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Marion county Planning Division
5155 Silverton, Rd. NE
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Please find enclosed the City of Aurora's Record Submittal following last week's hearing regarding the City of Aurora's appeal regarding Marion County's Approval of Conditional Use Case Number 18-025.

If you have any questions or concerns, please do not hesitate to contact me. I look forward to hearing from you.

Sincerely,



Sara Kendrick
KENDRICK LAW, LLC
Attorney at Law

Encl: City of Aurora Record Submittal, dated June 13, 2018

CU 18-025

City of Aurora Record Submittal

June 13, 2018.

Introduction

The City of Aurora thanks the county staff, the hearings officer and the applicant's representative for raising important topics at the June 6 hearing, which we would like to respond to and address below. As a preliminary matter, the city would like to focus on the substantive aspects of this appeal, and takes this opportunity to withdraw the request for reimbursement of fees and costs, and the request to void the application due to incomplete and inaccurate information.

At the conclusion of the hearing, the record was held open for all parties to submit additional testimony and evidence until June 13th. The applicant's representative reported that the applicant will not submit any additional evidence or testimony; however, if that changes and the county accepts additional evidence or testimony from the applicant, the city would appreciate an opportunity to respond, pursuant to ORS 197.763(6)(c).

This narrative and the attached exhibit comprise the City of Aurora's record submittal, and will answer the following questions.

1. Is the application for a rural or urban use?
2. Is land in the UT-20 zone rural, urban or urbanizable?
3. What is the intent of the city comprehensive plan?
4. Can the county delegate its legislative authority to the city, so that the city comprehensive plan can specify what land uses are allowed in the county UT-20 zone?
5. Is the application for a development or a use; and what level of detail is required for the county to adopt adequate findings and conclude that the conditional use criteria and the development standards are satisfied?
6. Can the waivers of remonstrance for annexation and connection to city sewer service be postponed or eliminated?

7. Can the decision assume the industrial use will not increase traffic beyond the capacity of existing roads, without knowing what types of businesses will occupy the building, and without a traffic study?
8. Does the approval of the industrial use in the UT-20 zone follow the Transportation Planning Rule?
9. Is the decision consistent with the city TSP and state administrative rules for coordinated transportation planning?
10. Is the decision consistent with the UGMA provisions on annexation prior to development?
11. Procedurally, what is the correct method to revise the site plan and remove the conditions of approval that cap the number of employees and require a waiver of remonstrance for annexation?

1. The distribution warehouse is an urban use.

The proposed and approved use is a wholesale health supplement business in a 15,000 square foot warehouse. The words “wholesale”, “warehouse”, “industrial” and “distribution” do not appear in the text of the UT-20 farm zone that lists the conditional uses. MCC 16.13.020.

The applicant’s representative testified that there may be light industrial tenants as well, and asks that the number of employees not be limited. The warehouse and light industrial uses are urban because it is of a kind and intensity characteristic of urban development in nearby cities.

The county interpretation that the intensity of the use does not require urban services is not supported by substantial evidence in the record because the applicant representative’s testimony is clear that the applicant intends for more people to work on the site than presumed in the decision. Nor is the purported reliance on a septic system conclusive in determining the use as rural. A 15,000 square foot, multi-tenant industrial building is an urban use that requires urban services, and cannot be approved on this urbanizable property without annexation into the city.

2. The UT-20 zone is an urbanizable zone.

Goal 14 states:

Urban Growth Boundaries

Urban growth boundaries shall be established and maintained by cities, counties and regional governments to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land.

In other words, there are three types of land; rural which is outside UGBs, and two types of land within UGBs, urban and urbanizable. Goal 14 further describes urbanizable land.

Urbanizable Land

Land within urban growth boundaries shall be considered available for urban development consistent with plans for the provision of urban facilities and services. Comprehensive plans and implementing measures shall manage the use and division of urbanizable land to maintain its potential for planned urban development until appropriate public facilities and services are available or planned.

The Urban Growth Management Agreement between the city and county identifies land within “the UGB as urbanizable.” UGMA, Section I.1. The subject property is available for urban development such as industrial warehouse and distribution, only when the development is consistent with the city plans for the provision of urban facilities and services, such as streets, water and sewer. In the interim, the subject property is in a farm zone, consistent with ORS 215.203. MCC 16.13.000.

The applicant’s representative testified at the hearing that the applicant does not intend to develop consistent with city plans for annexation and the provision of urban services. (June 6, 2018 appeal hearing audio file, at 0:56:45.) The decision is contrary to Goal 14, because it does not maintain the subject property for planned urban development.

The decision utilizes the overlap in these definitions to selectively apply different features of rural land, urban land, and urbanizable land and zoning. The county policy is that all land within a UGB is urban land, notwithstanding that the subject property is zoned UT-20, a farm zone. The county interpretation is that the proposed use is a rural use, notwithstanding this is urban land. Third, the decision states that because the land is identified in the city comprehensive plan as urbanizable and future industrial, it has authority to approve the industrial use, even though that use is not allowed in a farm zone, and the applicant opposes a requirement to annex at some time in the future. The decision is contrary to Goal 14.

3. The intent of the city comprehensive plan is for the property to remain in a farm zone until annexed.

As the city understands the hearings officer comments, the county implements the city comprehensive plan on the basis of the intent of that plan. MCC 16.01.030. The intent of the city comprehensive plan is that the property will retain farm zoning “until annexed by the City. At that time, the City will zone the property consistent with its plan designation.” City of Aurora Comprehensive Plan Update 2009, page 84 (attached).

Clearly the city intends that farm zoning will apply until annexation, and only upon annexation will industrial zoning, along with its list of allowed land uses, be applied. The decision is not consistent with the intent of the city comprehensive plan and therefore is not consistent with the text of MCC 16.01.030.

4. Reliance on the city comprehensive plan is a delegation of the county’s legislative authority.

Reliance on the city comprehensive plan to specify what land uses are allowed in the county UT-20 zone (under MCC 16.01.030) is a delegation of the county’s legislative authority to the city that is contrary to Article I, section 21 of the Oregon constitution. This is impermissible because it allows the city to legislate what uses are allowed in the county zones.

The land uses allowed in the unincorporated areas of Marion County are limited to those uses proscribed in ORS Chapter 215 and its administrative rules. Those regulations do not provide authority for a county to delegate legislation proscribing

what land uses are allowed within a county zone, even a county zone that is within a city urban growth boundary.

5. The application is for development of a new use.

At the hearing, the applicant's representative insisted the application was only for a "use", and not for "development", and therefore it was not necessary to provide more information regarding the "development" such as architectural or civil engineering drawings, a traffic study, or a septic approval as part of this application. That is a false dichotomy because the industrial use does not exist separately from the industrial development, such as a building, site improvements and utilities necessary for the use to operate.

For that reason, the UT-20 zone requires compliance with numerous "development" standards. MCC 16.13.100. There is no authority in the zoning code to approve an industrial use without also reviewing and approving the various physical and operational elements of the industrial development, and making findings based on substantial evidence that both the conditional use criteria and the applicable development standards are satisfied.

The applicant's representative testified that the site plan in the record is not accurate. Apparently the building will be located further west on the site, outside of the area designated as future commercial on the city comprehensive plan map. As the city understands the testimony, the existing dwelling, which lies on the portion of the property designated by the city as future commercial, may be utilized for office use. There is insufficient evidence in the record regarding the location and size of the building, the parking, stormwater facilities, or the future collector street, and the potential future use of the existing dwelling.

As a different applicant representative wrote, "the applicant has chosen to not employ the services of an engineer or architect at this time." Since the design is not complete and the businesses that will occupy the structure are not certain, it is not possible to measure the impacts on traffic, or the sewer and water needs. Because the minimalist site plan is not accurate, and there are not other drawings of any kind, there is not substantial evidence in the record that a reasonable decision maker could rely on to find compliance with the approval standards and criteria.

6. The decision, and the applicant’s request to waive the condition requiring a waiver of remonstrance for annexation, conflict with county requirements for on-site sewage disposal.

The zoning code requires completion of several items “prior to the approval of a use”. MCC 16.13.320.E. The city requires the execution of an agreement to connect to the city sewer when the system comes to within 300 feet of the property and can provide gravity service, pursuant to MCC 16.13.320.E.5. The city also requires a signed remonstrance agreement for future annexation and connection to water and sewer service, pursuant to MCC 16.13.320.E.6. The decision does not comply with applicable provisions of the land use regulations requiring these items to be complete prior to the approval of this conditional use, and requiring them to be consistent with city requirements.

These county code provisions are consistent with Implementation Guideline 6 of Goal 14 which provides for a detailed management program to assign respective implementation roles and responsibilities to the city and county. The decision impairs the city’s assigned role under MCC 16.13.320.E.5-6, and thereby is contrary to Goal 14.

The interpretation that compliance can be postponed to a later proceeding is inconsistent with the express language of MCC 16.13.320.E. The decision prejudices the substantial rights of the city and other interested parties because postponement of these sewer requirements to a later proceeding denies them an opportunity to receive notice, to comment, and to participate in a land use review of the on-site sewage disposal system.

7. The decision fails to ensure the proposed industrial use will not increase traffic beyond the capacity of existing roads.

A conditional use cannot increase traffic beyond the capacity of existing roads. MCC 16.13.030.A. In this instance, there is not a traffic study or other evidence in the record that the proposed development will not increase traffic beyond the capacity of existing roads, so this criterion is not satisfied. The staff finding is conclusory and indicates a traffic study can be made a condition of approval. Given the applicant representative’s hearing testimony, the uses of the proposed structure are not certain. The decision approved a warehouse with five employees, however the new testimony is that the building may include different industrial uses and tenants with many more employees.

Until the proposed use is clarified, it would be premature to perform a traffic study. The decision is not supported by substantial evidence in the record.

The decision that compliance can be postponed to a later proceeding is inconsistent with the express language of MCC 16.13.030.A, which requires a finding on traffic capacity “in order to grant approval for a conditional use”, because the decision approves the conditional use application before traffic capacity is analyzed. The decision prejudices the city and other interested parties because postponement of traffic analysis to a later proceeding denies them the opportunity to receive notice, to comment, and to participate in a land use review of traffic capacity.

8. The approval of industrial and commercial uses in the UT-20 zone is not consistent with the Transportation Planning Rule.

At the hearing, and apparently in response to the city’s comment that in order to approve an industrial use in the UT-20 zone, a zoning text or map change was required, the county staff indicated the county disagrees because that would require a traffic study. (June 6, 2018 appeal hearing audio file, at 0:28:35.) That is precisely the point.

The TPR requires that amendments to local zoning be analyzed, and if they significantly affect a transportation facility, the local government must adopt specified measures to manage the increased traffic. OAR 660-012-0060(1). Therefore changes to the UT-20 zone text to allow commercial and industrial uses, or a zoning map change to allow commercial and industrial uses, would require a traffic study and TPR compliance. As the city understands the hearing testimony, county policy is that commercial and industrial uses can be allowed in the UT-20 zone without an amendment to the zoning text or map change to avoid the traffic analysis that would normally be required by the TPR. This policy is an interpretation which is contrary to the TPR, which is a state administrative rule implemented by MCC 16.13.030.A.

9. The decision is not consistent with the state transportation planning administrative rules that are implemented by the county zoning code and the Aurora Transportation System Plan.

Broadly speaking, the state administrative rule on transportation planning requires “coordinated land use and transportation plans”. OAR 660-012-0000(3)(a). A local government TSP “establishes land use controls”. OAR 660-012-0010(1). The county

shall protect transportation corridors for their identified functions, have a process for coordinated review of land use decisions, and apply conditions to development proposals to protect transportation corridors. OAR 660-012-0045(2)(d-e).

Implementation item 4 of Goal 12 requires “a detailed management program to assign respective implementation roles and responsibilities to those governmental bodies operating in the planning area and having interests in carrying out the goal.” Pursuant to OAR 660-012 and Goal 12, the city’s Transportation System Plan describes a future city collector street that is likely on the subject property.

The city acknowledges the delay in informing the county about this future street. Because that information is now in the record, the hearings officer’s decision, if it denies the appeal, must apply a condition to account for this future right-of-way and transportation corridor which is intended to carry traffic from the subject property. As written, the decision does not comply with UGMA Section III.3, MCC 16.13.030.A, or the OAR 660-012 provisions cited above. To the extent that the county interprets its zoning code to mean that the city’s TSP and planned future street are not applicable to this application, the decision is inconsistent with the purpose of the traffic capacity criterion, and is contrary to state land use Goal 12 and the rules in OAR 660-012 which MCC 16.13.030.A implements.

10. The decision is not consistent with the Urban Growth Management Agreement and the state administrative rule which the agreement implements.

One purpose of the UGMA is to “[p]romote the retention of lands in resource production in the urban growth boundary until provided with urban services and developed.” UGMA, Recital 3. The decision is not consistent with this purpose because it converts the subject property from resource use to urban industrial use before the property is provided with urban services and developed. This purpose is implemented by Section I.9 of the UGMA, which requires annexation prior to conversion to an urban use, in large part because of transportation issues. The decision approves an urban use prior to annexation which is not consistent with the UGMA.

11. For the applicant to amend the conditions of approval, a new application is required.

The county zoning code recognizes that sometimes project plans change following a land use approval, and expressly provides for amendments to conditions. MCC 16.46.050. Amendments require a new application and new notice, following the same conditional use procedures as the original application. MCC 16.46.050.A, C, and F.

At the time of this writing, the applicant does not intend to submit additional evidence to support the request for deletion of these conditions, and the city believes there are not any amendments to the existing conditions, or new conditions, that could be applied to make the application satisfy the development standards and conditional use criteria. A new application is required.

Conclusion

The hearings officer properly indicated that participants should describe their issues with sufficient specificity to afford the other parties an adequate opportunity to respond to each issue. The city has endeavored to provide sufficient detail on its issues to ensure the other parties have all the information necessary to understand the city's positions and reasoning. It respectfully requests that the decision on this appeal respond to each issue raised in the city's correspondence, and thanks the hearings officer in advance for the considerable effort that will be required to do so.

the City limits and then carefully and incrementally expand public facilities and services into the UGB.

Almost all property in the southern portion of the UGB has direct access to Highway 99E, a regional transit way. Similarly, the northwest portion is bounded by Ehlen Road, which provides access to I-5 via the Hubbard Cut-Off Road (Highway 551) and Ehlen Road.

Currently, the statute and administrative rules require that cities establish UGBs that accommodate the projected 20-year growth. There is sufficient vacant and redevelopable acreage within the UGB to accommodate projected year 2029 residential land needs, using the present land use designations on the comprehensive plan map and the Land Use Inventory shown on Tables 3A and 3B above. Additional commercial and industrial lands may become necessary to provide employment for the community.

Within the City limits, zoning designations for all property are identical to the corresponding comprehensive map designations. However, property outside the City is now zoned urban transition farm (UTF) by Marion County and will retain that zoning until annexed by the City. At that time, the City will zone the property consistent with its plan designation.

B. Growth Management Framework

While the City wants continued growth to occur, it does not desire to be overwhelmed by development activities. There is a desire to manage growth so that it can be assimilated and properly served with appropriate urban services and facilities. Therefore the City establishes the following growth management framework:

1. Public facilities service capacity.

The basic policy is to provide orderly, efficient, and cost effective urban services to support growth over the next 20 years. Further, it is the intent of the City to ensure adequate public facilities and services are provided to support full density development of all or a significant percentage of all the Net Buildable Lands presently located within the current City limits before allowing future annexation.

As shown in the Annexation Criteria below, a three tier priority system shall manage sequencing of future annexations. However, in order to allow annexation there must be sufficient sewer and water system service capacity to serve all net buildable lands inside the City, plus the proposed annexation area. No reserve system service capacity needed to serve the existing City limits shall be allocated to serve an area to be annexed.