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Continuance of Conditional Use Permit (Type III) CUP-19-03

SUPPLEMENTAL STAFF REPORT

Date Submitted: April 15th, 2020

Agenda Date Requested: April 21st, 2020

To: John Day Planning Commission

From: Nick Green
John Day City Manager

Subject: Smartt Conditional Use Permit (Type III Quasi-Judicial)

Location: 212 Valley View Drive
Map: 13S31E22A Tax Lot: 1600

Type of Action Requested:

<input type="checkbox"/>	Resolution	<input type="checkbox"/>	Ordinance
<input checked="" type="checkbox"/>	Formal Action	<input type="checkbox"/>	Report Only

1. BACKGROUND

Steve and Kathy Smartt are the owners of 212 Valley View Drive (Map Number 13S31E22A Tax Lot 1600). The property is zoned Residential General (RG). Mr. Smartt is requesting a Conditional Use Permit to build an accessory structure exceeding the standard size permitted by the city development code. Table 5-2.2.020 of the code allows accessory structures taller than 14 ft., or larger than 1,000 sq. ft. of building footprint, in residential zones only with a conditional use permit. The proposed building would be 30x40 ft. (1,200 sq. ft.) with a height of 18.5 ft.

On January 14th, 2020 and March 12, 2020, the Planning Commission conducted a public hearing on CUP-19-03. On March 12, after receiving written testimony from Mr. Burton,

(Exhibit B), a neighbor of the Smartt's, and further oral and written testimony from the applicant, (Exhibit C), the Commission closed the hearing and deliberated on the application.

The Commission was unable to reach a majority vote to approve or deny the application. Instead, the Chair "tabled" the application, reopened the record, and recommended the Commission refer the application to City Council.

2. KEY ISSUES

The key issue that the Commission debated is whether the accessory structure would have a negative impact on adjacent residents' views of the surrounding mountains. Where a CUP is required, the code specifically allows the City to limit height and impose other reasonable conditions of approval to mitigate negative impacts, which may include aesthetic impacts or "views". Although the City routinely requires submittal of any existing CC&Rs with land use applications, CC&Rs are private agreements that the City has no authority to enforce. This is discussed in more detail below.

The applicant did submit photographs and oral and written testimony (evidence) supporting his argument that the CUP criteria were met. He explained and the commissioners acknowledged that he graded the site to reduce the finished floor elevation of the proposed structure to avoid blocking views from his own house. Based on the grading plan and proposed building elevations, did the applicant satisfy the CUP criteria relating to aesthetics and negative impacts to neighboring properties? Did Mr. Burton submit evidence to the contrary?

Following the March 12 Planning Commission meeting, staff reviewed the development code to verify the correct procedure for the City to issue a final decision under the circumstances, due to the split vote. Staff also contacted Mr. Smartt and requested that he extend the 120-rule rule under ORS 197.178, because the City was at risk of exceeding the deadline for making a final decision, which was March 19th. Mr. Smartt has allowed an additional 120 days for the City to make a final decision under the statute, which must include completion of any appeal to City Council. See applicant's waiver of 120-day rule in Exhibit D.

2. APPLICABLE CRITERIA AND REVIEW PROCEDURE

During the March 12 hearing, the Commission focused its deliberation on the CC&Rs for Ironwood Estates, specifically the private covenant (non-land use restriction) protecting views for some property owners. On the motion to approve the application that evening, Commissioners Wilson, Boethin, and Aleman voted "no", stating they may have voted to approve the CUP if there were no conflict with the CC&Rs.

Although the CC&Rs are not applicable land use criteria, the Commission may "take notice" of CC&Rs (or any other facts in the record it deems relevant) in making its decision to approve or deny a CUP, provided the decision itself must be based on the applicable land use criteria, which for this application are contained in the John Day Development Code, Section 5-4.4.040.

Due to the 3:3 split vote, the Commission “tabled” the application and left the record open, which means the Commission did not make a decision. Staff’s reading of the code is that the Commission must approve, deny, or approve with conditions the CUP application. **“No decision”, or referral to City Council, are not options.** The applicant and other parties with standing are entitled to due process which includes the ability to appeal the Commission’s decision to the City Council if they want. **It is not within the Commission’s purview to decide which applications the City Council reviews.**

One other observation on the failed motion is that it relied entirely on “findings in the staff report”. However, the March 5 staff report does not provide a complete set of findings. Instead, staff felt that it would be appropriate for the Commission to receive public testimony and then decide whether the CUP criteria were met, establishing its own findings specifically with regard to criterion A.2:

A.2. The negative impacts of the proposed use on adjacent properties and on the public can be mitigated through application of other code standards, or other reasonable conditions of approval. [emphasis added]

The Commission must decide whether the proposed accessory structure will have negative impacts on adjacent properties, and if so whether those impacts can be mitigated with conditions of approval.

In addition, although the March 5 staff report addresses CUP criterion A.1, the Commission should also consider whether criterion A.1 is met in light of how it rules on criterion A.2.

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

Staff Findings: The size, dimensions, location, topography and access are adequate for the proposed use.

Does the Commission agree with the staff finding that the size, height and location of the accessory structure adequately address potential visibility (view) and aesthetic considerations based on evidence in the record?

3. SUPPLEMENTAL ANALYSIS

The applicant has submitted photographs (Exhibit D) and a grading diagram/profile which he says shows the accessory structure sitting well below the sight lines of adjacent homes (Exhibit E). Mr. Smartt has testified that he believes this demonstrates the CUP criteria are met. Mr. Burton has submitted two letters stating that the proposed accessory structure would impair views contrary to the intent of the Ironwood Estates subdivision and city codes (Exhibit B). **With whom does the Commission agree and based on what set of facts (evidence) in the record?**

Before granting CUP approval, the Commission must also find that the application meets the criteria for variance approval (under CUP subsection A.4). A key criterion for approving a variance is that the proposed deviation from a zoning standard is the “minimum necessary” to achieve reasonable use of the property as allowed by the zone.

While the applicant’s proposed accessory structure is a reasonable use for a residential zone, and it can be argued that it is reasonably sized (1,200 sq. ft.) to provide a functional workshop space, **the Commission should consider whether the structure would cause negative impacts to adjacent properties (e.g., due to height/view concerns) as argued by Mr. Burton.** If negative impacts would result, the Commission may impose reasonable conditions to mitigate the impacts, for example by limiting height or placement of the structure. If impacts to adjacent properties cannot be mitigated, the Commission is obliged to deny the application.

4. RECOMMENDATION

Staff recommends the Commission accept final written testimony including evidence and argument up until and including the April 21, 2020 Planning Commission meeting. The Commission may also allow oral testimony but the hearing record should then be closed following that oral testimony, if any.

The Commission will need to decide whether to approve, deny, or approve the CUP with conditions. The Commission may refer to the March 5 staff report along with this supplemental report in making its decision, but it will also need to provide findings relative to CUP criteria A.1, A.2, and A.4, above.

The Commission must determine if there is evidence in the record that allowing the structure as proposed would cause negative impacts to adjacent properties:

- If the answer is no (there is no evidence of negative impacts on adjacent properties), the Commission should approve the application as proposed.
- If the answer is yes (there is evidence of negative impacts), the Commission should consider whether those impacts can reasonably be mitigated.
 - Can the impacts be mitigated by imposing conditions of approval (e.g., reduced height, different placement of the structure on the lot, etc.)? If so, the Commission should approve the application with conditions.
 - If impacts on adjacent properties cannot reasonably be mitigated the Commission must deny the CUP application.

The Commission must also decide if the proposed structure height is the minimum necessary variance.

Referring the application to City Council is not an option under the code. Whatever the Commission decides, any party with standing will have an opportunity to appeal the decision to City Council and given the circumstances the City Manager may waive the appeal fee.

5. PLANNING COMMISSION MOTION

After receiving any further applicant presentation, public testimony, and applicant rebuttal, the Commission will need to close the hearing and deliberate. The following motions are suggested:

“I move to approve the Conditional Use Application CUP-19-03 as proposed, based on the findings in the March 5, 2020 and April 2, 2020 staff reports and relevant public testimony; the proposed accessory structure will have no negative impact on adjacent properties.” Or...

“I move to approve the Conditional Use Application CUP-19-03 with the condition that *[clearly state condition]*, based on the findings in the March 5, 2020 and April 2, 2020 staff reports and relevant public testimony; as conditioned, any negative aesthetic/view impacts on adjacent properties will be mitigated” Or...

“I move to deny the Conditional Use Application CUP-19-03 based on the findings contained in the staff report and relevant public testimony; the accessory structure will have negative aesthetic impacts on adjacent properties by blocking residents’ mountain views.”

The staff report may be amended during the course of the hearing.

Respectfully submitted April 15th, 2020



Nicholas Green, City Planning Official

Attachments: Application (Exhibit A)
Letters from neighbor- Larry Burton (Exhibit B)
Letters from applicant- Steve Smartt (Exhibit C)
Site Photographs (Exhibit D)
Grading Plan (Exhibit E)