

AQUA VISTA SQUARE, LLC

P.O. BOX 108
YACHATS, OR 97498-0108

September 30, 2010

Mayor Brean & City Council
City of Yachats
411 Highway 101 North
Yachats, OR 97498

Re: Appeal from Planning Commission Findings and Conclusion dated July 26, 2010, as re-affirmed by letter dated September 27, 2010 (the "Decision")

Dear Mayor Brean and Council Members:

This will constitute the appeal of Aqua Vista Square LLC ("AVS") from the Decision of the Planning Commission.

Decision Appealed

The Decision includes this sentence under paragraph 3 of "Findings": "The Planning Commission finds that required off-street [commercial] parking spaces need to be located entirely on the subject lot." The Decision also includes this sentence under paragraph 4 of the "Conclusions and Final Order" that "All required parking spaces shall be provided on site." This finding and order are directly contrary to the City Code provisions on commercial parking space requirements. AVS requests that the City Council reverse this finding of the Planning Commission. A copy of the Decision is attached hereto as **Exhibit A**.

This Appeal involves 13,488 square feet of land known as lots 9 and 10 of Block 2 Aqua Vista at the southwest corner of north Aqua Vista Loop and Highway 101, also described as parcels 1308 and 1309 on Assessor's Map 14-12-27AA (the "Property"). Aqua Vista Square (the "Project") includes 1,500 square feet of commercial space in three or four ground floor units and six residential units (ranging from 900 to 1,400 square feet) of which five are entirely on the second story above the commercial space and garages for the residential units, and one of which is a ground floor unit. The residential units are intended to be made available at substantially below market rates for families earning less than 80% of area median income.¹

¹The sole Member of AVS is Our Coastal Village, Inc. ("OCV"), a public charity whose primary mission is to create affordable home ownership opportunities in Yachats for families earning below 80% of area median income ("Eligible Purchasers"). At least four of the six residential units in the Project would be homes made permanently affordable to Eligible Purchasers. Permanent affordability is achieved through the following means:

Timeliness of Appeal

In a letter dated September 27, 2010 the City Planner notified AVS that the deadline for appealing the Decision is October 12, 2010. This Appeal is being filed early so the matter can be placed on the City Council agenda for October 14, 2010.

Executive Summary

During its pre-purchase due diligence on the Property, AVS consulted with the Yachats City Planner about the zoning requirements applicable to the Property and the proposed Project. This consultation was comprehensive, and included several telephone conversations, emails from AVS summarizing its analysis about the zoning restrictions applicable to the Project and return emails from the City Planner confirming that the conclusions were correct; as well as securing the City Planner's comments on conceptual site plans which transformed narrative exchanges into a visual presentation.

The specific issue involved in this appeal was addressed with the City Planner. He confirmed that the Code defines a "street" as a vehicular passageway that is located within a larger "right of way"; and that commercial parking spaces are considered "off-street" if they are located partially on the lot

- OCV's Perpetua Housing Fund would make available to Eligible Purchasers affordability grants in the amount (not more than 20% of the purchase price of the home) necessary to bridge the gap between the purchase price and amount of the mortgage for which the monthly payment is affordable to the Eligible Purchaser.
- The project is planned for the maximum residential unit density permitted under the Zoning Code so that the high cost of land creates as many home ownership opportunities as possible.
- OCV donates the land it purchased at a cost of \$175,000 to the Project, so that Eligible Purchasers are not paying for the land.
- The selling prices of the affordable units include no developer profit; Eligible Purchasers pay only the actual costs of designing, permitting, and constructing the residential units.
- OCV is working with Lincoln Community Land Trust to take over stewardship of the units as beneficiary of an "affordability covenant" or a "ground lease" which requires that the residential units never be sold at market rates, but remain affordable in perpetuity.

and partially in the non-street portion of the right of way. When the Code requires “off-street” parking to be also entirely “on the same lot” on which the building is located, it so states.

AVS purchased the Property in reliance upon its own due diligence in reading and understanding the applicable Zoning Code provisions and upon the City Planner’s confirmation of the correctness of those readings.

In the Decision, the Planning Commission rejected the specialized expertise of the City Planner in understanding and applying the provisions of the Code. Instead, the Planning Commission conflated the rules applicable to parking spaces for residences with the rule for commercial parking spaces. Parking spaces for dwelling units must be not only “off-street” but also “on the same lot as the dwelling.” Notwithstanding the clearly disparate treatment of parking spaces for dwelling units and parking spaces for commercial uses, the Planning Commission “found,” somewhere, a requirement for “off-right of way” parking that simply does not exist in the Code.

The Decision of the Planning Commission is without any support in the Code, and in fact is contrary to the Code’s definitions of street and right of way. The City Council needs to reverse this clearly erroneous decision of the Planning Commission.

**Pre-Purchase Due Diligence and
City Planner Confirmation on Zoning Code Issues**

Prior to signing a contract to purchase the Property, AVS contacted the Yachats City Planner with its “tentative conclusions about zoning restrictions” and asked the City Planner to identify any tentative conclusion “that is incorrect or anything that might have been overlooked.” Later, as the conceptual design progressed, AVS identified a few more questions and asked the City Planner “to confirm that my understanding is correct, or point out areas where I have it wrong.”

Specifically, AVS stated to the City Planner:

“3. 9.48.010 provides general requirements for ‘off-street parking spaces’. Under 9.04.030 ‘street’ is defined as ‘a way of travel for vehicular traffic . . . for public use.’ ‘Off-street’ is not defined. As long as parking spaces are off the ‘street’ they can be partially located in the portion of the public right of way that is not occupied by the actual street, subject to any public works issue. I understand you will be speaking with John about this on Tuesday.”

A copy of this email (as well as earlier emails on other issues) is attached as **Exhibit B**.

The next day, the City Planner responded that: "Your understanding provided below is correct. For parking on Aqua Vista, John wants to ensure the parked cars will clearly be off the pavement ...". A copy of the referenced email chain is attached as **Exhibit C**.

Prior to closing on its Purchase of the Property, AVS provided to the City Planner a preliminary site plan for the Project to assure that AVS had properly reflected the constraints required for the Project under the Code; and, on May 18 AVS provided revised concept sketches with the request that the City Planner review "and let me know if you see any issues that have not been properly addressed in line with our prior conversations and emails." The conceptual site plan showed the commercial parking located partially on the Property and partially in the public right of way, but not touching the paved street. The City Planner, after reviewing the revised conceptual site plan, advised that it met the requirements of the Code. A copy of the May 18 email and its attached revised concept site plan is attached as **Exhibit D**.

Minor Modification of the Plan

AVS then proceeded to purchase the Property in reliance on the feedback received from the City Planner and to perform the next level of design for both the site plan and the residential and commercial units. The site plan was modified slightly from the concept site plan the City Planner had reviewed. Instead of a single two story residence at the southeast corner of the Property, the revised schematic site plan showed two 1,000 square foot stacked flats in the same footprint that had been provided for the 2,000 square foot two story single unit on the concept site plan. The City Planner advised that increasing the residential unit count to 6, even though the building footprints did not change, reduced the land to residential units ratio below the outright permitted 2,500 square feet of land for each residential unit, to 2,223 square feet of land for each residential unit. See Code § 9.28.10(O).

The City Planner explained that AVS had two options.

The first option was to change the one building back to a two story 2,000 square foot residence with exactly the same footprint, in which event no Planning Commission approval would be required and he would approve the building permit.

The second option was to request that the Planning Commission approve the design submitted at 2,223 square feet of land for each residential unit. The City Planner advised that he did not anticipate any issue with the Planning Commission on that request. A copy of the City Planner's email is attached as **Exhibit E**.

Because six residential units on the Property would further OCV's objective of maximizing affordable home ownership opportunities for Eligible Purchasers, AVS elected to pursue the second option.

The Application to Reduce Land Per Residential Unit Ratio

On June 22, 2010, AVS submitted its request for approval of one residential unit per 2,223 square feet of land to the Planning Commission. A copy of that application is attached as **Exhibit F**. Because of the City Planner's confirmation of AVS's conclusion that commercial parking spaces in the commercial zone could be located partially on the Property and partially off-street in the unpaved right of way, the only issue the application addressed was the request to approve one unit per 2,223 square foot of land, instead of one residential unit per 2,500 square feet of land.

The City Planner's Report to the Planning Commission on the application spelled out the commercial parking requirement and concluded that requirement was satisfied. A copy of the City Planner's Report is attached as **Exhibit G**.

The Planning Commission's Actions: July to September

At the Planning Commission meeting in July some neighbors spoke in opposition to the Project, primarily on grounds that they did not want a "commercial use" in their neighborhood, even though the Property was zoned commercial; and that they did not want "affordable housing" in their neighborhood even though the City Code allowed mixed use projects in the commercial zone, and even though the proposed mixed use project met all requirements of the City Code. Ironically, the Chair reminded the speakers that "the proposed development is in a C-1 zone and the Planning Commission can only consider how the application meets the standards in the current Code for a C-1 zone. **The Planning Commission cannot change what is in existence at the time of the application.**"

Totally contrary to the City Planner's earlier indications and to the City Planner's Report on the application, the Planning Commission balked at a portion of the commercial parking spaces being partially in the off-street portion of the right of way. Commissioners cited as examples that, when they built their homes, they were required to provide for two parking spaces **on their lot**, not in the right of way. The Commissioners did not voice any opposition to the six units at one unit per 2,223 square foot of land, acknowledging that this created no greater coverage of the lot by buildings that if the unit count were reduced back to the five units (one with two stories and 2,000 square feet) shown on the earlier site plan. A copy of the official minutes of this meeting are attached as **Exhibit H**.

After a lengthy discussion, however, the Planning Commission arrived at the view that the City Code **requires** that all commercial parking spaces be located entirely on the lot on which the

commercial building is located and not to any extent in the off-street unpaved right of way. The Planning Commission did ***not*** recognize that commercial parking spaces could generally be located partially in the right of way, but decide to ***condition its design approval on*** AVS's waiver of that right. Rather, the Findings and Conclusion and Order issued by the Planning Commission provide: "The Planning Commission finds that required off-street [commercial] parking spaces need to be located entirely within the subject lot."

After the Findings and Conclusion were issued, AVS approached the City Planner with a further analysis of the relevant provisions of the City Code. After reviewing this submission, the City Planner indicated that he agreed. A copy of this email chain is attached as **Exhibit I**. Thereafter, the City Planner provided a Memorandum to the Planning Commission in which he recommended that the Planning Commission reconsider its decision on the commercial parking space issues. A copy of this Memorandum is attached as **Exhibit J**.

At the August meeting the City Planner reviewed with the Planning Commission his Memorandum recommending a change of decision on the commercial parking issue. Unwilling to rely upon the recommendation of its expert staff, the Planning Commission decided to seek an opinion of the City Attorney before proceeding. That opinion, according to the official minutes, was to be "regarding the Code definitions for street, right of way, and off-street parking . . ." A copy of the minutes of the August Planning Commission meeting are attached as **Exhibit K**.

AVS was not provided a copy of the City Attorney's "opinion" itself, and it apparently was not a written opinion. However, on the morning of September 21, the City Planner provided to AVS a copy of his Memorandum to the Planning Commission dated September 14, 2010, purporting to summarize the views of the City Attorney. A copy of that Memorandum is attached as **Exhibit L**. Contrary to the Planning Commission's express request, the September 14, 2010 Memorandum did ***not*** address at all the Code's definitions of "street" and "right of way." AVS discussed the Memorandum briefly with the City Planner and agreed to provide a response to the Memorandum for consideration by the Planning Commission.

AVS sent an email to the Planning Commission prior to the September meeting, and we understand that it was provided to the Commissioners prior to or during the meeting. The response pointed out that the City Attorney's opinion ignored the Code's definitions of "street" and "right of way," and that under those definitions, the commercial parking spaces for the Project were "off-street" parking spaces located partially on the Property and partially in the unpaved "right of way." A copy of the AVS email is attached as **Exhibit M**.

At its September meeting, the Planning Commission “voted to maintain the approval of the enclosed Findings and Conclusion with conditions that were signed by the Yachats Planning Commission Chair on July 29, 2010.” See **Exhibit A**.

Basis and Reasons for the Appeal

The portions of the Decision that AVS appeals to the City Council is the finding that: “The Planning Commission finds that required off-street [commercial] parking spaces need to be located entirely within the subject lot”; and the Order that “all required parking spaces shall be provided on-site.” Given this finding and order, if AVS decides to reduce the residential unit count back to five, so that the 2,500 square feet of land per residential unit is satisfied and the Project is **permitted as a matter of right in the commercial zone**, AVS believes that the City Planner will not issue the building permit, because of the Planning Commission’s erroneous decision about commercial parking spaces.

There are several reasons why this “finding” must be reversed.

First, it is obvious from the comments of Commissioners at the meeting that the genesis of this erroneous finding was the Commission’s confusion between parking space requirements for residences and parking space requirements for commercial uses. It is true, as one or more Commissioners noted at the July meeting, that the City Code requires that all parking spaces for residences be located on the lot itself. Section 9.48.010.D expressly states that: “off-street parking spaces for dwellings shall be located on the same lot with the dwelling.” Commercial parking spaces, however, are not included in that requirement, but can be “located not further than 500 feet from the building or use they are required to serve.”

Second, the City Code has **no provision** stating that commercial parking spaces must be located “on the same lot” as the commercial building. Also, the City Code has **no provision** that commercial parking spaces must be “off-right of way”. The Planning Commission’s finding would be permissible if either such provision were in the City Code; but neither is.

Third, the Code does have specific language on required commercial parking spaces. And that language clearly does **not** state that all commercial parking spaces must be entirely “on the same lot” on which the commercial building is located. Rather, Section 9.48.010(O) states: “Off-street parking space requirements: . . . Retail store: one space for each two hundred (200) square feet of floor area; . . . bank, office: one space for each three hundred (300) square feet of floor area.” On its face, this language clearly does not say that commercial parking spaces must be located “on the same lot” as the commercial building to which they relate. By specifically providing in the case of dwellings that “off-street parking must be on the same lot,” the Code clearly acknowledges that “off-street” and “on the

lot” do not mean the same thing. If they did, the special provision on dwelling unit parking spaces would be unnecessary.

Fourth, at the beginning of Chapter 9, the Code does contain definitions of the terms used in the commercial parking space requirement. Those definitions are directly contrary to the Commission’s finding and order. As noted above, the commercial parking requirement is only for “off-street” parking in the required quantities. “Street” and “right of way” are not the same thing. The Code makes this clear. The Code defines “street” as “a way of travel for vehicular traffic which has been dedicated, deeded, or an easement granted to the public for public use.” The Code defines “right of way” as “a strip of land within which is located a passageway, as conveyed for a specific purpose.” Despite the Planning Commission’s instruction that the City Attorney’s opinion address the definitions “street” and “right of way,” the “opinion” ignored those definitions. Given these definitions, the requirement of “off-street parking” in the commercial zone is satisfied when parking spaces are partly on the lot on which the commercial building is located and partially in the non-paved portion of the right of way that is not the paved “street.” Such parking spaces are “off-street.” The Code does not require that they be “off-right of way.”

Finally, it is clear that the effect of the Commission’s “finding” is to re-write the Code’s commercial parking spaces requirements to read like the requirement for residential parking spaces in the residential zone, that “commercial parking spaces must be located on the same lot as the commercial building.” It is not the province of the Commission to re-write the City Code. Until the City Council so re-writes the Code after appropriate notice and opportunity to be heard, it remains permissible for “off-street” commercial parking spaces in the commercial zone to be largely on the same lot on which the commercial building is located and partially in the portion of the right of way that is not the street.

The Planning Commission might have found that, even though AVS has the right to build five units on the site (more than 2,500 square feet of land per residential unit) with the commercial parking partially in the right of way, if it wants to build six units (2,223 square feet of land per residential unit), we impose the condition that AVS forego its right and place all commercial parking spaces entirely on the Property. That would have left AVS free to reduce the residential unit count back to five and proceed to obtain a building permit with the parking as originally planned and approved by the City Planner, without any required Planning Commission approval.

The Planning Commission did not take that approach. Both the discussion at the meetings and the language of the finding and order reflect the Planning Commission’s conclusion that an outright permitted use in the commercial zone must have all commercial parking spaces located entirely on the lot containing the commercial structures.

In light of the finding and order, the City Planner is not going to approve a building permit for the Project revised to include only five residential units, even though he continues to believe that the Code requirements for "off-street" commercial parking are satisfied. Only a decision of the City Council will provide the necessary assurance for the City Planner to approve a building permit for the Project at five residential units (more than 2,500 square feet per residential unit) with the commercial parking spaces as shown on the plan submitted to the Planning Commission.

Conclusion

The City Council should rule that, for a commercial zone outright permitted use, the City Code allows commercial parking spaces to be located partially on the lots on which the commercial buildings are located and partially on the off-street portion of the right of way.

Very truly yours,

AQUA VISTA SQUARE LLC

By: Our Coastal Village, Inc., Sole Member

By: _____
K. Layne Morrill, President

KLM:dlm
Attachments

LIST OF EXHIBITS

- A. September 27, 2008 letter attaching a copy of the July 26, 2010 Findings and Conclusion.
- B. May 10, 2010 AVS email to Yachats City Planner; and March 30, 2010 email from AVS to Yachats City Planner and Yachats City Planner's April 6, 2010 response.
- C. May 11, 2010 Yachats City Planner's response to AVS.
- D. May 18, 2010 AVS email to Yachats City Planner attaching revised concept sketches.
- E. June 15, 2010 Yachats City Planner's email to AVS and responses and replies.
- F. AVS's July 2010 request to the Planning Commission, with attachments.
- G. City Planner's Report
- H. Planning Commission Minutes dated July 26, 2010.
- I. AVS's July 29, 2010 email to Yachats City Planner and Yachats City Planner's August 3, 2010 Response.
- J. Yachats City Planner's email to AVS dated August 10, 2010, attaching Memorandum to Planning Commission.
- K. Minutes of August 17, 2010 Planning Commission Work Session and Minutes of August 17, 2010 Planning Commission Meeting.
- L. AVS's September 4, 2010 email asking about City Attorney's opinion; Yachats City Planner's September 21, 2010 email attaching September 14, 2010 Memorandum regarding City Attorney opinion.
- M. September 21, 2010 AVS's email to Planning Commission regarding City Attorney opinion.