

February 19, 2021

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City Council
City of John Day
c/o City Manager, Nicholas Green
450 East Main St.
John Day, OR 97845

RE: Riverside Home Park, LLC's Comments on Proposed Ordinances
Our File No.: 135966-252955

Mayor Lundbom, Councilors:

Our offices represent Riverside Home Park, LLC ("**Riverside**" or the "**Park**"). This letter provides Riverside's comments on the torrent of new ordinances and request that the City of John Day (the "**City**") include this letter in the records for AMD-20-10, AMD-20-11, AMD-21-02, and the RERC Adopting Ordinance.

I. Introduction and Background

Riverside is a manufactured home park that provides roughly 15% of the housing supply for John Day and has been a valid and existing use since the 1960s. The entire park is adjacent to the John Day River and includes roughly 23 acres and 154 spaces for manufactured housing. Riverside provides affordable housing to some of the poorest residences in the City, and indeed, in all of Oregon. In recent years, Riverside has worked hard to upgrade the park. This has been a relatively slow process as it is complicated and requires careful compliance with state law, including issues regarding landlord-tenant rights, equal housing, and the state's manufactured housing statutes. In the last 14-months alone, this has meant an investment in excess of \$100,000.

Riverside is proud that it continues to provide some of the poorest citizens in all of Oregon with a safe place to live and a roof over their heads. Indeed, but for the extremely low rental rates that Riverside has attempted to maintain (most as low as \$230 per month), the City would likely see an increase in homelessness, people camping in public areas, and people of all ages living out of vehicles parked on the street.

Riverside is unclear as to whether the City Council is aware of the City's roughly 16-month battle and ongoing harassment at the hands of the City's Manager. Rather than repeat all actions unlawfully taken against Riverside, we highlight a few here:

- Early fall 2019: City Manager meets with Riverside's ownership after including portions of the Park on trail maps for the City's "Innovation Gateway." Riverside objects to the City planning to use its private property without compensation. City Manager asks if the City could purchase the park but scoffs when told the appraised value.
- November 2019: City Manager takes a tour of the Park and informs Riverside that there are "hundreds" of code violations. The City Manager then presents Riverside with an "Abatement Agreement" that would essentially require the Park to be gutted and dozens of families made homeless. Riverside refuses to sign such agreement and asks for even a basic list of the alleged code violations.
- January 14, 2020: City Manager takes a request before the Planning Commission to unlawfully revoke a conditional use permit related to the Park. Our offices are engaged to appeal that unlawful revocation. The City relents when the revocation is appealed to the City Council and the Land Use Board of Appeals ("**LUBA**") and withdraws that revocation. Riverside files a Tort Claim Notice against the City.
- April 9, 2020: City Manager issues to Riverside a "Cease and Desist and Notice of Code Violation" alleging that Riverside conducted unlawful fill in the John Day River. The notice is followed by a "Criminal Citation" for violating a particular section of the John Day Development Code ("**Code**"). The Criminal Citation is later dismissed by the circuit court.

City Manager also reports Riverside to the Department of State Lands ("**DSL**") alleging the same violation. DSL investigates and determines no such violation.

- May 2020: Without proper notice, City Manager asks the Planning Commission and the City Council to adopt two new ordinances that directly target Riverside and its business. Due to improper notice, the amendments were challenged by Riverside. Riverside files another Tort Claim Notice against the City.
- June 2020: Through referral from local DLCD Representative, mediator Sam Imperati ("**Mediator**") contacts both Riverside and the City about the possibility to mediate, paid for by DLCD.
- September 2020: Planning Commission again tries to take up ordinances, which, again, are improperly noticed and do not provide the availability for the public to comment.
- November 2020: Planning Commission again takes up the ordinances. Riverside comments voicing significant concern.

Mediator re-contacts both parties to offer assistance.

- January 2021: Planning Commission recommends approval of ordinances over the objection of Riverside.
- February 2021: Riverside renews its objections to the passing of ordinances that make the cost of doing business in John Day more expensive, and to the passing of any ordinance that provides the City Manager any more authority or discretion. The trust between Riverside and the City Manager is broken. Despite continued requests, the City Manager still refuses to provide Riverside with a list of alleged code violations, and, instead, has spent nearly a year attempting to adopt new code provisions that would enable the City to revoke, fine, or otherwise punish Riverside for alleged violations.

II. The City Council should decline to adopt Ordinance No. 20-188-09 (AMD-20-10) or remand it to the Planning Commission to Incorporate Changes that Protect Private Citizens

Riverside references and incorporates its previous comments regarding this code amendment. The draft presented to the Planning Commission and recommended for adoption by that body is substantially different from the proposal before the City Council and includes several changes made by staff that were not recommended by the Planning Commission. On that basis alone, this amendment should be remanded to the Planning Commission for review before a new recommendation before this body.

Section B of AMD-20-10 “deems” any violation of the code to be a “public nuisance” and subject to the procedures at Title 8, Chapter 2 of the Code. That is inappropriate and not supported by the law or by the Code. To the extent that the Code contains a definition of a “public nuisance” it is located at JDC 8-2-8-A, which states that “[a] public nuisance is any thing, condition, or act which is or may be a detriment or menace to the public health, safety, or welfare. No person will cause, permit, or maintain a public nuisance on public or private property.” Therefore, any “public nuisance” must, invariably, provide some risk of public health and safety. To the extent a party fails to get the proper permit or other technical violation of the code, or, perhaps places a pre-fabricated shed on its property but violates setback requirements, such “violations” simply cannot sufficiently be tied to the doctrine of nuisance nor its application in the Code. Any attempt at enforcement for “violations” without specific endangerment to public health and safety cannot be inappropriately lumped in via this amendment to the Code.

Section D of AMD-20-10 seeks to greatly expand the City’s ability to revoke permitted land uses. This sets a scary precedent and will lead to increased harassment on less-desirable yet necessary uses (such as low-income housing), and enables revocation proceedings upon just a single allegation of violation – whether technical in nature or actually endangering the public.

It is likely that this provision will be un-equally applied and could cause an as-applied constitutional challenge because it is likely that the City’s enforcement is targeted more at uses and properties of low-income persons who could not defend against alleged violations. Further,

the remedy for a violation should be to seek compliance and not to revoke the permit. Such compliance can already be forced through the City's Code or via ORS 197.825(3)(a).

Section F, and its companion (the new definition of "Planning Official") are misguided. Under the current definition, there are no professional requirements for the "Planning Official" – no planning experience requirements, certifications, building inspection or other expertise, or any vetting process. Further, the City Manager is given full authority to appoint anyone to said function. Staff argues that there is "no incentive for the City Manager or Planning Official to designate someone that is unable to perform the duties assigned" but that assurance is simply not good enough. As stated above, Riverside has been forced to hold the current City Manager and Planning Official, Nicholas Green, accountable for a variety of illegal and improper planning acts. Enabling the City Manager to continue to appoint unqualified persons to administer the Code and independently enforce its provisions will only lead to additional conflict and litigation.

Lastly, Section I seeks to add vicarious liability to the owner of any property. Liability should lay with the bad actor alone. In Riverside's case, vicarious liability could be particularly inappropriate as Riverside is a landlord to 15% of the residents of the City. If a tenant violates the Code, even if corrected, the City could (and based upon the pattern of broken trust, will) seek penalty against Riverside – even if the violation is corrected. Further, during COVID-19, many of Riverside's authorities to enforce against its tenants, such as through eviction, remain, difficult. Although statewide moratoriums on eviction only relate to non-payment of rent, it is virtually impossible to schedule a court hearing or other process to seek eviction or other causes as well. Liability should be limited to the actor.

Lastly, to the extent the City plans to use this ordinance as a weapon, such as to punish or revoke permits due to past-occurring violations, such application is disallowed under the Oregon State Constitution as an *ex post facto* punishment. See Section 21, Oregon Constitution Article I. *State v. Harberts*, 198 Or App 546, 108 P3d 1201 (2005) (a law that increases the punishment for a crime for an offense committed prior to enhancement of the penalty is a prohibited *ex post facto* law).

III. The City Council should decline to adopt Ordinance No. 20-188-09 (AMD-20-11) or remand to the Planning Commission to Amend Consistent with these Comments

Riverside refers to and incorporates its past comments regarding this proposed amendment. Riverside's main objection to this amendment remains that it increases the cost of housing and seeks to further limit manufactured dwelling uses, which violates Housing Policy 1 of the John Day Comprehensive Plan.

Beyond that, Riverside is unclear as to the City's interpretation of Section F.1., which requires manufactured homes to be multi-sectional and in excess of 1,000 square feet. It is unclear whether the City intends this restriction to apply to manufactured homes outside of manufactured home/dwelling parks, or whether it only relates to those homes outside of dwelling parks. To the extent it intends this restriction to apply within parks, such as Riverside, the enactment of this restriction will result in a regulatory taking of approximately thirty (30) lots

within Riverside because the established lot sizes cannot accommodate more than a single-section manufactured dwelling. If it is the City's intent to apply this to Riverside, Riverside reserves the right to seek just compensation for such taking.

Further, given the rapid rise of tiny homes, which have substantially increased the options for affordable housing, this limitation is just poor policy. Staff included scant evidence with regard to its Goal 10 analysis, focusing on the actual lands and housing needs for new dwelling units within the City. No analysis was provided regarding the economic consequences and restriction in housing types that this amendment creates. It does not take a planning expert to see that prohibiting tiny homes or other affordable modularized homes – as this amendment does – violates the City's Comprehensive Plan, including Housing Policies 1, 2, 4, 6, and 8.

This amendment needs additional analysis and should be remanded to the Planning Commission until such analysis is provided.

IV. Ordinance No. 21-191-02 (AMD-21-02) is Designed to Reduce Public and Participation instead of furthering Oregon Planning Goal 1

The entire purpose of this amendment is to further restrict public participation and involvement. Staff is correct that this aligns the state and code requirements for notice. However, given that the City has failed to meet the current requirements, on numerous occasions (which Riverside has been forced to point out and/or appeal), further reducing procedural protections is ill advised. Additionally, the City continues to reduce public access in other matters, including reducing hours of operation and access to City Hall in general.

This pattern of reducing public notice, access, and participation is deeply concerning. The response from the City Manager on challenges to process and participation has resulted in this (and other) attempts at shutting down public participation. This should be a warning sign for all.

This amendment should be rejected until the City Manager and Planning Official can show an actual pattern and practice of meeting the existing requirements of the Code.

Perhaps most importantly, this amendment would be in direct conflict with the John Day Comprehensive Plan. The Comprehensive Plan requires that notice to DLCD be given 45 days prior to the first public hearing. *See* Plan Amendment Procedure 1, Comprehensive Plan, p. 85. However this amendment only amends the Code and *not* the Comprehensive Plan. Therefore, this amendment may not be adopted until accompanied by the required Comprehensive Plan amendment so that the two are not in conflict.

V. RERC Plan incorporates Riverside's Lands – Including for Public Access Trails – Without Just Compensation

The RERC Plan seeks to increase economic vitality within the City. Riverside applauds the City's work for that endeavor. However, this plan, when accompanied by the onslaught of additional regulation and consistent attack by the City Manager, has Riverside understandably

concerned. For example, page 9, Figure 4, again depicts and “integrated park and trail system” which directly traverses Riverside’s property. Riverside has not received compensation for this taking and will challenge any regulatory taking as such.

With more particularity, Riverside objects to certain findings contained within the Staff Report:

- Goal 1’s requirements are not met. The City conducted the bare minimum when it comes to process to adopt a new plan that governs future of John Day. According to the plan, only one community workshop was held, despite the fact that the City has been actively engaged in seeing grants and other code changes for the past 12-months to facilitate this plan’s adoption.
- Goal 2 is not met. The City has engaged in planned adoption of additional ordinances to facilitate the adoption and furtherance of the RERC Plan. The City provided no analysis as to how the RERC Plan comports with the City’s existing code and/or the Comprehensive Plan.
- Goal 10. Staff’s findings are in error. The RERC Plan impacts the housing provided by Riverside and violates Housing Policy 1, which seeks new ordinances to “better accommodate manufactured housing” instead of continuing the City’s assault on Riverside. (Including adding public trails over Riverside’s property.)

The impacts of the RERC Plan have not been properly evaluated. A more proper and complete analysis must be completed before the RERC and its adopting ordinance may be approved.

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VI. Conclusion

Riverside has attempted to work collaboratively with the City Manager. After multiple calls, ongoing correspondence, and multiple assurances that we should just “trust” the City Manager in performing his duties equitably, my client simply cannot continue to stand by and wait for the next attack. Over the past 13-months, rather than continuing to improve the Park, Riverside has spent tens of thousands of dollars fighting improper adoptions, illegal revocations, and erroneous reports to state agencies. Enough is enough.

Rather than collaborate or engage in the mediation process suggested by DLCD, the City Manager continues to attempt to adopt additional code provisions to weaponize the code against a manufactured home park that houses some of the state’s poorest citizens.

This Council should review each and every ordinance and each and every comment submitted, carefully. Anything that increases the cost to citizens during this extremely difficult time should be rejected. Now is not the time to hit the community when it is down or to further alienate the citizen and business community.

Sincerely,

/s/ J. Kenneth Katzaroff

J. Kenneth Katzaroff

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