obtain environmental review. To receive approval, Appellant argues that an applicant must demonstrate the absolute final disturbance area down to the inch. However, to know that number, the development must be constructed, and it cannot proceed with construction until it received environmental review approval. The code was not set up to create this chicken and egg situation where applications can never be approved

Lots 3 through 8 in Alternative 4A back up to an existing neighborhood that is zoned R10 and has large lots. Riverview proposed those lots to be slightly larger than the other lots to create a transition from those larger adjacent lots. Riverview also submitted that the mature trees at the rear of those lots could be protected using a deed restriction. In response to staff, Riverview had its consultant identify the resources that were present within the rear 20 feet of Lots 3 through 8. Consistent with a recent approval involving a similar situation, Riverview proposed to record a deed restriction on each lot requiring that those resources be retained. (Ex. 100b.). The hearings officer imposed a condition to assure that the required steps will be completed. Appellant argues that an easement does not afford the required protection. Riverview never proposed to use an easement; it proposed a binding, recorded restriction. Riverview submitted a recent City decision that used a similar recorded restriction in a similar situation. The example Riverview submitted proves that its proposal has been used by the City before. (Ex. H-105l.).

The key is that the hearings officer found that the proposal and evidence, including plans, drawings and reports demonstrate the final disturbance area to the degree necessary to conclude that environmental regulations are met.

C. Mitigation Plan.

The Appellant does not raise any substantive points from which Council can conclude that the evidence in the record does not demonstrate compliance with the mitigation requirements. It claims only that it did not have enough time to review Riverview's evidence that the hearings officer evaluated and accepted.

Riverview included a detailed mitigation plan with its January 2017 application. Riverview's environmental consultant had numerous discussions with staff. Staff and the consultant agreed that for the site the appropriate mitigation plan should use a higher percentage of shrubs and ground cover and less trees In the October 6, 2017 staff report BES noted that it preferred different varieties of plants in some area. Riverview revised its plan accordingly. The October 30, 2017 hearing was the first evidentiary hearing under ORS 197.763. The purpose for the hearing was for

the parties to submit new evidence. From Riverview's perspective, the hearing was the statutorily prescribed process for it to submit evidence in response to the staff report. At the conclusion of the hearing, the Appellant requested that the evidentiary record be keep open. As noted above, Riverview further responded to staff, increasing the temporary disturbance area in two locations. That required additional evidence on the mitigation plan which Riverview submitted. (Ex. H-100b.). In its November 3, 2017 memorandum to the hearings officer, BES expressed agreement with the mitigation plan and noted only that it preferred small changes in a couple of species of plants.

Riverview, like the Appellant, submitted evidence within the recognized process and consistent with all submission requirements. The parties all had equal time to evaluate each other's evidence. Most importantly, the hearings officer had sufficient time to evaluate all of the evidence and his 100 page decision explains how he evaluated it. His evaluation is on pages 52 through 54 of the Decision.

D. Setback Modification for Lots 3-8.

The hearings officer, after evaluating all of the evidence, found that Riverview satisfied the requirements to reduce the side setback on Lots 3 through 8 from 10 feet to 5 feet. The setback standard in the R10 zone is 10 feet and in the R5 zone, it is 5 feet. The lot sizes in the proposed development are similar in size to those in an R5 zone. Thus, 5-foot side setbacks are proportionate, ordinary and necessary for the site to accommodate design flexibility Riverview also requested the same adjustment on the other 17 lots and neither staff nor the Appellant opposed it.

The hearings officer correctly evaluated the request for Lots 3 through 8 in the context of the entire proposal. Riverview proposed a low density development on a small portion of the site. As noted, the development is on a relatively flat 4 acre portion of the site preserving forever 10 acres of forest and streams. To further enhance the protection of environmental resources, Riverview obtained an adjustment to reduce fifteen (15) of the proposed lots below the minimum size for the R10 zone. The average lot size for all lots is less than 6,000 square feet. Riverview proposed a deed restriction on Lots 3 through 8 so that the rear 20 feet cannot be developed. Restricting development on the rear 20 feet of Lots 3-8 produces about 6,500 foot lots, which is slightly larger than lots allowed in the R7 and R5 zones, and protects identified resources in that area. It also provides a valuable buffer for the existing homes along Ruby Terrace.

E. Tree Preservation.

Appellant's fourth ground for appeal recites that, because of a failed concept approval, it is impossible to identify if they (Riverview) have maximized tree preservation to the extent practicable. This appeal ground lacks foundation because there was no failed concept approval. The approvals Riverview sought (except for one adjustment to a development standard it abandoned) were all approved in the hearings officer's decision. The Appellant does not explain what concept approval it believes was rejected.

Furthermore, the Appellant does not recite the full text of the relevant code provision, PCC 33.630.200. The code states that tree preservation is required to the extent practicable, while

allowing for reasonable development of the site. In pages 49 through 56 of his decision, the hearings officer detailed the evidence in the record upon which he found compliance with PCC 33.630.200. He noted that, after the initial staff report, Riverview, through its environmental consultant and arborist, provided substantial evidence. The hearings officer focused particularly on the environmental consultant's November 3, 2017 supplemental report. (Exhibit H-100b.). He quoted from that report to emphasize that, with Riverview's revised Alternative 4A, Riverview was preserving more trees than previously and removing less trees.

As noted above, in addition to preserving as many trees as practicable while allowing reasonable development, Riverview is planting many new trees and shrubs as mitigation. On pages 52 and 53 of his decision, the hearings officer set forth extensive sections from Riverview's revised mitigation plan that detailed all of the trees and shrubs Riverview is planting as part of its mitigation. It is also worth noting that, while the Appellant often mentions that Riverview proposed removing 500 trees, by proposing responsible development on a small portion of the site, Riverview is preserving 1,400 trees on the site. (Ex. H-105i.). The basic requirement for tree preservation is met by retaining 35% of the trees. Riverview is retaining 70%. That fact, coupled with the extensive mitigation proposed, is substantial evidence upon which the hearings officer found compliance with PCC 33.630.200. Additionally, the November 3, 2017 Memorandum from Riverview's environmental consultant, Schott and Associates, was expressly listed on page 83 of the Decision as the mitigation plan to be followed as a condition of approval.

F. Landslide Hazard Area.

The Appellant simply does not agree with the City staff and the hearings officer's conclusion that the site is suitable for development in a manner that reasonably limits risks of landslide on the site and adjacent sites.

On page 56 of his decision, the hearings officer identified the four reports that Riverview's geotechnical engineers submitted to City staff.

> January 30, 2017 GEO Consultants Northwest, *Geotechnical Evaluation, Macadam Ridge Planned Development, GCN Project 1161* (Exhibit A.2)
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> January 30, 2017 GEO Consultants Northwest, *Landslide Hazard Study, Macadam Ridge Planned Development, GCN Project 1161* (Exhibit A.2)
>
> March 9, 2017 GEO Consultants Northwest, *Macadam Ridge Subdivision, Site Conditions Following February 2017 Rainfall Events* (Exhibit A.5)
>
> July 17, 2017 GEO Consultants Northwest, *Landslide Hazard Report Addendum, Site Development Request for Additional Information, Macadam Ridge Subdivision, Case File: LU 16-213734, GCN Project 1161-03* (Exhibit A.3.d)
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> October 14, 2017 GEO Consultants Northwest, *Seismic Slope Stability Analysis, Macadam Ridge Subdivision, Case File LU 16-213734, GCN Project 1161-03* (Exhibit H-40).

In its November 3, 2017 memorandum, the Site Development Section for BDS noted that the Land Slide Hazard Study ("LHS") concludes that the proposed development can be constructed as envisioned and will not adversely impact the Stephens Creek watershed or produce hazards to life safety related to the planned improvements. It also noted that the LHS concludes that the proposed locations of the lots, buildings, services and utilities are suitable for development in a manner that reasonably limits risk of a landslide affecting the site, adjacent sites and site directly across the street. The appellants did not submit any reports from a qualified geotechnical engineer. In that same memorandum, Site Development staff concluded that Riverview's Landslide Hazard Study satisfied the approval criteria in PCC 33.632 and PCC 33.730.060.D.1 with the understanding that, at the time of site development, a rigorous slope stability analysis will accompany the retaining wall calculations.[2]

The hearings officer specifically discussed Riverview's studies and staff's memorandum on page 56 of the Decision and found that, based upon Riverview's studies/ reports and staff's concurrence, there was substantial evidence to show compliance with the criteria. In the absence of any report from appellants, there is no evidence in the record that could support a contrary finding.

G. Transportation Impacts

In its initial response to the proposal, PBOT concurred with most of Riverview's traffic impact study. PBOT found though that the element in PCC 33.641 requiring it to consider safety for all modes was not satisfied. In particular, PBOT focused on the lack of safe access to transit, particularly the bus stop at SW Taylors Ferry and SW 2nd Avenue. PBOT indicated that, to address that, Riverview had to construct public sidewalk improvements and a bike lane the entire length of SW Taylors Ferry between Macadam and Terwilliger. PBOT also noted that there was no indication that Riverview had consulted with TriMet.

Before the hearings officer, Riverview explained that requiring massive improvement with no evidence that the proposal will generate the impacts upon which PBOT based its exaction, violated federal constitutional law. (Ex. H-54). Riverview illustrated that PBOT agreed that the exactions were not roughly proportionate to impacts from the proposal, but was insisting on the improvements nonetheless. Riverview provided evidence that, after the initial staff report, it contacted TriMet. The evidence of TriMet's response to the issue is critical. The TriMet representative stated:

> "I agree that a full sidewalk along Taylors Ferry is not necessary. I would like to see a pad at Taylors Ferry and 2nd that allows for safe accessible boarding for customers using mobility devises and that allows pedestrians coming from SW 2nd to safely access it." Decision, p. 64.

Riverview also submitted sight distance diagrams that PBOT requested in its response.

The hearings officer recited all of the evidence submitted on transportation impacts. He quoted from Riverview's TIS explaining how the proposal is providing safe alternative access for

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[2] It is not clear from the exhibit list included with the Decision what exhibit number the hearings office assigned to Site Development staff's November 3, 2017 memorandum.

pedestrians and bicycles through the development west through local streets such as Ruby Terrace. He quoted, with apparent approval, Riverview's argument that the major improvements PBOT requested could not be reconciled with federal constitutional requirements. He recited the evidence related to Riverview's communication with TriMet and its agreement to provide the improvements TriMet requested. He quoted from Riverview's sight distance analysis finding that there were no deficiencies. Based upon all of the evidence in the record, the hearings officer correctly found that the proposal before him met the transportation impact approval criteria.

H. Procedural Error.

The hearings officer did not commit error in setting the schedule he did. At the end of the October 30, 2017 continued hearing, the appellant requested that the hearings officer keep the record open. Staff advised the hearings officer that the schedule was already tight. The hearings officer indicated that consistent with PRS 197.763, he was inclined to leave the record open 7 days for all parties to submit evidence and another 7 days for parties to submit rebuttal evidence. The appellant voiced a concern over that schedule. The hearings officer specifically asked the appellant how much time it needed and what it would be able to complete in the time requested. The appellant did not answer those questions so the hearings officer stayed with his initial time periods.

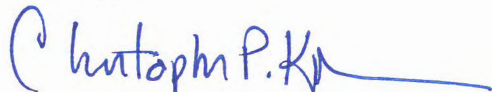
On November 13, 2017, the appellant submitted substantive evidence. Even though the appellant was able to make its submission within the original schedule, on November 27, 2017, the hearings officer issued an interim order opening the record to December 7, 2017, for opponents, including the appellant, to submit new evidence addressing Riverview's November 13, 2017 rebuttal evidence. The hearings officer actually gave the appellants more rights than he was required under the applicable statute.

VII. Conclusion

The hearings officer carefully evaluated a substantial amount of evidence from all participants. He articulated the evidence he evaluated and explained why that evidence constituted substantial evidence demonstrating that Riverview's proposal met the applicable criteria.

Riverview respectfully requests that Council deny the current appeal and affirm the hearings officer decision. Thank you for your consideration of this matter.

Sincerely,



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February 5, 2018

VIA HAND DELIVERY

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1221 SW Fourth Avenue, Room 140
Portland, OR 97204

Re: LU 16-213734 – Appeal Request by SBNA / Fee Waiver Request by SBNA
Information indicating SBNA violated ONI Minimum Standards

Dear Mayor and COmmissioners:

We represent the applicant in this matter, Riverview Abbey Mausoleum Co. ("Riverview"). Riverview is also a member of the South Burlingame Neighborhood Association, the appellant in this matter We submitted substantive arguments against the appeal in a separate letter, This letter is for the purpose of addressing a significant issue over Council's jurisdiction to hear this appeal. We are submitting this issue in a separate letter and encourage Council to consider it before considering the merits of the appeal because if Council applies the definition of "shall" in its code, the appeal is defective and there is no need to expend significant time on the merits of the appeal.

Under its express requirements, the City was prohibited from granting a fee waiver to SBNA and thus, the Appeal, unaccompanied by the required fee is defective.

Summary

Based upon information included with the appeal, including the minutes of the SBNA for the voting meeting, we believe you will find the following:

- The SBNA appeal vote on LU 16-213734 that occurred Sunday January 7, 2018, is invalid since they did not meet the specific requirements of an Emergency Meeting contained in the SBNA Bylaws which incorporates all the minimum standards of ONI in Article XIV of these Bylaws (see attachment).

- Secondly, the SBNA Type III Appeal Fee Waiver only allows the Appeal Fee Waiver for an organization, if special conditions are met. The third requirement of the Zoning Code

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(Form instructions attached) is only allowed if the organizations "vote to appeal was done in accordance with the organization's bylaws. As noted above, the minimum standards of ONI (which are a part of the SBNA Bylaws) were not met, so the answer to that question is "no". Since the specific preconditions of the waiver is mandatory and were never met, the Appeal Fee Waiver could not have been granted and thus, the appeal was not accompanied with the mandatory fee.

Detailed Analysis

The City has important, strict requirements for appeals of its land use decisions. Appeals must be submitted by a certain time and date. In its decisions, the City expressly advises parties the date an appeal is due and admonishes that an appeal must be submitted by 4:30 p.m. on that date.

The City has fees for appeals. Its rules mandate that all appeals be accompanied by the proper fee. An appeal without the proper fee is invalid. *See,* Instructions for Type III Appeal that are part of the Appeal Form. Because the City's fees are an important part of its ability to process appeals, there are limited instances when a party can obtain a waiver and proceed with an appeal without paying the appropriate fee. There are also strict requirements to which a party must adhere to obtain a fee waiver. According to the City's instructions, the Director may waive an appeal fee for Organizations recognized by the Office of Neighborhood Involvement (ONI), or for low income applicants, but only if certain requirements are met.

Specific to ONI Recognized Organizations, the Type III information the City publishes about fee waivers lists the express requirements an organization must meet to qualify for a fee waiver consideration.

- The organization must have standing to appeal;
- The appeal must be made on behalf of the organization; and
- The appeal contains the signature of the chairperson or the person authorized by the organization, confirming that the vote to approve the appeal was done in accordance with the organization bylaws.

The Type III Appeal Form requires the person signing to confirm that "the vote to appeal was done in accordance with the organization's bylaws." The Appeal Form requires that the organization appealing include a copy of the minutes from the meeting of the meeting when the vote to appeal was taken.

SBNA is a ONI Recognized Organization. As such, it has bylaws. The City has published standards for organizations that wish to receive the benefits of being a ONI Recognized Organization. To participate as a recognized organization, Neighborhood Associations must agree to comply with the Standards for Neighborhood Associations, Business Coalitions, Business District Associations and Office of Neighborhood Involvement ("ONI Standards"). The ONI Standards explain that the City revised the name of the important standards from "Guidelines" to "Standards" to reflect that they are the "Minimum Standards for Neighborhood Associations." Standards, p. 2.

Specific Requirements govern an appeal by a neighborhood association and the specific notice of meeting and voting is required. Voting must occur at a meeting that meets the minimum standard of ONI. The meeting must comply with the bylaws of the Neighborhood Association, including ONI Standards for Neighborhood Associations. A critical requirement is that, if a Neighborhood Association is going to vote to take action, including initiating an appeal, at an emergency meeting, its minutes shall state the nature of the emergency and state why the meeting could not be delayed to allow at least seven (7) days' notice. Standards, p. 42. The ONI Standards for emergency meeting noticing requirements include the following requirement:

> **F. Notice for emergency meetings**
>
> Emergency meetings may be held with less than seven days notice but not less than 24 hours notice. Direct notice as timely as practicable under the circumstances shall be provided to members of a board or committee that is meeting, and to individuals and news media that have requested notice. Notice to the general public shall be provided as set forth above in this section E, 1, a: Notice. Parties who are known to have a direct interest in the topic of a meeting should receive direct notice, even if they have not specifically requested so in writing. **<u>Minutes of the emergency meeting shall state the nature of the emergency and state why the meeting could not be delayed to allow at least seven days notice.</u>** Members conducting business at the meeting may make decisions or deliberate toward decisions only on the agenda topic or topics for which the emergency meeting was called. ONI Standards, p. 42 (enclosed).

The SBNA expressly incorporated the ONI Standards into its Bylaws. Article XIV of the SBNA Bylaws recites:

> **Article XIV: SWNI, ONI Standards**. The association, in all of its activities, shall comply with the requirements of the Southwest Neighborhood Inc. Office of Neighborhood Involvement Standards for Neighborhood Associations.

According to the City code, the term "shall" must be interpreted as establishing a mandatory requirement. PCC 1.01.040.K. Indeed, that is the dictionary definition and the definition given to that term by courts.

The SBNA chose to take a vote for appeal of the land use decision at an <u>Emergency Board Meeting</u> (held Sunday January 7, 2018, at 9 a.m. at a different location than normal). The minutes of that meeting should be included with the SBNA appeal. The SBNA failed to comply with the express and mandatory requirements in its bylaws and the ONI Standards. The minutes, which conclusively establish what occurred at the meeting, do not state the nature of any emergency or why a meeting could not be delayed to allow at least seven (7) days' notice. A representative from Riverview Abbey Mausoleum was present as reflected in the minutes and will confirm that the required statements were never made.

The SBNA could not have, in good faith, made the statement required by the ONI Standards. It had a regularly scheduled meeting for January 11, 2018, before the appeal deadline. The

regularly scheduled meeting of the SBNA could have accommodated a timely vote for appeal of the land decision and met the normal 7 day notice requirements. The Decision of the Hearings officer was dated December 29, 2017 and the Appeal Deadline is January 12, 2018. Since the SBNA received notice of the decision approximately ten (10) days before their regularly scheduled meeting, there was time to conduct the vote at a regular meeting within the normal seven (7) day noticing requirements. If they believed it was necessary to conduct the meeting and the vote at an emergency meeting, they should have complied with those specific requirements to achieve a proper decision that met the minimum standards of ONI.

Furthermore, the ONI Standards allow the SBNA to hold a special meeting with seven (7) days' notice. Since the Decision was mailed on December 29, 2017, the SBNA could have promptly issued a notice for a special meeting and conducted it well before the January 11th regular meeting. The SBNA had two options under which it could have complied with the mandatory requirements in the ONI Standards and its bylaws.

There are specific rules and stricter rules for notice of emergency meetings in ONI Standards since emergency meetings have shorter noticing requirements than a normal meeting of the neighborhood association. Within those notice rules is a requirement under the Section entitled "Open Meetings and Public Records" that state specific requirements to conduct business and make decisions of the Neighborhood Association at an Emergency Meeting. Those standards were not met.

The vote taken at the emergency meeting was not authorized, per the bylaws of the SBNA which includes the ONI Standards for Neighborhood Associations. No statement was made at the January 7 gathering of the SBNA that stated "the nature of the emergency" and stated why the meeting could not be delayed to allow at least seven days' notice. Accordingly, the SBNA minutes for this SBNA gathering did not indicate "the nature of the emergency and state why the meeting could not be delayed to allow at least seven days' notice." Since the minutes do not reflect why the emergency meeting (with a shorter notice requirement) was necessary, the SBNA failed to meet the noticing requirement for the meeting at which the vote to appeal was held. Accordingly, any decision reached is not in accordance with ONI standards for a meeting of the neighborhood association.

It follows that the City has to apply the express definition of the term shall in its code, and reject the fee waiver. The requirements in the standards shall be met. There is no dispute that SBNA did not submit a fee; it relied exclusively on its defective fee waiver request. Thus, its appeal was fatally defective and Council does not have jurisdiction to entertain it.

Conclusions

A vote to an appeal of a land use decision is a very serious matter for a neighborhood association to consider. All members of the neighborhood association and the public were afforded the opportunity to be heard in letters, testimony and rebuttal in the hearing for this land use decision (LU 16-213734) which extended over two days. The hearings officer even allowed an extra and extended period to respond and provide information to the record.

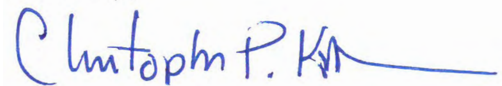
After considering all the input of the City staff, the neighborhood association and individual member and the general public, the decision of the Hearings Officer was for approval with conditions.

It is certainly a right of a neighborhood association to appeal a decision. If there was ever a time to get a vote right and follow the rules it is this one. Given the weight of this decision (on whether or not to appeal) which impacts the resources and time of City Council and impacts the resources and time of Riverview, the SBNA Board Members had a duty to conduct the meeting in accordance with the minimum standards of ONI included in their bylaws. The minutes show that these minimum standards were not met.

Accordingly the vote to appeal by the neighborhood association is not valid and the request for waiver of the organization appeal fee could not be granted. Thank you for your consideration of this information as you consider their application to appeal and request for appeal fee waiver.

Thank you for your consideration of this matter.

Sincerely,



Christopher P. Koback

CPK/pl