

November 6, 2018

Steven L. Pfeiffer
SPfeiffer@perkinscoie.com
D. +1.503.727.2261
F. +1.503.346.2261

VIA E-MAIL

Planning Commissioner
City of Hood River
211 2nd Street
Hood River, OR 97031

Re: Appeal of Director's Decision dated September 19, 2018 re File No. 2018-29 -- Site Plan Amendment Review/403 Portway Avenue - Open Record submittal

Dear Commissioners:

This office represents Citizen for Responsible Development LLC, one of the appellants of record in the above referenced appeal. In further support of our oral testimony at the public hearing on October 29, 2018, the purpose of this letter is to response to testimony offered by the applicant Key Development via oral and written submittal regarding the authority for approval of a full-service restaurant and outdoor facilities under applicable City Code provisions. Please include this letter in the record of the Commissions proceedings re this matter.

It is apparent from the oral and written testimony offered by the applicant at the recent public hearing that the sole basis for its assertion that a full service restaurant is an allowed use at this location is that the retail restaurant facility is not a "Commercial retail use..." under HRMC 17.03.130.D.3. Instead, the applicant argues that the restaurant constitutes nothing more than the "sale and display of products", which is allowed as an accessory/essential use on lands throughout the City zoned Light Industrial.

If somehow this approach, which is contrary to the analysis adopted by your Planning Director, were to succeed, this and other applicants would be able to avoid the specific and deliberate adopted policy constraints included under the Waterfront Overlay zone designation to ensure that only "some limited commercial development" be allowed within the primary light industrial district. See HRMC 17.03.130. The most notable development standard to be avoided under this approach is the cap on commercial retail square footage of 1500 square feet, which the existing developed restaurant facility exceeds by nearly 1000 square feet based upon the current record. On the other hand, if, as we believe to be clear, the established restaurant constitutes a commercial retail use far more intensive that any reasonable interpretation of the term "sale and display of product" would allow, the existing restaurant cannot exceed 1500 square feet absent a demonstration of "accessory and essential" to the industrial brewery facility, which we believe to be equally difficult to establish and defend under these circumstances.

As with most determinations of land use code compliance, the beginning point for the analysis of the correct and defensible interpretation of the relatively common allowance in the HRMC Light Industrial District of “sale and display of products” is the policy basis for this Code language as set forth in the City’s acknowledged comprehensive plan. In response to Statewide Planning Goal 9 – Economy, the City has adopted the following policy addressing the question of the type and scale of commercial operations such the proposed restaurant on lands zoned Light Industrial:

“7. Limit commercial use on lands reserved for light industrial and industrial use.”

While allowing a primary industrial manufacturing use to display and sell the manufactured goods on-site is reasonable and rarely would be displaced the primary manufacturing use if only because this activity is limited by the phrase itself to only those goods, it is difficult to conceive of an interpretation of the relatively clear phrase “sale and display of products” which would allow unbridled retail sale of virtually any and all goods, commodities or, in this instance, prepared food items which may contain a very limited amount of or even none of the manufactured “product”. Here, there can be no real question of whether the establishment and operation of a full-service restaurant constitutes the mere display and sale of brewed beer and kombucha and accurately reflects the limitation of commercial uses on Light Industrial lands under the above policy. The reasonable answer can only be no since the primary and apparent purpose of this commercial venture is the preparation and service of food on a large scale larger than most established commercial restaurants elsewhere in the City. And since it is well-established under Oregon law that development code provisions such as HRDC 17.03.060 are intended to and legally must implement and be consistent with applicable acknowledged plan policies, any determination, as offered by the applicant, that the proposed commercial restaurant currently in operation constitutes the “sale and display of product violates the City’s adopted comprehensive plan.

Under Oregon’s established land use regulatory scheme, the plain reading of the phrase “sales and display of products” and the supportive plan policy noted above are not the only factors in determining the allowable scale and intensity of uses such as the Ferment commercial restaurant which are clearly limited under applicable code provisions as accessory and subordinate to the primary planned use, which is Light Industrial in this instance. Under HRDC, accessory use status as claimed by the applicant here is limited to those uses which are demonstrated to be “accessory and essential”, as well as subordinate to the primary industrial use, which the record in this matter does not demonstrate.

The Oregon Land Use Board of Appeals has provided various guidance regarding the correct application of these key terms by local governments. For example, the Board has held that where and accessory use is, as here, ambiguously defined in the local code, the appropriate approach for interpretation is to look to the purpose section of the underlying zone for guidance. While the Light Industrial zone does not include a purpose statement, the above-referenced policy, together with purpose statement in the Waterfront Overlay zone to allow only “...some limited

commercial development” serve to provide this same binding direction to the Commission when considering the wholly independent and primary nature of the commercial restaurant being offered here as merely “accessory”. *Leonetti Furniture Manufacturing v. City of Beaverton*. 13 Or LUBA 59 1985. Similarly, the Board held in *Oregon Shores Conservation Coalition v Coos County*, _____ Or LUBA _____ 11/27/2017, slip at 10, that to be accessory to an allowed primary use, the function of the accessory use must be to support the primary use. It is not sufficient that the primary use may be ancillary or be merely a part of the primary use. Here, the restaurant use not only exceeds the manufacturing use by the size, scale and intensity of the use, it fundamentally and operationally is independent of the primary use as a free-standing restaurant which does not depend upon Ferment beer sales for its operation. Stated another way, the restaurant may be ancillary to the light industrial activity but it is not accessory due to the free-standing nature of the restaurant.

Finally, a defensible accessory must also be “subordinate and incidental” to the primary use, which has been held by LUBA to require that the local government ensure that conditions limiting the scope and nature of the accessory use to ensure that it truly remains subordinate over time. *Von Lubken v Hood River County* 18, Or LUBA 18 (1989); *Taber v Multnomah County*, 11 Or LUBA. Under the present facts, it is difficult to imagine how the City can develop conditions of approval which ensure that the full restaurant operating on site today can be reduced to a level of operation which ensures that the only commercial activity being undertaken is the “sale and display of products” being produced by the Ferment Brewery.

In closing, we request the Commission determine that the proposed restaurant use constitutes a commercial retail use under the Waterfront overly designation and not a permitted accessory use under the base Light Industrial zone designation, and, accordingly, that the use must be confined to a total area of 1500 square feet consistent with the five factors identified by the Director for measuring such area.

Sincerely,



Steven L. Pfeiffer

SLP:nn

cc: Joe Voboril
Christe White
Planning Director
City Attorney