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**CITY COUNCIL SPECIAL MEETING MINUTES
(REVIEW OF RECORD – APPEAL (CU-2020-01))
Tuesday, July 21, 2020 – 6:30 p.m. VIA ZOOM**

- I. PLEDGE OF ALLEGIANCE
- II. CALL TO ORDER
- III. PUBLIC HEARING – REVIEW OF THE RECORD (APPEAL) Garibaldi Planning Commission Public Hearing: (CU-2020-01)

Mayor Riggs called to order the hearing at 6:36 p.m. Present were Council members Melissa Elmore, Tim Hall, Amanda Cavitt, Whitey Forsman and Judy Riggs. City staff present were City Manager Geoff Wullschlager, Assistant City Manager Lori Longfellow and Administrative Assistant 2 Laura Schmidt. Attorney for the Applicant Jenny Bricker and attorney for Carl Kopacek Sean T. Malone were present. Unknown citizens were present electronically.

Mayor Riggs began by reading the appeal script. No objections were made with regard to the authority of the Garibaldi City Council acting as the review body. Mayor Riggs asked if there were any conflicts of interest, ex- parte contact or bias to declare. Cn. Daniels and Cn. Hall confirmed they had no bias, Councilwoman Cavitt stated that she would be abstaining from voting on the recommendation of the City Manager as she had not been on Council long enough to review the appeal record.

Mayor Riggs asked Councilman Hall if he was sure he didn't have a conflict of interest to which he reiterated he did not. Mayor Riggs stated that she was made aware of Councilman Halls recent communications with ODOT regarding traffic impacts of the project and went on to say that any communication regarding the application that was outside of the established record (as the hearing was to be on the record as established) would constitute ex-parte contact and potential bias. Councilman Hall reiterated that he did not have a conflict of interest or bias.

Mayor Riggs asked if anyone in attendance had any objections to the jurisdiction to the City Council to hear the appeal to which no-one responded.

Mayor Riggs asked the Council if there were any questions regarding the exhibits, materials, pleadings, memoranda, stipulations, and motions submitted in the record. There were none.

Mayor Riggs proceeded with reading the required statements as listed on the script. Mayor Riggs then asked City Manager Wullschlager to deliver his report. Wullschlager delivered his report stating the facts of the application which included: The date of application submission and official City acceptance; the publication procedures and

dates for the Planning Commission quasi-judicial review; the criteria from the GMC and the Garibaldi Comprehensive Plan against which the application was measured; the dates of any continuances; any staff recommendation as submitted by City staff; any conditions as determined by the Garibaldi Planning Commission; the date of decision by the Garibaldi Planning Commission; the dates of conclusion by final written order of the Garibaldi Planning Commission Chair; the dates of receipt of any appeals; and the noticing of a review of a Planning Commission decision (appeal).

Mayor Riggs asked if council had any questions of staff regarding the application. There were no questions. Mayor Riggs moved forward by instructing the City Manager, acting as the city Recorder, to present the final order and findings of the facts adopted in support of the decision being appealed.

Mayor Riggs asked for Appellant Testimony and noted that the appeal was received by the City on June 26, 2020. City Manager Wullschlager stated the basis for objection on the part of the appellant. Mayor Riggs stated that no new evidence or testimony would be permitted or allowed.

Ms. Jenny Bricker Esq., representing the appellant was recognized. Ms. Bricker submitted testimony stating the following for the record:

The City of Garibaldi Planning Commission denied Conditional Use Application CU-2020-01 in its public meeting on June 10, 2020 and issued its written final order on June 25, 2020. I represent the applicant, Coastal Housing Solutions, LLC. Please accept this letter as written notice of the applicant's appeal of the Planning Commission's decision. The applicant is the project proponent and was present at the Planning Commission meeting on June 10, 2020.

The grounds for appeal can be summarized as follows. The Commission considered the Staff Report dated March 12, 2020, which described the decision criteria under Title 18 of the Garibaldi Municipal Code and the Garibaldi Comprehensive Plan and concluded that the Commission could establish findings that the application complies with applicable criteria.

Members of the Commission questioned the Planner at length about the Staff Report.

No issue arose during the public meeting or the Commission's deliberations to suggest that the applicant failed to comply with any specific decision criterion. The three Commissioners who voted against the application could not point to noncompliance with any provision of the GMC. Indeed, Chair Findling stated that the application "adheres to the letter of the code," but nevertheless voted no based on a vague general reference to the Comprehensive Plan. Similarly, in explaining her no vote, Commissioner Parker did not cite any GMC provision but stated that "it doesn't feel like the right time or place" for the project, citing the Comprehensive Plan. Commissioner Inman gave no code-based explanation for her no vote.

I. Conditional Use Review Criteria

It is important to keep in mind that a conditional use is an allowed use, but one that is conditioned on review of the project to ensure its consistency with applicable standards. The project is a conditional use in both the R-1 Zone (GMC 18.15.030) and the C-1 Zone (GMC 18.25.030). Those sections establish restrictions on lot size, dimensions, and setbacks. According to the Staff Report, the zoning criteria are met. Nothing in the Commission's decision supports a contrary conclusion.

Portions of the project site lie within the hillside overlay zone (GMC 18.80). The

applicant submitted a geotechnical report, grading plan, and erosion control plan, which according to the Staff Report, meet the requirements of GMC 18.80.050.A. The report of the Geotechnical Engineer meets the requirements established in GMC 18.80.050.B. See the "Expert Reports" section below for additional discussion of this requirement.

GMC 18.110.010 imposes restrictions on multifamily dwellings. The application meets the criteria in this section, and nothing in the Commission's decision supports a contrary conclusion.

GMC 18.125 sets criteria for parking areas. The application meets these criteria. Nothing in the Commission's decision supports a contrary conclusion.

Finally, GMC 18.185 sets forth the review criteria for conditional uses. GMC 18.185.020.A requires consistency with the Garibaldi Comprehensive Plan. The consistency requirement appears to have been the Commission's sole basis for denial.

II. Comprehensive Plan Consistency

GMC 18.185.020.A requires that the proposed use "is consistent with the policies of the comprehensive plan." At the June 10, 2020, meeting, both Commissioner Parker and Chair Findling cited the Plan generally as the basis for their votes against the project, without identifying any specific inconsistency. Commissioner Inman voted against the project without citing a specific, code-based reason. GMC 18.210.050 establishes procedural requirements to ensure a fair, unbiased result. Subsection F, for example, requires a decision to incorporate findings of fact to support the decision; under GMC 18.210.050.F.1.c, an official who votes to deny approval must address "those criteria upon which the applicant failed to carry the burden of proof or, when appropriate, the facts in the record that support denial." The Commissioners who voted against the project failed to meet this procedural requirement, which puts the applicant at a disadvantage in knowing how to respond. From the nature of the project and the comments of Commissioner Parker at the June 10 hearing, the applicant assumes the Commissioners were referring to Goal 10, Housing (see, e.g., Finding Nos. 50 and 53).

Goal 10 is a requirement that local jurisdictions, like Garibaldi, must ensure there is enough housing for the long-term needs of their citizens. The Goal itself is not a regulation meant to impose additional restrictions on permit applicants. Instead, under GMC 18.185.020.A, conditional use applicants must show that "[t]he proposed use is consistent with the policies of the comprehensive plan" (emphasis added).

The Goal 10 policies are set forth in Chapter VI of the Plan, which follows a typical structure: Subsection A summarizes Goal 10 requirements; subsection B provides findings. The "Findings" section includes an analysis of population and housing trends (B.1); an analysis of future housing needs, by type (8.2); an analysis of future acreage needs, by zone (8.3); broad goals based on the analyses (8.4); policies calculated to meet those goals (8.5); and strategies for meeting goals and policies (8.6). The goals, policies, and strategies of Chapter VI are the City's responsibility, not the applicants. In accordance with GMC 18.185.020, the application is measured against the policies, to ensure consistency. That provision is designed to help the City meet its Goal 10 obligations. Neither Goal 10 nor its implementing Chapter VI are supposed to function as additional code requirements, or to be used as a regulatory "hammer." The Plan is a guidance document. It is not intended to establish minimum numbers or hard and fast rules limiting new development. In fact, using the Plan to limit new development directly contradicts the purpose of Goal 10, which is "to provide opportunities for the development of adequate numbers of needed housing units at price ranges and rent levels that are commensurate with the financial capabilities of Oregon households."

In critiquing the project, Commissioner Parker pointed to Table 6 on page 15 of Chapter VI, stating that projected future housing needs from 2005 to 2025 included 172 units in

the R-1 and C-1 Zones, with only 23 units of multi-family housing in those zones (Finding No. 50, ¶ 4). Commissioner Parker seems to believe that those numbers represent restrictions on new development. They do not. Table 6 is not a regulation limiting types or numbers of housing developments; rather, it is worksheet of assumptions used to analyze future land needs, and specifically whether Garibaldi has enough acreage within the UG8 to meet projected needs for future housing.

Commissioner Parker also stated that "the application does not support" two of the "Goals" in subsection 4, page 16, to "provide opportunities for development of housing in a range of types and price ranges" and to "minimize environmental impacts." Commissioner Parker apparently believes that the City should deny the application so that it can "identify and recognize the need for other types of housing" (Finding No. 50, ¶ 6), including cottages, duplexes, triplexes, townhomes, and row houses (Finding No. 53, ¶ 7).

Commissioner Parker's interpretation of the Plan is incorrect. First, the consistency requirement applies to policies, not to goals -which are stated in terms too general to make a finding of consistency meaningful. Second, the application does not have to "support" the goals or the policies: It need only be consistent.

Nevertheless, the proposed use is consistent and does support the policies in subsection B.5 because it helps the City "provide needed low and moderate-income housing." There is no evidence in the record to the contrary, but there is evidence to support consistency. For example, Michelle Adler provided hearing testimony in favor of the project. Ms. Adler, a school board member, stressed high rates of homelessness among students and the difficulty the school district experiences in finding elementary school staff because of a shortage of housing they can afford (Finding No. 57, ¶ 4). In addition, the applicant stated that his existing apartments, 44 units, are fully occupied with a waiting list.

The Comprehensive Plan does not give the Commission a legitimate basis for denial. The Council must overturn the decision and approve this project because it is consistent with the policies of the Plan and it satisfies the review criteria in the Code.

III. Other Considerations

In the hearings on May 13, 2020, and June 10, 2020, the Commission considered evidence that was unreliable, irrelevant, or both. In the interests of being thorough, we offer the following rebuttal.

A. Expert Reports

The applicant commissioned a report from a registered geotechnical engineer, Daniel Redmond of Redmond Geotechnical Services. Mr. Redmond concluded that "the site is presently stable and generally suitable for the proposed [use]." As the City Engineer observed (Finding No. 58, ¶15), Mr. Redmond is a professional, held to ethical standards that should allay any concern about bias. Evidence from a professional such as Mr. Redmond constitutes evidence "of a type commonly relied upon by reasonable and prudent persons in the conduct of serious affairs" and is therefore admissible under GMC 18.210.050.E.2.c.i.

Likewise, the City Engineer, Blake Lettenmaier, is a registered engineer -a licensed and qualified professional. He gave his professional opinion that groundwater would not be an issue on the site and that drainage would not adversely affect adjacent property (Finding No. 58, ¶¶21, 26). He stated that the applicant's proposed grading was "fine," was not a problem under the hillside overlay zone, and would not affect the adjacent property owner except that the property to the west might become more stable as a result of the development (Finding No. 58, ¶¶ 24, 26, 28). The City Engineer's statements constitute evidence "of a type commonly relied upon by reasonable and prudent persons

in the conduct of serious affairs" and are therefore admissible under GMC 18.210.050.E.2.c.i.

Sean Malone, an attorney representing project opponent Carl Kopacek, submitted written testimony concluding that "the geotechnical report is not 'adequate'" (Sean T. Malone Letter of May 13, 2020, at 2). Linda Bade provided hearing testimony that she was concerned about "unintended consequences" of development (Finding No. 58, ¶ 7). She stated that "my belief is that this whole area is geographically a little on the unstable side"; however, she also admitted, "I'm not an expert on any of that" (Finding No. 58, ¶ 9). Neither Mr. Malone nor Ms. Bade are qualified to give professional opinions about geotechnical issues, nor are either in a position to legitimately question Mr. Redmond's conclusions. With respect to the geotechnical report, the statements of Sean Malone and Linda Bade are not admissible and must not be factors in the Council's decision, because the statements fail to meet the standard in GMC 18.210.050.E.2.c.i.

The applicant also submitted a traffic impact study, as required by GMC 18.210.110. The TIS was authored by OKS Associates, a well-recognized regional transportation engineering firm. To measure the estimated traffic impacts of the project, OKS relied on historical count data on Highway 101, from both ODOT and the Garibaldi Transportation System Plan. Although historic counts have been steady or declining since 2002, OKS took the conservative approach of assuming a modest growth rate for traffic volumes in 2021. The report concludes: "[The] project is expected to have little impact on traffic operations. The site driveway is expected to operate with minor to moderate delay during peak hours and perform at v/c [volume to capacity] ratio of 0.28 or better." The v/c ratio is a measure of congestion and traffic delays. As explained in the report (pages 78-79 of the application), a v/c ratio of 0.00 represents no delay, while a ratio of 1.00 represents increased congestion and delay. The "background conditions" v/c ratio for 2021 at the project site is 0.27, meaning that the project would increase the ratio by just 0.01. ODOT requires a v/c ratio of 0.85 or less for highways under its jurisdiction.

As with the geotechnical report, the TIS constitutes evidence "of a type commonly relied upon by reasonable and prudent persons in the conduct of serious affairs" and is therefore admissible under GMC 18.210.050.E.2.c.i.

Chair Findling registered his concern that the TIS was not done during "peak times" of traffic flow along Highway 101 (Finding No. 18); he insisted that the study should be supplemented with "historical data" (Finding No. 22) because "the study picked the slowest time of the year to show that the numbers met the threshold" (Finding No. 53 ,I 32). Commissioner Buker and Commissioner Parker also wanted the study to incorporate data from summer weekends or a holiday weekend (Finding Nos. 23 and 24).

The Commissioners are incorrect in their understanding of the TIS. First, OKS did not do traffic counts for this TIS; they relied exclusively on historical data, using ODOT methodologies. The dates printed at the top of the "Synchro 9 Report" (pages 85-87 of the application) are simply the dates the results of the analysis were printed. Second, the TIS did factor in traffic volumes from peak times. To establish background conditions, the TIS used historical data from ODOT transportation volume tables, as well as peak hour data from the Garibaldi TSP. The TIS incorporated ODOT data on average annual daily traffic ("MDT"), and thus accounted for peak time usage. According to ODOT volume data along Highway 101 (Table 1 of the TIS), the MDT totaled 8,000 trips in 2002 and 7,800 trips in 2018.

Neither Chair Findling nor the other Commissioners are qualified to question the methodology or conclusions of a study authored by professionals. The Commissioners' opinions about the reliability of the TIS are not admissible and must not be factors in the

Council's decision, because the opinions fail to meet the standard in GMC 18.210.050.E.2.c.i. In addition, the Commissioners lack the "specialized knowledge" required to take official notice of the relevance of "peak times" under GMC 18.210.050.E.2.c.ii.

In contrast, the City Engineer, a professional engineer qualified to give an informed opinion, clarified that "the study used historical data" (Finding No. 53, ¶ 42). He stated that peak season traffic counts range from 9,000 to 10,000 trips per day, possibly as many as 11,000 (Id.). Those counts are fully consistent with an MDT of 8,000 or 7,800.

The TIS's conclusion, that additional traffic will be insignificant, "has nothing to do with the date of the report as historical data was used," according to the City Engineer (Finding No. 53, ¶ 42). Again, the City Engineer's statements constitute evidence "of a type commonly relied upon by reasonable and prudent persons in the conduct of serious affairs" and are therefore admissible under GMC 18.210.050.E.2.c.i.

The Council should defer to the conclusions in the TIS and to the City Engineer's interpretation. The Council should give no weight to the non-expert opinions and comments of Chair Findling and the other Commissioners.

B. Design Review

The City of Garibaldi does not require design review in addition to conditional use approval. Despite that, Commissioner Parker insisted during the June 10 hearing that the "look" of the project was an important consideration (see, e.g., Finding Nos. 14, 16, 50, ¶ 25). Because there is no design review process, however, the concerns Commissioner Parker raised about color and lighting and design cannot be relevant considerations for decision.

C. GMC 18.05.020

GMC 18.05.020 states the purpose of Title 18, as follows: "to encourage the orderly development of the city; to promote appropriate uses of land; to conserve and stabilize the value of property; to provide adequate light and air; to lessen congestion; to prevent undue concentration of population; to facilitate adequate provisions for community facilities such as water supply and sewerage; to protect and enhance the appearance of the city; and in general to promote the public health, safety, convenience, and general welfare."

Citing this provision, Carl Kopacek provided hearing testimony that the proposed project is contrary to Garibaldi's "orderly development" (Finding No. 58, ¶¶ 29, 31). In addition, Commissioner Parker stated that "air and light" was a "standard" that the Commission must address (Finding No. 50, ¶ 27).

This statement of purpose is not, and cannot be, a review criterion. First, it is by its express terms a summary of the purpose or policies that the more specific requirements of Title 18 are intended to implement; it is not in itself a requirement applicable to particular applications. Second, the regulated community cannot be held to vague, aspirational statements because, as a practical matter, evaluation for compliance would be impossible. The policies expressed in GMC 18.05.020, like the goals in the Comprehensive Plan, are not intended to function as a regulatory hammer - but rather to guide the City's decision making over time.

In making its decision on the application before it, the City must apply strict and particularized review criteria from the Code and be guided by documents such as the Comprehensive Plan and GMC 18.05.020. It does not serve the City and is not fair to the regulated community to use those guidance documents as justification for denial of a sound, beneficial project like this one that fully complies with all review criteria.

Mayor Riggs thanked Ms. Bricker for her testimony and asked the Council if they wanted to

consider any other information that was not new evidence or testimony. Mr. Sean T. Malone asked if the City was going to take any opposition Testimony. Mayor Riggs stated that the City attorney directed the City to not permit any other testimony. Mr. Malone stated that he did not know of any land use hearing process that did not allow for opposition testimony. City Manager Wullschlager stated that the City Attorney had directed the City to not take any other testimony. Mr. Malone protested, and City Manager Wullschlager indicated to Mayor Riggs that if Mr. Malone would like to present, that he could be permitted to.

Mr. Malone offered the following testimony with subsequent illustrative attachments:

On behalf of Carl Kopacek, please place this supplemental, open record testimony into the record for the above-referenced application. I respectfully request that the application be denied for the following reasons.

The applicant alleges that an eastbound left-turn is not warranted for the site because the "proposed development generates fewer than 10 left turns into the site during the PM peak hour. This is not consistent with the trip count of 37 PM peak trips. The applicant has not provided a rationale as to why the left-turns comprise only (roughly) one-quarter of all the PM peak trips. This is all the more suspect when the total eastbound trips at the PM peak hour is 420 and the total westbound trips are 480 at the PM peak hour. If the number of trips eastbound and westbound are comparable, why would left turns represent only one quarter. It simply does not add up. Moreover, the applicant must disclose the "left turn warrant analysis," so that the public may review it. The development will result in 483 daily trips and the eastbound left-turns will cause delays and backups along Highway 101.

As noted in previous testimony, the applicant must disclose, at this time, the amount of land that will be dedicated as right-of-way in order to make accurate determinations about impervious surface coverage and lot coverage, under GMC 18.80.050(G). The City must interpret GMC 18.80.050(G) within the context of the buildable area, not simply the entire lot.

The information about encountering groundwater is not helpful, unless the applicant has disclosed the time of year the exploratory test pits were dug. If the pits were excavated in the summer or dryer months, the figure must be updated with groundwater depth during the winter and spring months, which are typically drier.

Ironically, the geotechnical analysis acknowledges the materiality of this issue when it alleges that the "moisture sensitivity" of the site could be mitigated by requiring "all site grading and earthwork operations be scheduled (if possible) for the drier summer months which is typically late June through September." An addendum to the geotechnical report must be provided that addresses the wetter months.

As noted in prior testimony, the DOGAMI SLIDO1 mapping for this property indicates landslide deposits and high and very high landslide susceptibility. See Exhibits A through E (Exhibit A – Aerial photo; Exhibit B – landslide deposits; Exhibit C – landslide susceptibility; Exhibit D – Lidar – Bare Earth; Exhibit E – Lidar – Hillshade). Despite being publicly available information and the Geotech report's allegation that it purports to "[r]eview ... available and relevant (pertinent) geologic maps and/or geotechnical reports for the subject area," the geotechnical report does not address these glaring issues that call into question the suitability of the site for the proposal. Moreover, the following statement about slope instability appears to be at odds with the DOGAMI SLIDO maps: "the risk of slope instability at the site resulting in landslides and/or lateral earth movements does not appear to present a serious potential geologic hazard or this project." Moreover, the notion that the "site is presently stable and generally suitable for the proposed new" use not plausible until the applicant addresses the DOGAMI SLIDO maps. The failure to account for these issues means that the applicant has not fully complied with GMC 18.80.050(C)(1)(a), GMC 18.80.050(A), and GMC

18.185.020(E).

After alleging the property is suitable for the proposed use, the geotechnical report goes on to identify existing concerns. These include the presence of existing undocumented fill materials across the site; the presence of moderately steep slopes located across the southerly and easterly portions of the site; and the moisture sensitivity of the underlying native clayey silt subgrade soils. As for the first concern, the geotechnical report notes that "all existing fill materials present beneath the planned new site improvements should be removed in their entirety down to an approved native subgrade soil and/or replaced with properly compacted structural fill."

The applicant has not identified what effect this significant removal would have on the property and the applicant has not disclosed the extent of that removal (i.e., how much of the property will be subject to removal). The "site preparation" alleges that "areas requiring deeper removals, such as the existing undocumented fill materials and/or old foundation remnants, will be encountered and should be evaluated at the time of construction by the Geotechnical Engineer." Again, the extent of that material and depth of removal must be disclosed in light of the DOGAMI SLIDO maps. Until that occurs, the geotechnical report necessarily falls short.

As it relates to the next concern, there appears to be some contradiction in the geotechnical analysis. The geotechnical analysis notes that "although a site grading plan is not available at this time, we envision that some grading and/or fill placement will be required for the proposed apartment project." This appears to be stock language because the prior concern made clear that significant removal and grading will occur. If the geotechnical analysis has not acknowledged a grading plan, which must be reviewed by the geotechnical consultant, then it is questionable why the application alleges that a grading plan GMC 18.80.050(2) requires a grading plan and includes numerous criteria for the plan. The application alleges that a "grading/erosion control plan has been prepared by a licensed Professional Engineer and is included in the plan set at C8.0." C8.0 is identified as an erosion plan, not a grading plan. A grading plan is required of GMC 18.080.050(2), whereas an erosion control plan is required of GMC 18.080.050(3). Looking to C8.0, the single page that apparently constitutes both plans does not include the location of existing buildings or structures, and it does not appear that all cut and fill slopes, proposed drainage channels, and related construction have been disclosed. It is also not apparent where the location of all surface and subsurface drainage devices or protective devices to be constructed, as well as drainage areas, complete drainage network, and so forth, as required by GMC 18.080.050(2). This is all the more important when coupled with the concern from the geotechnical consultant noted that the site's "moisture sensitivity."

For the above reasons, the application cannot be approved because it violates the GMC and state law, as well as prejudice the substantial rights of my client.

Mayor Riggs asked the City Council if they wanted any public review of the minutes to which there was no interest put forth.

Mayor Riggs then closed the public hearing at 7:42 p.m.

Mayor Riggs re-opened the regular meeting at 7:43 p.m. and asked the Council for deliberation on the application.

IV. CONSENT CALENDAR: NONE

V. OLD BUSINESS: NONE

VI. NEW BUSINESS: Consideration Planning Commission Decision CU 2020-01

Cn. Elmore made a MOTION to remand the decision to the Planning Commission with instructions. Mayor Riggs seconded.

AYES: Elmore, Riggs; NAYS: Hall; RESCUSAL: Daniels; ABSTAIN: Cavitt; 2 Aye's, 1 Nay, 1 Recusal, 1 Abstention. **MOTION PASSES.**

VII. ADJOURNMENT

Mayor Riggs adjourned the regular council meeting at 8:14 p.m.



Judy Riggs, Mayor

ATTEST:



Geoff Wullschlager, City Manager

