The Following Written Testimony was Received During the
Second 7-day Continuance Period Between
January 16 and 22, 2020.

January 31, 2020

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January 22, 2020

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VIA E-MAIL

Mr. Bob Schuppe, Chair
Hood River County Planning Commission
Hood River County Business Administration Building
601 State Street
Hood River, OR 97031

RE: Appeal #19-0243 of Commercial Land Use Permit #13-0216; Applicant's Second Open Record Period Submittal

Dear Chair Schuppe and Members of the Hood River County Planning Commission:

This office represents Apollo Land Holdings, LLC ("Apollo"), the Applicant for the fourth one-year extension (the "Extension") of the commercial land use permit approved in 2014 (the "2014 Permit").

1. Introduction.

The Applicant appreciates the time the public has taken to think about and comment on this Application. While the Applicant disagrees with the arguments advanced by opponents to the Extension, the Applicant understands their motivation. Nevertheless, as explained in the Applicant's oral testimony, its prior written testimony and this letter, the County is bound by both state law and local law to apply only the approval criteria for an extension; "past practice" or the use of the word "may" do not provide additional criteria or discretion on which the Planning Commission may decide the appeal. LUBA has already addressed and rejected the precise argument in *Ashley Manor Care Centers, LLC v. City of Grants Pass*, 38 Or LUBA 308, 316, 317 (2000) and ORS 215.416(8)(a) requires the County to apply only the applicable approval criteria for a decision on a permit, such as this Extension. Furthermore, if the Director is correct regarding discretion, then the notice provided to surrounding property owners for an opportunity to comment and the notice for the Planning Commission initial evidentiary hearing were incorrect because they listed no other approval criteria for the Extension. The Oregon land use system requires that decision-making on land use applications such as this be based exclusively on approval criteria that are identifiable.

As explained in the Applicant's January 14, 2020 letter, *Ashley Manor Care Centers* considered and rejected the identical argument made in the Staff Report and the Appellant's and opponents' arguments: that the use of the word "may" in Hood River County Zoning Ordinance ("HRCZO") 1.130 allows the decision to be made on factors outside of the approval criteria. LUBA rejected

that precise argument in *Ashley Manor Care Centers* and because that decision was not appealed, it is binding law.

Additionally, as explained below, one of the opponents mentioned that the Applicant's attorney had failed to answer Commissioner Frothingham's question at the initial evidentiary hearing. The Applicant's attorney again apologies for being unable to answer Commissioner Frothingham's question but as explained at the public hearing, answering a question calling for fact irrelevant to the approval criteria serves no purpose and, in fact, confuses the matter before the Planning Commission.

2. Response to first open record period submittals.

A. January 15, 2020 Staff Report by Planning Director Eric Walker.

The Staff Report argues that the Planning Director, and implicitly the Planning Commission, have the discretion to decide the Extension outside of the approval criteria exclusively found in HRCZO 1.130.A.1-4 based on "historic practice."

The Applicant agrees with the Staff Report's two-part test for deciding the appeal on Page 2 of the Staff Report. First, the Applicant agrees with the Planning Director that the test is whether HRCZO 1.130.A. is met (subject to applying only HRCZO 1.130.A.1-4). No party disputes that they are met, with the exception of Ms. Staten's January 15, 2020 letter, which is addressed below. If disputed, no party provides sufficient legal or factual basis upon which the Planning Commission can conclude that the criteria are not met.

Second, the Applicant agrees with the second test in the Staff Report that the Director made a decision he was authorized to make given the authority provided in the HRCZO. As the Staff Report noted "[i]f the answers to these questions are yes, then the extension approval should be supported, and the appeal denied." Because that is the case, the Director has correctly framed the Planning Commission's analysis for decision-making.

B. January 15, 2020 letter from Ms. Heather Staten on behalf of Thrive Hood River.

First, Ms. Staten argues that the Planning Director and the Planning Commission have discretion to decide the Extension outside of the sole approval criteria in HRCZO 1.130.A.1-4 based on "historic practice." Ms. Staten provides no legal basis for her argument and her argument is contrary to HRCZO 1.130.A.1-4 and ORS 215.416(8).

Second, she raises several arguments regarding the Planning Director's comments on the past extensions for the 2014 decision. She argues that those comments provided no guarantee of future extension approvals. The Planning Director's "comments" were not binding conditions of approval, nor were they "requirements" to be applied to future extension applications and, in any event, were inconsistent with the approval criteria in HRCZO 1.130.A.1-4. Additionally, notwithstanding those comments, none of the prior extension decisions stated

that future extensions would not be granted based on unidentified factors outside of the approval criteria.

Third, Ms. Staten argues that the Applicant has failed to provide "extraordinary circumstances" for this Extension. Ms. Staten fails to cite any local law, case law or statutory provisions requiring that the Applicant provide "extraordinary circumstances," a phrase not found in HRCZO 1.130.A.4.

Finally, Ms. Staten argues that the **"County policy"** has changed based on an exception application by a different applicant. The Planning Commission must reject this argument because HRCZO 1.130.A.4 provides:

> "The approval criteria for the original decision found in a ***state*** goal, ***policy***, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed;***" (emphasis added)

The correct reading of HRCZO 1.130.A.4 is that only **state policies** are relevant to this criterion. The criterion does not consider County policies. That is because the first clause of HRCZO 1.130.A.4 is concerned with state provisions and is separated from the second clause by a comma and the second clause is concerned only with County factors, not including County policy. Thus, Ms. Staten's argument is inconsistent with the express language of HRCZO 1.130.A.4 and the Planning Commission must reject it.

C. January 15, 2020 letter from Mr. Peter Cornelison.

Mr. Cornelison makes two arguments. First, he argues that the Applicant's "inaction" is a basis for the decision and, second, that external impacts from the 2014 decision may be considered by the Planning Commission.

The Planning Commission must reject both arguments because they are not relevant to the applicable approval criteria in HRCZO 1.130.A.1-4.

D. Undated letter from Mr. Dale Hill.

Mr. Hill argues that the Planning Commission may consider criteria outside of HRCZO 1.130.A.1-4. Mr. Hill provides no legal support or textual support for his argument and it must be rejected.

Second, Mr. Hill faults the Applicant for having not started construction work. As noted above, this factor is irrelevant to the applicable approval criteria and, if applied by the Planning Commission, would be inconsistent with state law requiring permit decisions to be made based on applicable approval criteria.

Third, Mr. Hill argues that the Planning Commission has the discretion to deny the Application based on the Applicant's failure to commence work. For the reasons explained

elsewhere in this letter, this is argument is irrelevant to both local and state and local law and may not be a basis for this decision.

Finally, Mr. Hill faults the Applicant's attorney for failing to answer the question asked by Commission Frothingham at the initial evidentiary hearing. As explained at the beginning of this letter, the Applicant's attorney apologizes for being unable to answer Commission Frothingham's question but did so solely based on the fact that the question would have called for facts irrelevant to the applicable approval criteria and as Chair *Pro Tem* von Lubken stated at the beginning of the hearing, irrelevant testimony and arguments should not be provided in the hearing.

E. January 15, 2020 letter from Ms. Mary Ellen Barilotti.

First, Ms. Barilotti argues that OAR 660-004-0018 is relevant to the Planning Commission's decision. It is not. This administrative rule applies to exception applications, not extension applications, and Ms. Barilotti's letter fails to support a legal argument that the administrative rule is relevant. Second, Ms. Barilotti cites the State of Oregon's "Comprehensive Plan." Her argument fails to cite any relevant criteria under HRCZO 1.130.A.4. Further, the decision by the Oregon Land Use Board of Appeals ("LUBA") remanding the exception decision for the hotel is irrelevant to the Extension.

F. January 11, 2020 letter from Steven Hunt and Ayn Shilisky.

Mr. Hunt and Ms. Shilisky argue that the Planning Commission may consider the "intent" of the HRCZO. However, intent is not a relevant standard under HRCZO 1.130.A.1-4 and considering intent would be inconsistent and beyond the discretion of the Planning Commission under ORS 197.829(1) because "intent" is outside of the plain language of the only approval criteria.

Mr. Hunt and Ms. Shilisky also argue that the 2014 Permit was limited to two years. This argument is inconsistent with the 2014 Permit, condition of approval 50, which expressly provides for extensions, and with HRCZO 1.130.A.1-4.

G. January 14, 2020 email from Ms. Lois Poole.

Ms. Poole's email cites no criteria relevant to the Extension. Her recitation of impacts that future development might have on the surrounding area is irrelevant to the applicable approval criteria.

H. January 8, 2020 email from Mr. Jude Russell.

Mr. Russell's email cites no relevant approval criteria for the Extension.

I. December 12, 2019 email from Ms. Susan Hartford.

Ms. Hartford argues that there should be a limit on extnsions. However, this argument is inconsistent with both the 2014 Permit and HRCZO 1.130.A.1-4. In fact, extensions are limited by the Applicant's ability to meet the applicable approval criteria. Should the Applicant fail to meet the approval criteria, which is ***not*** the case here, then an extension application need not be granted.

3. Conclusion.

None of the letters submitted during the first open record period that represent opposition to the Extension are a basis for the Planning Commission to reverse the Planning Director's decision, grant the appeal and deny the Extension. In fact, the arguments relied upon by the opponents, that the use of the word "may" in the HRCZO provides sufficient authority for discretion outside of the approval criteria, has been considered and rejected by LUBA and cannot be a lawful basis for the decision.

The Applicant agrees that the Planning Director's two-part test on Page 2 of the January 14, 2020 Staff Report is an appropriate basis for the Planning Commission to act on the Extension.

For all of the reasons contained in the Applicant's oral testimony, its prior written testimony and this letter, the Applicant respectfully requests that the Planning Commission affirm the Planning Director's decision, reject the appeal and grant the Extension.

Very truly yours,

Michael C. Robinson

MCR:jmhi

cc: Mr. Eric Walker *(via email)*
Mr. Keith Cleveland *(via email)*
Mr. Bob Benton *(via email)*
Mr. Derek DeBorde *(via email)*
Mr. Jason Taylor *(via email)*
Ms. Heather Staten *(via email)*

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Thrive
HOOD RIVER

January 22, 2020

Hood River County Planning Commission
601 State Street
Hood River, OR 97031
Via Email eric.walker@co.hood-river.or.us

RE: Second Written Comment Period in Appeal #19-0243 of Commercial Land Use Permit #13-0216

Dear Chair Schuppe and members of the Planning Commission:

HRCZO 1.130.A.4 provides that a permit extension may be granted provided:

"The approval criteria for the original decision found in a state goal, **policy**, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed."

In our January 15, 2020 testimony we included emails from Hood River County Planning Staff to Brad Perrron on an application for a commercial use on his property adjacent -and zoned identically- to Apollo Land Holdings LLC's Deetour concert venue property. These emails demonstrate that the county's **policy** on decision criteria for processing commercial uses in the Dee Mill exception area has changed since the original 2014 approval of the concert venue.

Mr. Robinson suggests that the only way to read HRCZO 1.130.A.4 ("The approval criteria for the original decision found in a state goal, **policy**, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed.") is that the adjective "state" modifies each of the nouns in the list that follows ("goal, policy, statute or administrative rule").

However, there is another plausible way to read the list above that is more consistent with its punctuation. Given that the list is punctuated only by commas, the word "state" should be read to modify the word "goal" only and not the other items in the list. With this interpretation "policy" is unmodified, and would apply to policies promulgated by any source including the county or state. "Statute" is a written law enacted by a legislature; it could be enacted by the federal or state legislature. "Administrative rules" are officially promulgated agency regulations that have the force and effect of law; the State of Oregon has administrative rules, Hood River County also has an administrative code that covers county operations including aspects of land use procedure such as the conduct of quasi-judicial hearings.

Correct grammar requires the use of semi-colons to separate items in a list when one or more items contain a comma. Lists of items that contain commas are called "complex lists." We encourage the Commission to watch this short 2-minute video on the use of semi-colons in complex lists: https://www.khanacademy.org/humanities/grammar/punctuation-the-colon-semicolon-and-more/introduction-to-semicolons/v/semicolons-and-complex-lists-the-colon-and-semicolon-punctuation-khan-academy

In order to have the meaning that Mr. Robinson suggests, the list should be punctuated like this: "The approval criteria for the original decision found in a state goal, policy, statute or administrative rule; the Comprehensive Plan; or this Ordinance have not changed."

If Hood River County agrees with our suggested reading of HRCZO 1.130.A.4 and finds that the County's policy on approval criteria for the exception area at Dee have changed, and the extension should be denied, LUBA will apply a highly deferential standard of review on appeal that will likely support the County's decision. When reviewing a governing body's interpretations of ambiguous provisions in its own ordinances, LUBA must affirm the local government's interpretation provided it is plausible and not inconsistent with the express text of the provisions. (*Siporen v. City of Medford, 349 Or 247, 255-59).*

For these reasons, we encourage you to reverse the staff decision and deny Apollo Land Holdings LLC's request for a fourth land use permit extension.

Best regards,

Heather Staten

Heather Staten
Executive Director

To: Hood River County Planning Commission

From: Mary Ellen Barilotti 2680 Reed Road, Hood River OR. email: mebarilotti@msn.com

Date: 1/22/2020

Re: Appeal #19-0243 of Commercial Lad Use Permit #13-1216

Applicant argues, in letter dated 1/14/2020, that he has a right to a permit for a fourth land use extension since he has satisfied his burden in establishing that he met the requirements of the Hood River County Zoning Ordinance (HRCZO) 1.130.A.1-4. He argues those requirements are the only ones the county is authorized to consider. He asserts any other action the county takes would be in violation of ORS 227.173(1) which provides: "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan".

I understand the county has a practice of exercising its reasoned discretion to consider other "factors" beyond the four corners of HRCZO 1.130. The planning director has used his discretion to deny applications for repeated extensions when little or no development progress has been demonstrated by the permit holder. This it cannot do, according to the applicant. Applicant's position was made abundantly clear when he declined to reply to a commissioner who asked why no development has, to date, been commenced. (Commission hearing on 1/08/2020) Applicant replied that he declined to answer the question since the question relates to factors that are outside the commissions' authority to consider when acting on the application before it. Applicant's arguments, if correct, limit the county's ability to ensure that projects be completed in a timely manner by any applicant requesting frequent extensions when little or no progress is demonstrated, or for the county to act based on changed conditions over time.

The county must adhere to the requirements of ORS 215.427(3)(a) before final approval can be granted.

Applicant, in addition to citing ORS 227.173(1) cites ORS 215.416(8)(a) for his conclusion that the commission has no discretion to deny the application outside of considering the requirements contained in HRBZO 1.130. These cited statutes relate to requirements and procedures governing land use permit applications. This current application is a land use permit application. "We continue to believe that the decision to extend a statutory permit decision is a statutory permit decision and statutory procedures that govern statutory decisions must be followed". (*Floyd E. Bard et.al. vs Lane County*, LUBA No, 2010-091 ORS 215.416(8)(a))

Applicant argues that he is entitled to approval under state statutes and county ordinances. But what about the county's obligations when taking "final action" to approve the permit application for an extension?

There is a statute that governs the county's process. ORS 215.427(3)(a) requires the county to make additional findings other than those requirements that apply to the applicant when submitting a permit application. Final action on a permit requires the county to find: " If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section , within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251 (Compliance Acknowledgment), approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." (emphasis added)

As stated in my prior memo, dated 1/15/2020, LUBA determined, conclusively, that the only acknowledged plan for the area was exclusively for the Dee Mill and related activities. That finding transcends the hotel case since LUBA ruled on the entire area in question, "as a matter of law" (Memo dated 1/15/2020 herein incorporated) *(Hood River Valley Residents Committee v. Hood River,* LUBA No. 2017-014 (pg. 9,10)

The requirement that LCDC acknowledge the county's plan is in addition to any issues related to agency discretion, collateral attack or to the standards and criteria for permit applications, per se, contained in ORS 215.416(8)(a) or ORS 227.173(1). This acknowledgment requirement pertains to all local agencies in the state and cannot be ignored or waived by individual cities/counties when considering land use permit applications.

Applicant maintains that the 2014 permit is a done deal and he apparently has, based on his arguments, a right to forever build on the property, assuming his burden is satisfied pursuant to HRCZO 1.130 He argues this despite the lack of an LCDC's Compliance Acknowledgment recognizing applicant's nonrural use on rural land.

Applicant filed his permit application on 9/05/2019. I am not herein challenging the standards and criteria for the 2014 Permit or trying to change any conditions initially imposed on the applicant. (collaterally attack) As previously stated, I was not a party to the appeal on the second extension and I raise new issues not presented in that case. (*Hood River Valley Residents' Committee vs. Hood River County,* LUBA No. 2018-081) The county is not bound by the prior LUBA decision when considering these new issues. I argue that, with respect to this current application permit to extend the original permit, the county should determine if there is an acknowledged plan that provides authority for the original permit to be extended. In other words, does the county have the authority to grant a permit extension for the nonrural use of the land without a "Compliance Acknowledgment"?

If the county determines that it does not have a "Compliance Acknowledgement" from LCDC, it should deny the permit and both the applicant and county can consider options available to them, some of which were discussed in my letter dated 1/05/2020.

Respectfully submitted,

/s/ Mary Ellen Barilotti