

**To:** Mayor Drabkin and City Council

**From:** Damien Hall

**Date:** April 19, 2023

**Subject:** Gwendolyn Hotel - Appeal of Planning Commission Approval  
AP 1-23 (HL 6-22), AP 2-23 (HL 7-22), AP 3-23 (HL 8-22) and AP 4-23 (DDR  
2-22)

---

This firm represents the Hugh Development LLC, applicant in the above-reference matter. This memorandum addresses the approval criteria applicable to the appeal currently before the McMinnville City Council ("Council"). We appreciate the opportunity to make our case, look forward to the hearing this evening, and hope to investing the City of McMinnville and Downtown community for years to come.

## **1. Downtown Design Standards and Guidelines**

The stated grounds for appeal include 17.59.050(A)(1), which requires that, "buildings shall maintain a zero setback from the sidewalk or property line." As noted by the Planning Commission decision, the proposed structure has a zero setback, as is correctly measured under the MMC on the ground floor, and satisfies this standard. The inclusion of "step-backs" in the design, such that the façade of upper floors are stepped-back from the lot line, does not change the manner in which a setback is calculated. This is the sole mandatory standard under the 17.59 Downtown Design Standards and Guidelines that is included in the grounds for appeal.

Throughout the review process there has been discussion of whether the guidelines that say "may" or "should" (as opposed to "shall") are intended to be mandatory approval criteria or non-mandatory guidelines. The applicant agrees with the findings of the Planning Commission that the use of the word "should" is permissive, as opposed to mandatory.

This understanding of the intent of the guidelines is the only supportable interpretation. Not only is intuitive that the code uses different words (should and shall) to mean different things, but that bit of common sense is memorialized in Oregon law of statutory interpretation. *See Atkinson v. Board of Parole*, 341 Or. 382, 388, 143 P.3d 538 (2006) (when the author of a statute "uses different terms within the same statute, normally it intends those terms to have different meanings").

Further, individuals involved in the drafting of the Downtown Design Standards and Guidelines have stated that the express intent of the drafters and City discussions in adoption were to establish a set of non-mandatory guidelines, as indicated by the use of the words "may" and "shall." See letter from Walter Gowell:

851 SW Sixth Ave., Suite 1500    Portland, Oregon 97204-    **Main** 503.224.6440    **Fax** 503.224.7324    [DunnCarney.com](http://DunnCarney.com)  
1357

Dunn Carney Allen Higgins & Tongue LLP | *Member of Meritas Law Firms Worldwide* [Meritas.org](http://Meritas.org)



- "The word 'shall' was intended to be mandatory, required and directive as to certain primary design criteria standards. The term 'should' was intended to designate preferred (but not required) design guidelines..."
- "Section 17.59.080(B) relating to signage contains a preference by use of the words 'should' for grouped signage on a single buildings, but does not make grouped signage a mandatory design requirement, as is readily apparent in Downtown at the present time."
- "I don't recall any intention by the Committee to place a height limitation on building modifications, reconstructions, replacements or new construction, hence the Committee's use of the word 'should' instead of the word 'shall'..."

To reach the outcome requested by appellant, the City Council would be required to find that "should" means the same thing as "shall" in contravention of Oregon principles of statutory interpretation and giving no credence to the direct testimony of those involved in the drafting of the Downtown Design Standards and Guidelines. The City Council should decline to make such a counter-intuitive interpretation, and should deny the appeal grounds that are non-mandatory guidelines, specifically 17.59.050(B)(1) and (2).

Furthermore, the project design has been informed and shaped by the land use review process and the application of the non-mandatory guidelines. The applicant has incorporated multiple design changes in response to the feedback from City staff, the Historic Landmark Commission, and the Planning Commission, based on advancing the intent on the non-mandatory guidelines. For example, the proposed building has incorporated

- Articulating the façade of the building to break-up continuous massing and instead read visually as three separate buildings consistent with the historic lot and development pattern on the block.
- Integration of additional architectural details (crown, corbel, arched french doors)
- Integrated step-backs with a 2-story expression on the corner of 3<sup>rd</sup> and Ford

Utilizing the non-mandatory guidelines to inform and improve project design is consistent with the intent of the code, also as indicated by Mr. Gowell's letter stating:

"It was never the intent, as I understood it, for the Downtown Design Standards and Guidelines to act as a strait jacket to future development. They were intended to act as a combination of suggested guidelines and required standards (and prohibitions) to maintain and enhance the historic character of our Downtown and to encourage the voluntary preservation of historic structures. The approach taken was to foster cooperation between city and private property owners, to include areas of flexibility in the guidelines and to minimize overly restrictive standards or requirements in order to avoid stifling private development and redevelopment."



The cooperative application of non-mandatory guidelines throughout this review process has made the proposed building design more attractive and suited to 3<sup>rd</sup> Street, resulting in a hotel that can be an asset to the City and Downtown for years to come.

## 2. Certificate of Approval for Demolition

The standard for approval of a certificate of approval for demolition are found in state law [OAR 660-023-0020(8)(a)] and the Chapter 17.65 of the McMinnville Zoning Code ("MMC"). State law requires that the City consider a non-exclusive list of factors, and the MMC requires the City to apply a different set of factors. The City and state factors are summarized in the below chart. The state law and MMC factors are of a nature that necessitates the City to undertake a weighing of the evidence in the record as to each factor, and then to weigh all of the factors in the aggregate.

<b>State OAR 660 -023-0200</b>	<b>McMinnville Municipal Code, 17.65.050</b>
Condition	Comprehensive Plan Policies
Historic Integrity	Economic Use of the Historic Resource
Age	Value and Significance of the Historic Resource
Historic Significance	Physical Condition of the Historic Resource
Value to the Community	Whether the Historic Resource is a Public Hazard
Economic Consequences	Whether the Historic Resource is a Deterrent to an Improvement Program Whose Benefit Substantially Overrides the Public Interest in Preservation
Design or Construction Rarity	Whether the Retention of the Historic Resource would Cause Financial Hardship to the Owner not Outweighed by the Public Interest in Preservation
Comprehensive Plan Policies	Whether Retention of the Historic Resource would be in the Best Interest of the Majority of the Citizens of the City and the Resource Could be Documented and Preserved in Another Way

The Planning Commission decision undertakes the required weighing analysis and comes to the correct conclusion, granting the certificate of approval. This decision was based primarily on both practical and expert evidence in the record demonstrating that rehabilitation and ultimately preservation of the 609, 611, and 619 buildings is not economically viable and investment from the marketplace is unlikely.

Unrefuted expert testimony in the record includes the following:

1. Structural Report, prepared by Harper Houf Righellis Inc. Concludes that the structural condition of the 609, 611, and 619 buildings present "emergent concerns that are significant and should be addressed in the very near futures."



2. Historic Resources Assessment, prepared by Architectural Resources Group. Concludes that the 609, 611, and 619 buildings and their individual historic elements have undergone extensive alterations such that the historic integrity has been significantly compromised.
3. Economic Evaluation, prepared by Johnson Economics. Concludes that based on the physical condition of the buildings, requirements to bring the buildings into compliance with current code:
  - a. "[T]he retention of the existing structures would cause substantial financial hardship to the owners."
  - b. "The likely cost of the necessary improvements and upgrades would render the cost of space to likely be hundreds of dollars more per square foot than new construction."
  - c. "If the redevelopment was not done and the buildings were kept in their current use without significant upgrades, they would pose a life safety hazard and may not be insurable."
  - d. "The structures are depreciated to a point in which investments in the structures would be unlikely over time as they would not yield an economic return."
  - e. "As a result the properties would be likely to face an extended period of declining condition and underutilization for the foreseeable future."

Generally, the factors under state law and the MMC involve the economics of preservation, the history and condition of the buildings, and local policies for preservation and economic development. Here, all of the factors relating to economics of preservations weigh against preservations. The only evidence in the record to the contrary are comparables submitted by the applicant that show the pricing for select other historic properties. However, selling the property on the cheap does not solve the economic issues associated with preservation, it just passes them along. The cost to improve the buildings remains preclusively high and the likelihood of investment in rehabilitation of the buildings remains preclusively low.

The record contains evidence of the history and condition of the building that both favors and weighs against preservation. The evidence in favor is that the buildings are unquestionably old. The evidence weighing against preservations is that the buildings have been altered to such an extent that they no longer reflect the historic elements of the original buildings. The condition of the buildings, including vacant and unusable upper floors, also weighs against preservation. In the aggregate, the age of the buildings are outweighed by the indistinct nature of the retained historic elements, lack of historic integrity, minimal historic significance, and limited value to the community of vacant unusable space. Thus, the factors for the history and condition of the building also weigh against demolition.

Finally, the local goals and policies of the comprehensive plan include statements both in support of historic preservation and in support of economic development. The record contains substantial evidence that the Gwendolyn will advance the economic development



goals of the City, including Comprehensive Plan Goal IV and the MAC-Town 2032 goals of economic prosperity, growth and development character. In contrast, there is substantial expert evidence that denying the demolition will result in the preservation of the buildings, rather if required to remain, the properties would “the properties would be likely to face an extended period of declining condition and underutilization for the foreseeable future.” Economic Evaluation, prepared by Johnson Economics. Thus, the policies for preservation should be given discounted weight due to the demonstrated unlikelihood of investment in preservation as an outcome.

Accordingly, both the state and local standards weigh in favor of granting the certificate of approval for the requested demolition.

### **3. Conditions of Approval**

In response to the testimony and discussion at the City Council hearing on April 18, 2023, the applicant proposes the following modified conditions of approval for the City Council’s consideration.

- Parking: Condition 6. Provide detailed plans for the **required** parking structure, email correspondence has been provided by the developers engineer mentioning a possible encroachment into the city right-of-way for the structure of the underground parking. **Preliminary design of the parking structure has capacity for 67 stalls, such capacity may be modified in response to site conditions or to satisfy regulatory requirements. Any modification reducing the total capacity by more than 10% requires administrative approval.**
- Valet: Condition 7. Provide details for **required** valet parking so the City can review the location and size of the parking for approval prior to building permit issuance.
- Public Art: Condition 15. Per the Applicant’s testimony at the March 16, 2023, Planning Commission public hearing, the Applicant will need to memorialize the automobile heritage of this site with appropriate public art, murals, rooms named for historic McMinnville families and businesses as appropriate, and salvaging of the historic brick and interior materials as much as possible to be incorporated into the new project design. **Applicant will engage the McMinnville Downtown Association Committee for Public Art to collaboratively prepare a public art plan for the Gwendolyn, including the selection, acquisition and commissioning of public art.**