



Resolution 2004-075

A RESOLUTION ADOPTING FINDINGS FOR THE CITY COUNCIL DENIAL OF AN APPEAL FOR THE SAFEWAY FUELING STATION SITE PLAN AND CONDITIONAL USE.

WHEREAS, the City Council heard the applicant's appeal at their August 24, 2004 regular City Council meeting; and

WHEREAS, the City Council denied the applicant's appeal and affirmed the Planning Commissions' denial of SP 04-03/CUP 04-01, Safeway Fueling Station Site Plan and Conditional Use; and

WHEREAS, the City directed staff to prepare their final decision and bring it back before them for adoption.

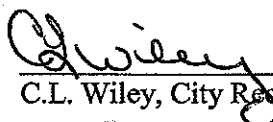
NOW, THEREFORE, THE CITY RESOLVES AS FOLLOWS:

The City Council adopts findings shown in the Notice of Decision attached as Exhibit A to this resolution.

Duly passed by the City Council this 1st day of September 2004


Mark O. Cottle, Mayor

ATTEST:


C.L. Wiley, City Recorder



Home of the Tualatin River National Wildlife Refuge

CITY COUNCIL FINAL ORDER

TAX LOT:	100
MAP NO.:	2S 1 29BC
CASE NO.:	SP 04-03/CUP 04-01
DATE OF DECISION:	August 24, 2004
DATE OF ORDER:	<u>9/01/04</u>
DATE OF MAILING:	<u>9/15/04</u>

I. DECISION

On August 24, 2004, the City Council of the City of Sherwood, Oregon **DENIED** the applicant's appeal and **AFFIRMED** the Planning Commission's denial of SP 04-03/CUP 04-01, Safeway Fueling Station Site Plan and Conditional Use, to construct a 4-pump fueling station with 8 fueling nozzles and attendant kiosk, proposed for tax lot 100 of Tax Map 2S 1 29BC in the Retail Commercial Zoning District.

II. FINDINGS

1. Decision.

On August 24, 2004, the City Council of the City of Sherwood, Oregon ("City") denied the applicant's appeal and affirmed the Planning Commission's denial of City of Sherwood File No. SP 04-03/CUP 04-01, Safeway Fueling Station Site Plan and Conditional Use.

2. Procedural Status.

Ken McCracken of RHL Design Group for Safeway, Inc. (the "applicant") submitted an application for a Safeway Fueling Station Site Plan and Conditional Use at the location specified above. The City deemed the application complete and mailed notice to surrounding property owners as required by applicable provisions of the Sherwood Development Code ("SDC") and ORS 197.763. The Planning Commission held evidentiary hearings on June 1 and June 15, 2004.

The Planning Commission also left the written record open for additional submittals. On July 20, 2002, the Planning Commission voted to deny the application by a vote of 4-2,

on the grounds that the applicant had failed to meet its burden of proof under SDC 4.302.03 C and E. The Planning Commission's Notice of Decision was mailed July 26, 2004. The applicant timely filed its Petition for Review of the Planning Commission's decision on August 9, 2004. The City Council heard the applicant's appeal on August 24, 2004. No City Council members revealed any ex-parte contacts. No City Council members announced any conflict of interest or potential conflict of interest. No City Council Member announced any bias or pre-decision on the application. Mayor Cottle disclosed his friendship and occasional business relationship with one of the attorneys for opponents. No one challenged the participation of the Mayor in this proceeding. The entire Planning Department file was physically before the City Council and was not rejected by the City Council.

The applicant appeared through legal counsel and through its consultants, and submitted argument as to why its appeal should be sustained.

Opponents appeared individually and through legal counsel and one consultant, and presented argument on why the decision of the Planning Commission should be affirmed.

One additional opponent, Gene Stewart, spoke in opposition to the appeal.

The applicant was allowed rebuttal and presented its rebuttal argument to the City Council.

The City Council voted to deny the applicant's appeal and affirm the Planning Commission's denial of the application by a unanimous vote of 6-0. The City Council directed that staff prepare findings for the City Council to adopt denying the appeal.

3. Findings

The City Council agrees with the Planning Commission and finds, based on substantial evidence in the whole record herein, that the applicant failed to meet its burden of proof under SDC 4.302.03 C and E. The City Council's reasoning is set forth below.

A. SDC 4.302.03C.

SDC 4.302.03C requires an applicant for a conditional use to prove the "granting of the proposal will provide for a facility or use that meets the overall needs of the community and achievement of the goals and/or policies of the Comprehensive Plan." As the applicant correctly points out, this language replaced prior language in effect when the applicant's 2000 conditional use application was denied in 2001. The prior provision required a showing of "demonstrable public need for the proposed use," and that the need is best served by allowing the use on the applicant's particular site. This provision had been interpreted as requiring a market study.

The new provision, more broadly stated than the old one, requires proof that the use will meet the overall needs of the community. This language has properly been interpreted as

no longer *requiring* a market study. However, the requirement to show the proposed use meets the "overall needs of the community" is not an invitation to present narrow grounds for compliance. In fact, we interpret this language as mandating a broad view of the needs of the community, including but not limited to economic factors such as the adequacy of existing, similar services; the need for an additional use of the specific type proposed; and impacts upon existing uses in the City. Such need may be shown with or without a market study, so long as the evidence in support of such need is persuasive.

Based upon the oral and written testimony submitted to the Planning Commission, the City Council finds the portion of the City in which the site is located to be amply served by existing fueling stations; the City as a whole is well served by fueling stations within the City and recently opened fueling stations outside but near the City; and the opening of the applicant's proposed fueling station may jeopardize the continued existence of existing stations, giving rise to unappealing and dangerous vacant sites detracting from the City's safety, appearance, and desirability as a place to do business. These factors are not outweighed by the benefits to traffic patterns in the City the applicant asserts the proposed fueling station would provide.

The applicant has not met its burden of proof under this approval standard.

B. SDC 4.302.03E.

SDC 4.302.03E requires an applicant for a conditional use to prove the "impacts of the proposed use of the site can be accommodated considering size, shape, location, topography and natural features." The City Council finds the site of the proposed fueling station to be considerably smaller than that proposed elsewhere on Safeway's property in 2000. Based upon oral testimony in the record; the written submittal of David Ramberg of petroleum industry consulting firm Economic Insight, Inc.; and photographic evidence submitted by George Johnston, the City Council finds the applicant has not proven that the size, shape and location of the proposed fueling station can accommodate the proposed use. In particular, the applicant has not demonstrated the safety and adequacy of the site to accommodate queuing of vehicles, circulation of vehicles, and deliveries by typical fueling trucks.

The applicant has not met its burden of proof under this approval standard.

C. ORS 197.522.

With respect to the applicant's additional argument that the City has an obligation under ORS 197.522 to approve the application with reasonable conditions, the City Council finds based on the advice of legal counsel that it is the duty of the applicant to show what those conditions would be and how they would result in meeting the criteria. In this case, the applicant presented an oversized exhibit and testimony proposing conditions relating to lighting, vegetative screening, additional internal curbing and related matters intended to address the compatibility of the proposed fueling station with surrounding uses. These

proposed conditions, even if adopted, would not result in meeting the two criteria identified above.

The City Council concludes that no reasonable and feasible conditions of approval were provided by the applicant so as to require approval of the conditional use application in this case.

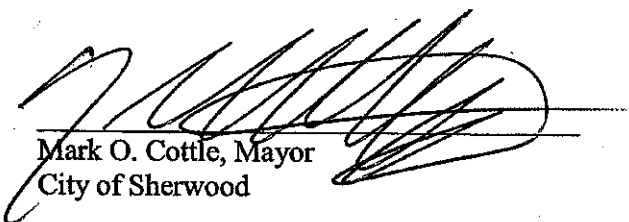
4. Conclusion

Based on these findings, oral testimony and written and photographic evidence in the Planning Commission record, and substantial evidence in the whole record, the City Council finds that the applicant has not met its burden of proof to satisfy all of the applicable approval criteria for the proposed fueling station site plan and conditional use.

Insofar as they are consistent with the above findings, the City Council hereby incorporates by reference the May 24, 2004 staff report and the June 2, 2004 update to the staff report. Where there is a conflict between the staff report and these findings, these findings shall control.

For the above reasons, the City Council hereby denies the applicant's appeal and affirms the Planning Commission's denial of the application.

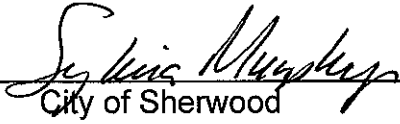
Dated this 1st day of September 2004.



Mark O. Cottle, Mayor
City of Sherwood

STATE OF OREGON)
)
Washington County)

I, Sylvia Murphy, Administrative Assistant for the City Manager of the City of Sherwood, State of Oregon, in Washington County, do hereby certify that the Notice of Decision on was placed in a U.S. Postal receptacle on September 15, 2004.



City of Sherwood