

April 5, 2021

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Planning Commission  
City of John Day  
450 East Main St  
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RE: Text Amendment – AMD-20-10  
Our File No.: 135966-252955

Dear Chair Boethin, Planning Commissioners:

As you know, I represent Riverside Home Park (“*Riverside*”). Riverside thanks the Planning Commission for the opportunity to provide comments on the above-referenced text amendment (“*Text Amendment*”).

Riverside has already provided substantial comments on the Text Amendment. Riverside references and incorporates its previous letters here and will attempt to only address new issues.

**A. John Day Should Re-Notice the Text Amendment**

The City has been working on the Text Amendment for more than a year. During that time, substantial changes have been made such that the Text Amendment is substantially different from the previous proposal and should be re-noticed. Riverside accepts that re-notice to DLCD may not be required, however, as will be explained below, the newest version of the Text Amendment is substantially more expansive and should be re-noticed so that citizens of John Day know they have an opportunity to weigh in. Absent this public notice, it is my opinion, that any citizen has a viable claim of procedural prejudice that, if the Text Amendment is ultimately adopted and appealed to the Land Use Board of Appeals, would result in a remand.

As may be relevant, this body recommended to the City Council the adoption of the amendment attached as **Exhibit A** (“*Original TA*”) hereto. After a public hearing, the City Council continued the hearing. On March 23, 2021, staff then advised the City Council that it was going to revise the amendment and asked for it to be remanded to the Planning Commission. The result was the amendment now attached as **Exhibit B** (“*Amended TA*”), which was first released on March 31, 2021.

In an email dated March 31, 2021, I asked the City Manager to provide public notice. In an email dated April 5, 2021, the City Manager determined that no notice should be required. It is unconscionable that the City Manager is trying to restrict public participation regarding this Text Amendment. Statewide Planning Goal 1 is “Citizen Involvement.” Not providing notice to the citizenry of the substantial changes to this amendment violates Goal 1.

**B. The Amended TA is Substantially Broader and Significantly More Impactful**

The Amended TA creates a significantly higher burden on land use applicants than that imposed by the Original TA. For example, under the Original TA, an applicant for a land use permit needed to certify

- a. That to the best of the applicant's knowledge, the subject property including any prior development phases of the property, is currently in compliance with both the Development Code and any applicable prior land use approvals for the property;

Original TA, 2.

On their own, and without direction of City Council, staff has now changed the requirement to read:

- a. That the subject property, including any prior development phases of the property, is currently in compliance with both the Development Code and any applicable prior land use approvals for the property;

Amended TA, 2.

What has been struck from the Original TA is the knowledge qualifier. This knowledge qualify is important, because, as the code is written, the city may revoke a land use permit "on account of false statements contained in the application form or false representations made at a public hearing." Amended TA, 2. The consequence is that a unknowing certification that stated a property was in compliance, but in fact has even a technical violation of any city ordinance, can lead to permit revocation.

As was stated by a City Councilor at the City Council hearing on the matter, and I'm paraphrasing, but "almost every property in Grant County would violate [the nuisance code]." Unless and until that ordinance is changed, virtually no party can make the certification required by the Amended TA.

It is likely that the City Manager will state that the City is not concerned with technical violations. However, that is irrelevant. The code is and does what it says. Further, any person could challenge a land use permit on the basis of some violation – and the city could not issue an approval, due to this provision of the code. Riverside has already informed the City of the risk of weaponization of code sections like this, however that reality has fallen on deaf ears. The reality is this: the code, as drafted, encourages land use fights akin to the Hatfields vs. the McCoys.

As may be especially relevant to John Day, is that many uses in the City are valid non-conforming uses. This is because the City was late to the adoption of any sort of

relevant land use code. The consequence is that no portion of Text Amendment accounts for non-conforming uses. Therefore, a party with a valid non-conforming use cannot make the certification required without actively making a false statement.

### C. Potential Revision Requested

Riverside's significant concern related to the Text Amendment remains how it will be applied, and, if it will be applied equitably. Riverside continues to have doubts. That said, the proposed revision (below), or something substantially similar, would greatly alleviate Riverside's concerns.

Proposed Revision:

#### B. Code Enforcement and Land Use.

1. If a ~~property~~-Property is in violation of this Development Code or any other City ordinance, the City shall not approve any permit or other land use approval including, without limitation, building permits, land divisions, and property line adjustments.

#### 5-6.1.030 Definitions

The following definitions are organized alphabetically and some related terms are also grouped together and cross-referenced under group headings (*e.g.*, Transportation-Related, Environment-Related, etc.).

...

Property. For the purposes of 5-1.2.100, "Property" means an individual lot, whether a legal lot of record, tax lot, or otherwise, specific to an alleged code violation. In the context of mobile home parks, manufactured dwelling parks, or other similar uses, "Property" means the specific residential lot and authorized for manufactured or mobile dwelling siting and not the entire dwelling park.

### D. Conclusion

Riverside thanks the Planning Commission for the opportunity to comment. This Text Amendment provides the City significantly increased powers, and, like many in John Day,

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Riverside believes that bigger government with more power is ill advised. The citizens of John Day live there because of the liberties they have traditionally enjoyed. While we recognize change happens, it should be done mindfully and with respect to the culture of the citizenry.

Thank you for your consideration of Riverside's comments.

Very truly yours,

SCHWABE, WILLIAMSON & WYATT, P.C.

/s/ J. Kenneth Katzaroff

J. Kenneth Katzaroff

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EXHIBIT B  
CITY OF JOHN DAY  
ORDINANCE NO. 20-187-08  
AN ORDINANCE AMENDING THE JOHN DAY DEVELOPMENT CODE TO STRENGTHEN  
AND CLARIFY ENFORCEMENT PROVISIONS WITHIN THE CODE

Added language in double underline

Deleted language in ~~strikethrough~~

5-1.2.100 Enforcement

~~A. **Misdemeanor.** Any person violating or causing the violation of any of the provisions of this Code has committed a misdemeanor, and upon conviction thereof is punishable as prescribed in Section 1-4-1 of the City Code of John Day. Such person is guilty of a separate violation for each and every day during any portion of which any violation of this Code is committed or continued by such person.~~

~~B. **Abatement of Violation Required.** A finding of a violation of this Code shall not relieve the responsible party of the duty to abate the violation. The penalties imposed by this section are in addition to and not in lieu of any other remedies available to the City.~~

~~C. **Responsible Party.** If a provision of this Code is violated by a business or other entity, the officer or officers, or person or persons responsible for the violation shall be subject to the penalties imposed by this section.~~

**A. Compliance with the Development Code.**

1. No structure (or part of a structure) may be used, erected, moved, or altered, no land may be used, altered, or divided, and no other action shall be undertaken unless such action conforms with the regulations and requirements of this Development Code.

2. Violations of conditions of approval set forth in permits and approvals issued pursuant to this Development Code are violations of this Development Code.

3. No permits or approval for the use, construction, or alteration of any land or structures may be issued unless applicable applications with all required plans, specifications, and other supporting materials are submitted and approved by the City in accordance with the provisions of this Development Code.

**B. Violation of this Development Code as a Nuisance.** Violation of this Development Code are hereby deemed a public nuisance and may be enjoined, abated, or removed pursuant to the procedures set forth in Title 8, Chapter 2 of the City Code of John Day.

**C. Code Enforcement and Land Use.**

1. If a property is in violation of this Development Code or any other City ordinance, the City shall not approve any permit or other land use approval including, without limitation, building permits, land divisions, and property line adjustments.

2. As part of the application process, the applicant must certify:

a. That to the best of the applicant's knowledge, the subject property, including any prior development phases of the property, is currently in compliance with both the Development Code and any applicable prior land use approvals for the property; or

b. That the application is for the purpose of bringing the property into compliance with the Development Code and/or prior land use approvals.

3. For purposes of this section, a violation means the property has been determined to not be in compliance with the Development Code or other applicable law either through a decision by the City or other tribunal, through the review process of the current application, or through an acknowledgement by the alleged violator.

4. Notwithstanding anything herein to the contrary, the City may issue a permit or other approval if:

a. Approval, and compliance with such approval, would result in the property coming into full compliance with all applicable provisions of federal, state, or local laws including, without limitation, the Development Code;

b. It is necessary to protect the public health or safety;

(1) For the purposes of this section, "public health and safety" means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger life, health, personal property, or safety of the residents of the property or the public.

(2) Examples of that situation include, but are not limited to, issuance of permits to replace faulty electrical wiring; repair or install heat sources; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failure.

c. It is for work related to and within a valid utility or right-of-way easement over, on, or under the affected property; or

d. It is for emergency repairs to make a structure habitable or a right-of-way passable.

e. The property owner has entered into a compliance agreement acceptable to the Planning Official.

#### D. Revocation.

1. The Planning Commission may revoke any permit or approval granted pursuant to the provisions of this Development Code if it is determined that the permit or approval was issued on account of false statements contained in the application form or false representations made at a public hearing.

2. The Planning Commission may revoke any permit or approval granted pursuant to the provisions of this Development Code for failure to comply with those conditions and limitations placed upon the exercise of the permit or approval.

3. Prior to revocation, a written stop work order shall be given to the owner of the property involved, to the owner's agent, or to the person doing the work. The stop work order shall state the reason for the order, and the conditions under which the cited work will be permitted to resume, or shall state that a revocation hearing shall be held by the Planning Commission pursuant to the procedures for a Type III action.

E. **Penalties of Violation.** Violation of this Development Code is an infraction and is punishable by a fine of not less than \$100.00 and not more than \$500.00. The second and subsequent violation of the same provision of this Development Code in any one-year period is punishable by a fine of not less than \$250.00. In addition to any other rights or remedies provided under this Development Code, City may file a civil action to recover unpaid fees, fines, and costs, including, without limitation, City's reasonable attorney fees and other fees, costs, and expenses incurred by City to enforce this Development Code. Each violation of a provision of this Development Code will constitute a separate offense and each day that a violation of this Development Code is committed or permitted to continue will constitute a separate offense.

F. **Administration; Remedies.** The City Planning Official and any public safety officer may enforce the provisions of this Development Code. In pursuing enforcement, the City Planning Official may pursue any remedy provided by this Development Code or otherwise available at law or equity including, without limitation, injunctive relief without prejudice to any other remedy available to City. The City Planning Official may enter into voluntary compliance agreements with the violator. The remedies available to City are not exclusive and it is within the discretion of City to seek cumulative remedies for a violation of the Development Code.

I. **Vicarious Liability.** The owner of real property is vicariously liable, jointly and severally, for any violations of this Development Code related to the owner's real property committed by the owner's employees, agents, contractors, tenants, invitees, and any other occupant of the owner's real property.

**SECTION 2: AMENDMENT** "5-6.1.030 Definitions" of the City of John Day Development Code is hereby *amended* as follows:

5-6.1.030 Definitions

The following definitions are organized alphabetically and some related terms are also grouped together and cross-referenced under group headings (*e.g.*, Transportation-Related, Environment-Related, etc.).

...

**Planning Official.** The person appointed by the City Manager to administer the City's Development Code and perform land use planning functions. The Planning Official may be a City employee or a contractor. This term includes any qualified designee of the Planning Official.

EXHIBIT B  
CITY OF JOHN DAY  
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STRENGTHEN AND CLARIFY ENFORCEMENT PROVISIONS WITHIN THE CODE

Added language in double underline

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**SECTION 2: AMENDMENT** “5-1.2.100 Enforcement” of the City of John Day Development Code is hereby *amended* as follows:

5-1.2.100 Enforcement

~~**A. Misdemeanor.** Any person violating or causing the violation of any of the provisions of this Code has committed a misdemeanor, and upon conviction thereof is punishable as prescribed in Section 1-4-1 of the City Code of John Day. Such person is guilty of a separate violation for each and every day during any portion of which any violation of this Code is committed or continued by such person.~~

~~**B. Abatement of Violation Required.** A finding of a violation of this Code shall not relieve the responsible party of the duty to abate the violation. The penalties imposed by this section are in addition to and not in lieu of any other remedies available to the City.~~

~~**C. Responsible Party.** If a provision of this Code is violated by a business or other entity, the officer or officers, or person or persons responsible for the violation shall be subject to the penalties imposed by this section.~~

**A. Compliance with the Development Code.**

1. No structure (or part of a structure) may be used, erected, moved, or altered, no land may be used, altered, or divided, and no other action shall be undertaken unless such action conforms with the regulations and requirements of this Development Code.

2. Violations of conditions of approval set forth in permits and approvals issued pursuant to this Development Code are violations of this Development Code.

3. No use, construction, or alteration of any land or structures is permitted unless applicable applications with all required plans, specifications, and other supporting materials are submitted and approved by the City in accordance with the provisions of this Development Code.

**B. Code Enforcement and Land Use.**

1. If a property is in violation of this Development Code or any other City ordinance, the City shall not approve any permit or other land use approval including, without limitation, building permits, land divisions, and property line adjustments.



2. As part of any application process intended to rectify a code violation, the applicant must certify:
  - a. That the subject property, including any prior development phases of the property, is currently in compliance with both the Development Code and any applicable prior land use approvals for the property; or
  - b. That the application is for the purpose of bringing the property into compliance with the Development Code and/or prior land use approvals.
3. For purposes of this section, a violation means the property has been determined to not be in compliance with the Development Code or other applicable law either through a decision by the City or other tribunal, through the review process of the current application, or through an acknowledgement by the alleged violator.
4. Notwithstanding anything herein to the contrary, the City may issue a building permit or other approval if:
  - a. Approval, and compliance with such approval, would result in the property coming into full compliance with all applicable provisions of federal, state, or local laws including, without limitation, the Development Code;
  - b. It is necessary to protect the public health or safety:
    - i. For the purposes of this section, “public health and safety” means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger life, health, personal property, or safety of the residents of the property or the public.
    - ii. Examples of that situation include, but are not limited to, issuance of permits to replace faulty electrical wiring; repair or install heat sources; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failure.
  - c. It is for work related to and within a valid utility or right-of-way easement over, on, or under the affected property.
  - d. It is for emergency repairs to make a structure habitable or a right-of-way passable; or
  - e. The property owner has entered into a compliance agreement acceptable to the Planning Official.

### **C. Revocation.**

1. The Planning Commission may conduct a public hearing to revoke any land-use permit or land-use approval granted pursuant to the provisions of this Development Code if it is determined that the permit or approval was issued on account of false statements contained in the application form or false representations made at a public hearing.
2. The Planning Commission may conduct a public hearing to revoke any land-use permit or land-use approval granted pursuant to the provisions of this Development Code for failure to comply with those conditions and limitations placed upon the exercise of the permit or approval.
3. Prior to a revocation hearing, a written stop work order shall be given to the owner of the property involved, to the owner’s agent, or to the person doing the work. The stop work order shall state the reason for the order, and the conditions under which the

cited work will be permitted to resume, or shall state that a revocation hearing shall be held by the Planning Commission pursuant to the procedures for a Type III action.

- D. Penalties.** A violation of this Development Code is punishable by a fine of not less than \$100.00 and not more than \$500.00. Notwithstanding the foregoing, any subsequent violation of the same provision of this Development Code in any twelve-month period is punishable by a fine of not more than \$250.00. Each violation of this Development Code, and each day that the violation persists, will constitute a separate offense subject to a separate fine. In addition to any other rights or remedies provided under this Development Code, City may file a civil action to recover unpaid fees, fines, and costs, including, without limitation, City's reasonable attorney fees and other fees, costs, and expenses incurred by City to enforce this Development Code.
- E. Administration; Remedies.** The City Planning Official and any public safety officer may enforce the provisions of this Development Code. In pursuing enforcement, the City Planning Official may pursue any rights or remedies provided by this Development Code or otherwise available at law or equity (including, without limitation, injunctive relief) without prejudice to any other right or remedy available to City. The City Planning Official may enter into voluntary compliance agreements with the violator. The remedies available to City are not exclusive and it is within the discretion of City to seek cumulative remedies for a violation of the Development Code.
- F. Vicarious Liability.** The owner of real property is vicariously liable, jointly and severally, for any violations of this Development Code related to the owner's real property committed by the owner's employees, agents, contractors, tenants, invitees, and any other occupant of the owner's real property.

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