

APPEAL TESTIMONY SUPPLEMENT

RE DECISION APPROVING AULD/JOHNSTON (2)  
PARTITION, TENTATIVE PLAN REQUEST

FILE P 07-19

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The following supplemental testimony by appellants, including the representative of the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, is submitted in support of the appeal of the above captioned decision approving a partition tentative plan.

The JWN neighborhood association encompasses the subject property, and the JWN Executive Board voted unanimously at its December 5, 2007 meeting to direct the Chair to appeal this decision.

Charles R. Snyder and Paul T. Conte, each on their own individual behalf as residents, are also parties to this appeal.

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**REQUEST FOR APPELLANT RESPONSE TO NEW EVIDENCE**

Pursuant to ORS 197.763(6)(c), appellants request the opportunity to respond to new evidence submitted during the period the record was left open by the Hearings Official.

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The section numbers and letters below correspond to appellants' January 23, 2008 Appeal Testimony. Some sections in the Appeal Testimony are not included below because appellants believe the issues are fully addressed in the testimony already submitted.

## **I. BACKGROUND**

### **C. Substantial evidence proves the design and purpose of Parcel 1 is to build a fourplex and that applicant intends to build a fourplex**

Despite appellants' invitation to applicant's representative at the January 23, 2008 appeal hearing, neither applicant nor staff presented any evidence or argument at or prior to the hearing to rebut the substantial evidence in the record that the design and purpose of Parcel 1 is to build a fourplex and that applicant intends to build a fourplex.

Appellants observe that applicant's "Tentative Partition Plan," under "NOTES AND RESTRICTIONS," item number 20, states:

"The existing waste water lateral will be cut back to serve Parcel 1. The proposed wastewater lateral will serve parcel 2."

The existing waste water lateral is shown on the plan as running directly from W. 12th Alley to the northwest corner at the rear of the existing house. Thus, the application explicitly includes the feature of a waste water lateral that will run from W. 12th Alley, approximately 12 feet inside the west side lot line, to a point behind the southern boundary of the rear portion of Parcel 1.

This explicitly included feature is stated "to serve Parcel 1," providing further evidence of applicant's stated intent to "put four units on the back lot" (i.e., the rear portion of Parcel 1).

### **D. Deferred approval criteria will not be evaluated during building permit process**

Neither applicant nor staff presented any evidence or argument at or prior to the hearing to rebut appellants' assertion that deferred approval criteria (as described in appellants' January 23, 2008 Appeal Testimony) will *not* be evaluated during building permit process.

## E. Parcel 1 is accessible only from an alley

During the appeal hearing, staff stated:

“With respect to West 13th Avenue, staff would note that the proposed configuration of the parcel does enable direct driveway access to West 13th to the rear portion of the lot assuming it would be the rear portion that were developed although staff doesn’t find that to be directly relevant or necessary for compliance with approval criteria.”

Applicant also made a similar claim during oral rebuttal at the hearing.

Appellants note that this claim, even if it were supported by evidence, would not be relevant to appellants’ arguments with respect to Lot Frontage (Appeal Item 2). Appellants argue that Lot Frontage must extend its full width from the street to the buildable portion of the lot, for at least the purpose of providing an access corridor.

There is nothing in the code to suggest, and neither applicant nor staff has advanced any theory, that Lot Frontage can narrow to the width of a one-way driveway between the street and the buildable portion of the lot. In fact, such an interpretation would conflict with the approach that currently exists in code for R-1 Flag Lot standards, which require the 15-foot frontage to maintain its full width for the entire length from the street to the “flag” portion of the lot. As appellants explained in Appeal Testimony, it’s unreasonable to assume, in the absence of any supporting evidence, that the code would allow a regular R-2 lot’s access corridor to narrow to *less than* the 15-foot requirement for the pole sections in *all* flag lots, in *all* residential zones.

Appellants also note that, to the degree an assertion that a legal driveway could be constructed across Parcel 1’s “pole” might be relevant to appellants’ arguments with respect to Street Connectivity, such an assertion also conflicts with staff’s and applicant’s other testimony, as explained further under Appeal Item 4, below.

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In any case, the *only* evidence presented in support of this general assertion over the entire duration of the PT 06-43 and PT 07-19 approval and appeal processes has been staff’s statement in PT 06-43 that a 12 foot driveway could be used for one way travel across the 13.9 foot segment of Parcel 1’s “pole.”

Neither applicant nor staff, however, has presented *any* evidence or analysis to demonstrate that a *legal* 12 foot driveway would be permitted or could be

constructed from W. 13th Avenue to the buildable portion of the lot through a section that would allow less than a foot on either side of a driveway of this width. (See also Item I.C, above.)

Depending on the situation, the code places a variety of requirements on driveways, including adjacent landscaping, as well as requirements for sidewalks to provide direct street access for pedestrians coming to and from dwellings on the rear of a lot such as Parcel 1. Use of a *one-way* driveway would also require the driveway to continue across the rear portion of the lot, and W. 12th Alley would have to be used for vehicles exiting Parcel 1. None of these considerations have been addressed by applicant or staff, and thus the claim that a driveway across the “pole” portion of Parcel 1 could provide direct access to W. 13th Avenue is complete speculation, as well as irrelevant.

Based on staff’s own comment that their unsubstantiated claim of driveway access is not relevant or necessary, appellants understand the Planning Director’s findings and decision to *not* be based at all on a finding that Parcel 1 provides direct street access across the “pole” portion of Parcel 1. Were such a finding to be a necessary element of any Planning Director decision, then such a decision would be in error on the basis that the record doesn’t contain substantial evidence in support of such a finding, nor was such a finding adequately identified in the Planning Director’s Decision to enable appellants to contest the finding.

The Hearings Official should, therefore, either ignore this unsubstantiated claim (if the decision does not depend on it) or reverse the decision, if the decision depends on this claim.

#### **F. City Council prohibited lots accessible only from an alley**

Neither applicant nor staff presented any evidence or argument at or prior to the appeal hearing that rebuts appellants’ assertion that City Council prohibited lots accessible only from an alley and that the code implements this prohibition in some manner.

As appellants demonstrated in their Appeal Testimony, the *only* way in which the Planning Director (and staff) addressed this issue was to establish that Parcel 1 is not encompassed by the definition of “Alley Access Lot/Parcel,” a fact that appellants do not dispute, but which is not relevant to the issue.

Appellants established in Appeal Testimony that the definition of “Alley Access Lot/Parcel” was not used in *any* way to limit creation of *any* form of

new lots, and was thus irrelevant to determining how the code implemented Council's prohibition.

During staff's response to appellants' oral testimony, in which this topic was discussed extensively, staff offered no rebuttal to appellants' explanation of the "Alley Access Lot/Parcel" definition and appellants' assertion this definition was irrelevant.

Nor did staff recant or qualify the Interim Planning Director's prior public statements confirming appellants' assertion that the code was changed to prohibit lots accessible only from an alley.

Thus, after two lengthy approval and appeal processes, appellants' assertions on this important topic remain unchallenged.

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At the appeal hearing, both staff and appellant restated the assertion that EC 9.5500 Multiple-Family Standards *requires* access to be from the alley.

Appellants note that EC 9.5500 is not applicable to tentative lot partition approval criteria unless the intended development is for three or more units. Thus, to the degree that applicant or staff desire to introduce EC 9.5500 into the discussion regarding Parcel 1, applicability of these standards must be based on the premise that three or more units are intended for Parcel 1. Otherwise, EC 9.5500 is irrelevant to this decision.<sup>1</sup>

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<sup>1</sup> Appellants also note that if staff's claim regarding multi-family development access were applicable and accurate, then staff's assertion that Parcel 1 could have direct, driveway access to W. 13th Avenue would be wrong for any development over two units on Parcel 1.

It can be difficult to track staff's shifting arguments regarding Parcel 1 access and connectivity, especially when staff tosses unsupported statements, such as that Parcel 1 can have "direct driveway access to West 13th," into the discussion and then, in the same breath, declares the statement not relevant.

Appellants would just point out that, melding staff's comments regarding driveway access and multi-family development access logically results in a staff position that Parcel 1 might be considered to have the potential for direct, driveway connectivity to W. 13th Avenue *only* if an approval condition were imposed that required Parcel 1 to be limited to two dwellings. Otherwise, according to staff's approach, Parcel 1 must be viewed as *not* having the possibility of direct, driveway connectivity to W. 13th Avenue because of the multi-family access standards.

Appellants note that even if EC 9.5500 were applicable, staff asserted at the PT 06-43 appeal hearing that Parcel 1 would not necessarily have to take access from the alley:

“The multi-family standards which require these multi-family developments, such as would potentially be the case, to take access to the alley. That standard is available for adjustment through further land use application and consideration of those approval criteria. So it’s not necessarily an absolute that upon development that it’s a certainty that all of those units would take alley access.”<sup>2</sup>

As staff asserted in the previous appeal, EC 9.5500(11)(c) does *not* require multi-family development take access from the alley when an adjustment is made based on the criteria of EC 9.8030(8)(e).

EC 9.8030(8)(e) states:

(e) Site Access and Internal Circulation. The requirements set forth in EC 9.5500(11) may be adjusted in accordance with the criteria in this subsection. In the case of an adjustment, all of the following standards apply:

1. Sidewalks may be designed as curbside walks only along those portions of the private streets providing parallel on-street parking.
2. Street trees may be placed in tree wells or adjacent to the sidewalk.

Neither of the two standards would prevent an adjustment for Parcel 1, and thus Parcel 1 would *not* be required to take access only from the alley.

In summary, nothing in applicant’s or staff’s comments regarding multi-family standards alters the fact that City Council prohibited lots accessible only from an alley, and the land use code implements that prohibition.

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Appellants overarching response is that direct, driveway street access by Parcel 1 has not been established with sufficient evidence and is (as staff agrees) irrelevant. Thus, the Planning Director’s decision is not, and cannot, be based on such a speculation.

<sup>2</sup> PT 06-43 Appeal Hearing Recording at 1:42:03.

## REPLY ON SPECIFIC APPEAL ITEMS

### **Appeal Item 1. Partition conflicts with allowable density**

Appellants note that the circumstances set forth under ORS 197.829(1) apply to this appeal item (as well as Appeal Item 2, as cited in the January 23, 2008 Appeal Testimony), and that LUBA is required to reverse or remand a city's decision or code interpretation if it:

- (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation;

Accordingly, the Planning Director erred in allowing a partition that produces results inconsistent with the express language (and diagram) of the Eugene-Springfield Metropolitan Plan.

### **Appeal Item 2. Parcel 1 has inadequate frontage**

In applicant's Response to Appeal Statement (PT-07019), submitted January 22, 2008, applicant states:

The Planning Director correctly interpreted the code standard as a one dimensional requirement. There is nothing in the code to suggest that a two-dimensional standard should apply. \*\*\* Lot frontage is a one dimensional measurement.

In oral testimony by Mr. Mueller at the January 23, 2008 appeal hearing, applicant reconfirmed that applicant's sole argument that Parcel 1 complies with the Frontage Minimum criterion *requires* interpretation of Lot Frontage as a one-dimensional line, equivalent to the Front Lot Line:

"There is nothing in the definition of lot frontage that indicates a two-dimensional standard. Lot frontage is a one-dimensional measurement; that portion of a lot abutting a public street."

During staff's oral response at the January 23, 2008 appeal hearing, staff also reconfirmed that the Planning Director's decision that Parcel 1 complies with

the Frontage Minimum criterion *requires* that Lot Frontage be interpreted as a one-dimensional line, equivalent to the Front Lot Line.

Appellants have established in their Appeal Testimony that the definition of Lot Frontage is a “portion” of a lot, and therefore a two-dimensional area, with a minimum width specified in Table 9.2760.

Appellants have subsequently searched the entire EC Chapter 9 Land Use Code and found *not a single instance* in which “portion of lot”, “portion of parcel”, “portion of development site”, or similar use of “portion of ...” treats “portion” of a lot as a line, rather than an area. In other words, *everywhere* in Eugene’s land use code – including *all* definitions in EC 9.0500, and every single development standard that uses this term – “portion of a lot” denotes an area. (Attachment A lists the instances where “portion of a lot” or similar term occurs in EC Chapter 9.)

Despite this fact, staff would have the Hearings Official accept that in the *singular* instance of the Lot Frontage definition, “portion of a lot” denotes a line, not an area – even though interpreting a portion of an area as a line doesn’t conform to standard English usage or conform to basic rules of high school geometry or treat the term consistently with the entire rest of Eugene’s land use code.

Just supposing the interpretation upon which applicant’s arguments and the Planning Director’s decision hinge were correct, here is how various sections of Eugene’s code would *have* to be interpreted in future cases:

**9.0500 Definitions**

**Alley Access Lot/Parcel.** A lot or parcel abutting an alley and not abutting a street and created from the rear **line** of an existing lot or parcel.

**Lot Coverage.** That **line** of a lot which, when viewed directly from above, would be covered by a building or structure, or any part thereof, \*\*\*.

**Open Space.** Unless otherwise specified in this land use code, the **line** of a development site not devoted to buildings, parking, or driveways.

**Wetland.** Any parcel or **line** of a parcel which meets the state or federal definition of wetlands that are under the jurisdiction of state or federal laws. Synonymous with "jurisdictional wetland".

**9.2683 Special Use Limitations.**

- (4) The physical area of the development site to be evaluated during the site review or conditional use permit process, when

required according to the above subsections, shall be based on the line of the development site specifically occupied by the proposed use and the surrounding 100 feet.

**9.2687 Special Standards for Table 9.2686.**

- (2) Minimum lot area includes both the pole line and flag line of the lot.

**9.5500 Multiple-Family Standards.**

**(2) Applicability of Multiple-Family Standards.**

- (a) Except for building alterations and building additions that increase the square footage of liveable floor area by less than 50%, multiple-family standards shall apply to all multiple family developments in all zones except commercial. In cases where the standards apply, they shall be considered applicable for the line of the development site impacted by the proposed development.

**(11) Site Access and Internal Circulation.**

- (b) Driveways. Driveways and parking drives are private roadways for projects or line of projects not served by streets. Driveways and parking drives shall be designed in accordance with the following standards:

**9.7065 Quasi-Judicial Hearings- Procedures.**

- (2) No member of the hearings body may discuss or vote on a matter when:
  - (b) The member owns all or a line of the property that is the subject of the matter before the hearings body or owns abutting or adjacent property.

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In the face of this overwhelming evidence, staff could muster nothing more in their oral testimony than the obviously *illustrative*, rather than *definitive*, Figure 9.0500 Lot lines, Lot Frontage, Lot Width, Lot Depth, which is reproduced in Attachment B.

The first thing to note is that this figure covers only the simplest of cases – perfectly rectangular lots, in which an example lot’s frontage extends arbitrarily deep, up to and including the entire depth of the lot. This figure does not, for example, cover flag lots; and if the figure were to include flag lots, it would be necessary to depict the extent of the frontage -- which is the full extent of the “pole” portion of a flag lot.

The second thing to notice is that the referenced figure doesn’t attempt to depict Frontage Minimum, and therefore doesn’t speak one way or the other to how deep the frontage must be to satisfy the criterion in Table 9.2760. Instead, the figure simply shows the width of the example lots’ frontages, because no matter what the required extent is for the Frontage Minimum, all the example lots obviously would satisfy the requirement as long as the widths of their lots were at least as wide as required by the Frontage Minimum.

That this figure is, in general, only *illustrative*, and not *definitive*, of various lot characteristics is further indicated by the fact that the figure provides an illustration of Lot Width only for the simplest case. The Hearings Official could no more rely on this figure to determine how Parcel 1’s Lot Width should be evaluated than the Hearings Official can rely on this figure to evaluate whether Parcel 1 complies with the Frontage Minimum requirement.

Finally, although appellants believe the referenced figure is nothing more than a partial illustration, and that the figure doesn’t inherently conflict with the definition of Lot Frontage as an area, if the figure were found to conflict to any degree with the written definition, the written definition must take precedence. *Carlson v. City of Dunes City*, 139 Or App 343, 911 P.2d 1279, (1996).

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As appellants have established through the direct words in the code’s definition and an abundance of supporting evidence, Lot Frontage is inarguably an area, not a line. Appellants have further presented a compelling argument, with substantial supporting evidence, that the minimum frontage must extend to the buildable portion of the lot in order to provide an access corridor and implement Council’s prohibition against lots accessible only from an alley.

Applicant and staff, however, have done *nothing* other than insist Lot Frontage is a one-dimensional line, and is therefore interchangeable with Front Lot Line. They have presented no evidence to support *any* other theory of the extent of Lot Frontage contrary to appellants’ evidence and arguments.

Appellants reiterate that a basic rule of statutory construction holds that use of a term in one section and not in another section of the same statute indicates a purposeful omission, *Emerald PUD v. PP & L*, 302 Or. 256, 269, 729 P.2d 552 (1986). The *only* interpretation that can be applied to the significantly different definitions that exist for Lot Frontage and Front Lot Line is that they are *different*, and therefore *not* identical as the Planning Director contends.

Instead, by inserting “line” in place of “portion” in the interpretation of the definition of Lot Frontage, the Planning Director has violated the statutory enjoiner “not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010.

Thus, because the Planning Director’s decision that Parcel 1 complies with EC 9.8215(1)(a) rests *entirely* on the patently erroneous finding that Lot Frontage is a one-dimensional line and is interchangeable with Front Lot Line, the decision must therefore be reversed.

Appellants note that the decision must be reversed on this basis, even if appellants’ explanation of how the required extent of Lot Frontage should be evaluated for purposes of the Frontage Minimum standard (i.e., to the buildable portion of the lot) is found lacking. The burden of proof rests on applicant, and by depending entirely on Lot Frontage being interpreted as a line, applicant has clearly not presented evidence or argument that is sufficient to prove compliance, regardless of the merits of appellants’ arguments on how to determine the extent of the required frontage.

#### **Appeal Item 4. Parcel 1 does not meet street width and connectivity standards**

##### **A. Street Width standards**

Applicant argues that EC 9.6870 should be *ignored* when referenced directly as one of the enumerated criteria included under EC 9.8215(1)(b), which lists: “EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways.”<sup>3</sup>

Applicant’s rationale is that the EC 9.6870 requirement that “\*\*\* the right-of-way width and paving width of streets and alleys dedicated shall conform to \*\*\*” actually means “\*\*\* the right-of-way width and paving width of streets and alleys *that are dedicated in this application* shall conform to \*\*\*.”

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<sup>3</sup> Application at 19.

The Planning Director did *not* present this argument in the Decision. Instead, the Planning Director simply relied on the argument that the Planning Director's uncertainty about the design for W. 12th Alley excused the applicant from complying with EC 9.6870.

Subsequently, however, staff adopted applicant's argument in their January 14, 2008 Memorandum:

It is staff's position that EC 9.6870 does not apply in the context of EC 9.8215(1)(b) because the partition does not involve dedication of streets or alleys that would be subject to EC 9.6870.<sup>4</sup>

But with no explanation for their inconsistency, staff states on the next page of the Memorandum:

Staff notes that the provisions of EC 9.6870 are relevant to compliance with EC 9.6805 Dedication of Public Ways, EC 9.6750 Special Setback Standards, and EC 9.6505(3) Improvements-Specifications for Streets and Alleys.<sup>5</sup>

Staff's selective application of EC 9.6870 in all cases, *except* when EC 9.6870 is considered as one of the directly enumerated criteria under EC 9.8215(1)(b), conveniently avoids Parcel 1 having to comply with EC 9.6870 right-of-way standards. That dodge was necessary for the Planning Director to approve an application in which applicant admits:

"The applicant cannot do anything about the fact that the alley right-of-way width does not meet the standard of Table EC 9.6870."<sup>6</sup>

The Planning Director cannot be allowed to *selectively* apply explicit, mandatory approval criteria. Nor can the Planning Director be allowed to *selectively* "insert what has been omitted" in the code, as has been done with the interpretation of EC 9.6870 with respect to compliance with right-of-way standards.

Further, the Planning Director's interpretation does not comport with the plain language and meaning of the code. Very few partitions require new dedication of streets or alleys. Most occur within existing subdivisions, as in the present case. The city proposes to greatly intensify the use of a clearly

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<sup>4</sup> Memorandum at 4.

<sup>5</sup> Memorandum at 5.

<sup>6</sup> Application at 19.

substandard alley that is the only access facility available, without requiring concurrent improvements to that alley.

The city's rationale would allow an undeveloped but subdivided tract of land to be further partitioned without requiring the developer to ensure the alley right-of-way is in accordance with EC 9.6870 standards. This is an absurd invitation to disorderly development and an unacceptable capitulation by the city. As such, it should not be sanctioned by the Hearings Officer.

The simple fact is that W. 12th Alley is a dedicated alley; and for this partition to comply with EC 9.8215(1)(b), the alley must meet EC 9.6870 standards, unless an alternative width has been approved, which has not happened.

Regarding applicant's other attempt to circumvent compliance with EC 9.6870, appellants reiterate that alleys are explicitly included under "Local Streets" in Table 9.6870, and therefore alleys are inarguably subject to EC 9.6870 standards, irrespective of the definition of "Street."

Appellants have fully addressed in our Appeal Testimony the remaining argument that compliance with EC 9.6870 can be deferred.

The application does *not* comply with EC 9.6870 standards and therefore the decision must be reversed.

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Regarding EC 9.8215(1)(g), which appellants do not contest: Appellants note that, to the degree necessary, Condition 2 must be consistent with the EC 9.6750(2) requirement:

A lot or parcel of land in any zone adjoining a street for which the planned public right-of-way width and alignment has been determined, shall have a building setback line equal to a distance of one-half the width established in EC 9.6870 Street Width, plus the setback required in the zone.

The current description of Condition 2<sup>7</sup> may or may not be adequate to that effect.

Notwithstanding that appellants do not contest the decision regarding EC 9.8215(1)(g), appellants maintain the application does not comply with EC 9.8215(1)(b).

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<sup>7</sup> Decision at 15.

## **B. Street connectivity standards**

Appellants note again that in the application, applicant provided no evidence or claim under the discussion of EC 9.6815(2)(b)<sup>8</sup> that Parcel 1 complies with EC 9.6815(2)(b) other than to request an exception to EC 9.6815(2)(b), based on EC 9.6815(2)(g)(1) or EC 9.6815(2)(g)(2)(b).

The Planning Director Decision asserts “direct vehicular access to West 13th Avenue is potentially available” to Parcel 1, but otherwise indicates only that such access is available via West 12th Alley. The Planning Director also found applicant had provided sufficient evidence to receive an exception to EC 9.6815(2)(b), based on EC 9.6815(2)(g)(1) and EC 9.6815(2)(g)(2)(b).

Following the Planning Director’s decision, applicant submitted the January 22, 2008 “Response to Appeal Statement (PT-07-19)”<sup>9</sup>, in which applicant inserted the claim that “West 12th Alley is a public way that provides a connection to all public streets within ¼ mile of the development.”

In oral testimony, staff asserted the “proposed configuration of the parcel does enable direct driveway access to West 13th to the rear portion of the lot assuming it would be the rear portion that were developed although staff doesn’t find that to be directly relevant or necessary for compliance with approval criteria.”

Thus, there are three ways in which compliance is asserted:

1. Via a driveway on Parcel 1
2. By an exception
3. Via W. 12th Alley

Appellants first note that the same lot configuration and surrounding environment were present in PT 06-43, and applicant and staff presented the same basic rationale (except in this case they have added a claim for an exception under EC 9.6815(2)(g)(1), as well).

The PT 06-43 decision states:

The Hearings Official agrees with opponents that the planning director erred by concluding that applicable street connectivity standards have been met. As the appellants note, the standards apply to the proposed

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<sup>8</sup> Application at 8.

<sup>9</sup> At page 4.

parcel configuration and the development that will occur on those parcels if the application is approved. The applicant has provided evidence to show that the only vehicular access to Parcel 1 is via the alley--and the city's standards require a demonstration that the proposed development includes "street connections in the direction of all existing or planned streets within ¼ mile of the development." As noted above, those standards may be waived or modified; however, no such modification has been granted.

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This basis for appeal is sustained. <sup>10</sup>

This decision was correct and still applies. Nevertheless, appellants offer the following comments.

Regarding the first claim, appellants established in section I.E, above, that suppositions about a "potential" direct connection via a driveway on Parcel 1 are unsupported by evidence, contradicted by applicant's own words, as well as irrelevant (in staff's own words).

As far as the two requested exceptions, appellants' Appeal Testimony established that applicant had not met the requirements for either provision for an exception. Among other deficiencies, applicant did not submit a local street connection study that encompassed the required area, the substandard W. 12th Alley does *not* meet the intent of all EC 9.6815(1) items, and the reason a street connection isn't possible for Parcel 1 is because of the *existing* house, not development on adjacent property. Neither staff, nor applicant contested these facts at the appeal hearing.

With respect to the third claim for street connectivity via W. 12th Alley, applicants note again that the definition of "Street" excludes "alley" and there is no indication in EC 9.6815(2)(b) that "or alley" should be inserted into this subsection of code wherever "street" appears.

Furthermore, at the same time that applicant and staff are claiming a broken down, substandard alley is adequate to satisfy street connectivity requirements, they're also attempting to avoid the code's requirements to make this connection a safe and efficient connection that meets city standards for right-of-way and paving. If the Hearings Official were to accept that W. 12th Alley could provide the required street connection to W. 13th Avenue,

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<sup>10</sup> PT 06-43 Appeal Decision at 10.

then the Hearings Official must do so *only* if W. 12th Alley meets right-of-way and paving standards.

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Related to several of the connectivity, right-of-way, and paving issues, applicant has floated the concept of “alternate theories” to explain the apparent conflicts between some of the claims found in the application and applicant’s testimony.

For example, in explaining the request for an exception to street connectivity in the current application, applicant states:

“Buildings and existing development on adjacent property in every direction preclude street connections now and in the future.”<sup>11</sup>

In applicant’s January 22, 2008 “Response to Appeal Statement (PT-07-19)”<sup>12</sup>, applicant also asserts that:

“\*\*\* applicant has also presented substantial evidence in the record that the proposed development qualifies for an exception to the Street Connectivity standards based on both EC 9.6815(2)(g)1 and EC 9.6815(2)(g)2.”

Thus, in applicant’s own words there is “substantial evidence” in support of EC 9.6815(2)(g)(2)(b), and such evidence therefore *must* indicate (per EC 9.6815(2)(g)(2)(b)) that “[b]uildings or other existing development on adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection now or in the future, considering the potential for redevelopment” as required by EC 9.6815(2)(b).

Applicant thus presented evidence in the application and subsequent testimony that directly contradicts applicant’s claims elsewhere that Parcel 1 *can* provide the required connectivity.

What applicant has presented in this case are not “alternate theories,” but rather applicant has presented *evidence* contradicting applicant’s own *claims*. Applicant can only rely on one version of the facts: Either a Parcel 1 connection to W. 13th Avenue *is* or *isn’t* precluded now and in the future.

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<sup>11</sup> Application at 15.

<sup>12</sup> At page 4.

Appellants have established in our Opposition Testimony, Appeal Testimony, and section I.E., above that Parcel 1 *cannot* have a connection to W. 13th Avenue, and does not qualify for an exception; and therefore the decision must be reversed.

#### **Appeal item 5. Parcel 1 does not meet street and alley standards**

In applicant's "Response to Appeal Statement (PT-07-19)", applicant states the "Director did not apply the constitutional requirements because no property was exacted and a lesser width for West 12th Alley was not approved."

However, the Planning Director *did* rely on the constitutional requirements, at least in part, to not require compliance with EC 9.6505(3):

Given that immediate improvement of the alley segment abutting the plat would not be logical or proportional to the impact of the development, deferring improvements to a later date is appropriate in this instance.<sup>13</sup>

Appellants note that this decision by the Planning Director does not establish *any* requirement for, or certainty of, future compliance with EC 9.6505(3). Instead, this statement and the associated Irrevocable Petition in Condition 1 of the Decision impose only a toothless condition merely requiring the applicant to request *some* alley improvements that *might* be made at some uncertain time in the future.

Appellants fully addressed the constitutional requirements in our Appeal Testimony and established that the EC 9.6505(3) requirements are mandatory, satisfy constitutional requirements, and cannot be deferred unless *sufficient* conditions are imposed to assure full compliance.

Appellants also contend that the irrevocable petition in Condition 1 is a sham that in no way meets the requirements for compliance with EC 9.6505(3). A standard that imposes both an analytical requirement and an ultimate legal standard that public services be adequate to accommodate a proposed zone change is not satisfied by a conclusion that the ultimate legal standard is met, if the required analysis has not been conducted. *Fay v. City of Portland*, 43 Or LUBA 390 (2002).

In this case, the analytical requirement is that the alley satisfy the minimum width for paved alleys as set forth under EC 9.6870. The legal standard is that

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<sup>13</sup> Decision at 8.

this exaction be consistent with the constitutional requirements under *Dolan* et al. Staff and applicant have failed to make findings regarding the adequacy of the existing alley, although the substantial evidence in the record clearly shows it is substandard. Staff and applicant have also failed to make ultimate legal findings concerning ultimate compliance with EC 9.6505(3) or whether paving would pass the constitutional consistency test. As such, the decision is inadequate.

Further, staff's and applicant's repeated reference to EC 9.8240(3) is misplaced, since EC 9.8240 governs *final* lot partitions, and *no* section of EC 9.8240 is referenced *anywhere* in the approval process for a *tentative* lot partition.

Even considering EC 9.8240(3), this subsection allows a "petition for public improvements and for the assessment of the real property for the improvements" only in lieu of completing "[p]ublic improvements as required by this land use code or as a condition of tentative plan approval."

Thus, an ill-defined petition<sup>14</sup>, such as in Condition 1, cannot substitute in *this* approval process for compliance or a condition that is *adequate* to assure future compliance. This is because a condition cannot be relied on to supersede a standard with which a use cannot comply. *Miller v. City of Joseph*, 31 Or LUBA 478 (1996) (city cannot determine there will be compliance with criterion prohibiting adverse impacts on residential zones by imposing condition that requires abatement of that adverse impact).

While the city may adopt a finding that it is feasible to satisfy an approval standard and impose conditions necessary to *ensure* the standard will be satisfied, the findings of feasibility must be supported by substantial evidence that solutions to problems posed by the project are "possible, likely, and reasonably certain to succeed." *Just v. Linn County*, 32 Or LUBA 325 330 (1997) (quoting *Meyer v. City of Portland*, 67 Or App 274, 280 n 5 (1984)).

EC 9.8240(3) would be adequately addressed *only* if a condition were imposed that required *applicant* to pave W. 12th Alley between Adams and Jackson Streets to 12 feet, and to have the alley designated for one-way travel, prior to approval of any development of Parcel 1.

Otherwise, the decision must be reversed.

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<sup>14</sup> One that doesn't even list the extent of improvements or mention an assessment of the real property to pay for improvements.

## **Appeal item 7. Lot configuration conflicts with Westside Neighborhood Plan policies**

The Westside Neighborhood Plan policy adopted in EC 9.9680(1)(a) states:

Prevent erosion of the neighborhood's residential character. (Policy 1)

In their comments at the January 23, 2008 appeals hearing, staff appears to insinuate that this policy doesn't apply as a mandatory evaluation criterion or that it requires only that parcels in the subject area not be converted from residential to non-residential uses.

Staff made the following comments at the hearing:

"With respect to Westside neighborhood polic— the policy at Eugene Code section 9.9680(1)(a) that was addressed in testimony which states prevent erosion of neighborhood character. Staff would like to acknowledge that the applicant originally argued that the policy does not apply in the absence of a specific development proposal, in that the majority of the testimony, if not all of the testimony, maintained that this policy does apply.

Staff believes that both positions have some merit, and the Planning Director didn't make a definitive determination on that point, but did address compliance with the plan policy. And while staff also acknowledges that many of the issues that are raised in testimony have a clear bearing on neighborhood character, certainly. It remains unclear to staff the degree to which the policy applies as a mandatory approval criteria.

Nonetheless, the Planning Director did evaluate it based on known variables likely to have a demonstrable impact on residential character<sup>15</sup> and the most noteworthy of those was the degree to which the configuration enabled preservation of the existing residence and other factors.

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<sup>15</sup> As discussed in this section, the "known variables" the Planning Director seems to have ignored with respect to evaluating the lot division include: increase in number of allowable units, increased in allowable density, change from allowable Medium-Density Residential development to High-Density Residential development, conversion of the use of the alley from secondary to primary access, and the radical change in the lot configuration pattern that is a fundamental element of the neighborhood character.

But considering the variety of development scenarios and um, it, it was difficult for staff to really look at that criteria and look at that policy with the, the many variables that was [sic] raised in testimony.”

Staff would also point out that the policy specifically refers to residential character, as opposed to neighborhood character. And the policy appears in the land use element section of the code and that that section has several policies that address both commercial zoning and commercial uses and residential zoning and residential uses. And it’s unclear to staff the extent to which the policy is aiming at residential character, preserving residential character as opposed to commercial character versus residential character amongst other residential uses. Staff welcomes additional clarification from the hearings official on all those points.<sup>16</sup>

In the first and second paragraphs, above, staff appears to suggest applicant claimed that EC 9.9680(1)(a) did not apply to this application. To be clear, applicant stated:

“The applicant submits this policy may be applied only to that development which is actually proposed in this application.”<sup>17</sup>

As established in Appeal Item 4, Section B<sup>18</sup>, “development” includes lot division, and therefore the proposed lot partition is “development” that is subject to policy EC 9.9680(1)(a). Applicant did not contend otherwise, and staff’s statement that “both positions have some merit” is a bogus attempt to create a difference where none exists. While it may be “unclear to staff the degree to which the policy applies as a mandatory approval criteria,” to anyone who reads the code itself, there is no question.

In the third paragraph, staff claims: “the Planning Director did evaluate it based on known variables likely to have a demonstrable impact on residential character \*\*\*.”

The entirety of the Planning Director’s evaluation of whether the proposed lot configuration complies with EC 9.9680(1)(a) is in one paragraph of the Decision:

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<sup>16</sup> Appellants address the point raised in this paragraph under Appeal Item 8. Those arguments are also included for Appeal Item 7 by reference.

<sup>17</sup> Application at 36.

<sup>18</sup> January 23, 2008 Appeal Testimony, pages 40-41.

To the extent the Policy (1)(a) applies to land division applications, the policy requires consideration of whether the proposed parcel configuration will affect and erode neighborhood residential character. To the extent that the above policy applies as a mandatory approval criterion, staff concludes the proposed partition does not pose a significant adverse affect [sic] on neighborhood character in the context of the above criterion, because it is configured to facilitate preservation of the existing residence and the act of dividing the subject property into two parcels does not significantly impact the nature of development that can occur on the subject site.<sup>19</sup> Staff notes that the existing R-2 zoning allows for a net density of 28 units per acre if applicable development standards can be met, irrespective of lot configuration. Staff notes that the proposed configuration allows for a buildable area on Parcel 1 with minimal impact to the existing residence and yard<sup>20</sup> on Parcel 2, and must comply with applicable development standards, including access standards.<sup>21</sup>

In staff's January 14, 2008 Memorandum, staff essentially reiterates these points and concludes:

Given the Planning Director's findings that the proposed configuration supports the neighborhood's residential character, and in the absence of a specific proposal for new development or a zone change that would

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<sup>19</sup> Staff apparently has never thought to ask: "If the proposed partition has *no* effect on the nature of development that can occur on the site, *why* has the developer proposed the partition?" The obvious answer is that there is a financial advantage to dividing the lot and building the fourplex on a separate lot from the existing house. This advantage likely arises out of more favorable financing terms and a higher total valuation of the resulting two properties.

In a *thorough* examination of the potential impacts of such an unusual and questionably legal lot partition, staff might not have overlooked this factor because it's a significant element in analyzing the potential *cumulative* impacts of approving similar lot configurations. A significant financial gain from such a partition increases the likelihood that other owners of similar lots will request similar (or more extreme) partitions.

<sup>20</sup>Staff's comment that creating Parcel 1 will have "minimal impact to \*\*\* the existing yard" can only be taken as a bad joke. This lot division will entirely *eliminate* the existing parcel's back yard. This misstatement is just one more example of staff's glossing over the impacts that approval of this type of *de facto* alley-access-only lot will have throughout the neighborhood.

<sup>21</sup> Decision at 13.

markedly change the type and nature of development that can occur on the site as it is currently zoned, staff finds that additional analysis is not warranted.<sup>22</sup>

In these Memorandum comments, staff uses a circular justification, citing the “Planning Director’s *conclusion*, but not any further evidence that would provide a legitimate basis for not doing *any* analysis of the objections raised by opponents.

In the Decision, the Planning Director’s finding that the “proposed partition does not pose a significant adverse affect on neighborhood character” is based on only two factors:

1. The partition is configured to facilitate preservation of the existing residence.
2. The act of dividing the subject property into two parcels does not significantly impact the nature of development that can occur on the subject site.

The first factor is not contested by appellants, and has no bearing on appellants’ claims.

The second of the Planning Director’s conclusions is not supported by any evidence in either the Decision or staff’s Memorandum, and appellants have demonstrated in Appeal Testimony regarding Appeal Item 7 that the partition, in and of itself, will permit an additional dwelling unit to be built on the area of the existing parcel, which is an increase of 14.3 percent. This increase will thereby allow development on the area of the existing parcel to be in the *High Density* Residential range, rather than the currently allowed *Medium Density* Residential range, which is how the existing parcel is designated in the Metro Plan diagram.

These concrete, uncontested facts *require* at least some analysis by the Planning Director, yet the *only* response by staff has been to simply dismiss all possibility of impacts by the lot division. Nowhere in the decision has the Planning Director explained why allowing an additional unit will have no impact, especially when this changes the density range for development allowed on the area of the original parcel.

Further, appellants established in Appeal Testimony that the existing parcel has *primary* access from the street and uses the alley for *secondary* access, whereas this lot partition will necessarily convert a substantial area of the

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<sup>22</sup> January 14, 2008 Memorandum at 9-10.

existing parcel to use the alley for *primary* access. This significant change *requires* the Planning Director to conduct credible analysis, even if the Planning Director were ultimately to reach a conclusion that disagreed with appellants.<sup>23</sup>

Appellants have provided substantial additional evidence regarding how the street, alley, and lot pattern is an essential, foundational element that determines neighborhood character. Yet, as of the appeal hearing, neither applicant nor staff has presented *any* evidence or analysis related to this critical issue. Again, had the Planning Director conducted a credible analysis, and reached a decision based on substantial evidence, the decision might be justified. But the Planning Director did *not* do any such analysis.

Appellants also established the importance of analyzing the potential *cumulative* impact on the Central Residential Area that would occur by approving lot configurations similar to (or even more extreme than) the requested partition.

Finally, appellants contacted one of the City's own consultants, a professor of architecture at the University of Oregon and asked him to provide an opinion on this question. Mr. Michael Fifield, who has extensive expertise in the areas of neighborhood character, infill development, and alley development stated:

“Essential to the design of any neighborhood is the relationship of new interventions to the existing fabric of the neighborhood. Thus, one of the fundamental elements that determines a residential neighborhood's

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<sup>23</sup> Staff has claimed Parcel 1 can have primary access from W. 13th Avenue, which might counter appellants' claim that creating Parcel 1 necessarily converts the use of the alley from primary to secondary access. However, the Planning Director does not in any way reference this claim in the analysis of compliance with adopted policies, and staff has said elsewhere that staff “doesn't find [driveway access to W. 13th Avenue] to be directly relevant or necessary for compliance with approval criteria.” Further, as discussed under I.E, above, substantial evidence has *not* been submitted to support a claim that a legal driveway could actually be constructed.

Staff also repeats in the Memorandum the misleading suggestion that “should multi-family development be proposed in the future for the area proposed for Parcel 1, the applicable standards require primary vehicle access via the alley, notwithstanding available adjustment review provisions.” This point is addressed fully in section I.F, above.

character is the pattern of streets, alleys, and lots configurations. In traditional “grid-patterned” neighborhoods, such as Eugene’s Westside neighborhood, the orthogonal lot and alley orientation, and the regular, rectangular lot pattern are fundamental elements of the neighborhood’s character. Altering the lot configuration pattern could impact the character of the neighborhood, and would warrant careful analysis before being encouraged or approved.”<sup>24</sup> [Emphasis added.]

Despite the multiple ways that approval of this lot partition will affect the nature of development that can occur on the subject parcel, as well as throughout the neighborhood, the Planning Director did *nothing* to analyze the impact of a significant increase in number of units and allowable density; did *nothing* to analyze the impact of converting the use of W. 12th Alley from secondary to primary use; and did *nothing* to analyze the impact of radically altering the fundamental lot configuration pattern of the Central Residential Area.

Before approving this lot partition, the Planning Director didn’t even look to see whether there was a *single* lot configuration *anywhere* in the neighborhood that was comparable to the unusual lot configuration being requested, despite objections raised by neighborhood leaders and residents over the two appeals processes. Nor did they bother to even ask the expert engaged by the City to advise them on related issues.

And what was staff’s response to this failure at the appeal hearing?

“But considering the variety of development scenarios and um, it, it was difficult for staff to really look at that criteria and look at that policy with the, the many variables that was [sic] raised in testimony.

Staff apparently expects the Hearings Official to approve the Planning Director’s decision on compliance with EC 9.8215(1)(l) because staff found it too difficult “to really look at that criteria” and thoroughly evaluate the proposal’s compliance.

Staff has flagrantly shirked their responsibility to assure approval criteria are *thoroughly* and *fairly* evaluated, and the Planning Director has *not* complied with the law. Therefore, the decision must be reversed.

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<sup>24</sup> E-mail dated January 30, 2008. Attachment C.

Appellants have conducted analysis of the lot configuration element of the neighborhood character, some of which was presented at the appeal hearing and some of which was done after the hearing. We present the results from both efforts here.

The Central Residential Area (CRA) is the defined area of the Westside Neighborhood Plan that encompasses the subject parcel. The CRA west of Polk Street is now covered by the Chambers Special Area Zone (CSAZ), which City Council adopted as a pilot project to implement zoning standards that would protect the character of the neighborhood, consistent with the Westside Neighborhood Plan. For example, a lot partition such as the one in this case would not be permitted in the CSAZ because the minimum frontage requirement is 45 feet. Some comparative analyses would be affected by these standards, so we limited our analysis to the lots east of Polk Street.

The potential impact of approving partitions that create flag-shaped lots with “poles” that narrowed to less than the minimum frontage would be extensive – over 25% of the lots (123 of 489) in the CRA east of Polk Street are currently rectangular, street-to-alley lots that would be subject to this type of division.

There are *no* lots in CRA east of Polk Street<sup>25</sup> that have anything resembling the proposed configuration of Parcel 1, i.e., a flag-shaped lot with a constricted “pole”. In fact, there aren’t even any flag lots; and there are only two developable lots that have frontage less than 30 feet wide, both of which are small, regular-shaped lots without alley access.

In no uncertain terms, Parcel 1 is utterly unique and atypical and yet could be replicated extensively throughout the CRA if this partition were allowed. This very basic, easy-to-obtain data *should* have warranted at least some analysis by the Planning Director. Having not determined even these basic facts, the Planning Director cannot claim to have a credible basis for the decision.

#### **Appeal item 8. Intended or potential development conflicts with Westside Neighborhood Plan policies**

Nowhere in the Planning Director’s decision, the staff Memorandum, or staff comments at the appeal hearing does the Planning Director or staff address the potential or intended development on Parcel 1.

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<sup>25</sup> Or indeed, *anywhere* in the CRA.

The sole basis of the Planning Director's decision remains the assertion that substantial evidence of the potential and intended development can simply be ignored.

In the following comments made at the appeal hearing, staff appeared to insinuate that EC 9.9680(1)(a), which requires "Prevent erosion of the neighborhood's residential character," might be interpreted narrowly to mean nothing more than "prevent conversion of residential *uses* to non-residential *uses*":

Staff would also point out that the policy specifically refers to residential character, as opposed to neighborhood character. And the policy appears in the land use element section of the code and that that section has several policies that address both commercial zoning and commercial uses and residential zoning and residential uses. And it's unclear to staff the extent to which the policy is aiming at residential character, preserving residential character as opposed to commercial character versus residential character amongst other residential uses. Staff welcomes additional clarification from the hearings official on all those points.

Staff has apparently not looked at, or decided not to mention, obvious facts in plain view that confirm the meaning of this policy.

EC 9.9680(1)(a) is taken verbatim from Policy 1 in Section 3. Land Use Element of the Westside Neighborhood Plan, and EC 9.9680(1)(a) explicitly cites "Policy 1" as the adopted policy.

Ordinance 19444 adopted the Westside Neighborhood Plan<sup>26</sup> and states:

Section 1. \*\*\* the goals and policies set forth in the Westside Neighborhood Plan are hereby adopted as a refinement of the Eugene-Springfield Metropolitan Area General Plan for the area of the Westside Quality Project.

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Section 3. The land use diagram included in the Westside Neighborhood Plan is hereby adopted as a refinement of the Eugene-Springfield Metropolitan Area General Plan diagram and the explanatory text discussing each segment is recognized as clarifying and providing further explanation of the intent of the Metro Plan diagram.

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<sup>26</sup> Appellants include herein the entirety of the **Westside Neighborhood Plan 1987** by reference.

The adopted goals of the Westside Neighborhood Plan are listed on page 2-1:

### GOALS

- Protect and improve the residential quality of the neighborhood
- Protect the neighborhood from the negative effects of motor vehicle traffic.
- Provide public facilities and services to meet the unique needs of the neighborhood.
- Ensure that new development is in scale and harmony with existing neighborhood character.

The first and fourth goals speak directly to the issue and confirm that Policy 1 isn't just about residential versus non-residential use, but is about the improving the residential "quality" and specifically ensuring new development is compatible with the existing neighborhood character.

Policy 1 occurs in the Land Use Element section, which begins by explicitly stating the scope of the policies in that section:

[This element] contains policies and implementation strategies addressing the entire neighborhood \*\*\*.

Immediately under Policy 1 is a list of implementation strategies. Although these items are not evaluation criteria, they directly convey the intent of the policy. These include:

- 1.2 Amend the Zoning Ordinance to require site review approval for residential developments of four or more units
- 1.3 Initiate a zoning subdistrict for the properties along the west side of Jefferson Street between 8th and 12th Avenues from R-3 Multiple Family Residential to R-3/20 A. (Maximum of 20 units per acre instead of 35.)

The site review strategy in 1.2 is directed solely at *residential* development, and would be irrelevant if Policy 1 were only concerned with conversion to non-residential uses.<sup>27</sup>

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<sup>27</sup> Ironically, the city has done nothing to implement this site review, which would have applied to the fourplex the applicant intends to build.

The 1.3 strategy to reduce *residential* units per acre would likewise be irrelevant if Policy 1 were only concerned with conversion to non-residential uses.

Staff's comments fail to pass an obvious "smell test." To interpret Policy 1 as if it required only that residential uses not be converted to commercial uses, a decision maker would have to believe the Westside Neighborhood Plan is completely indifferent to whether land use actions result in the existing Westside neighborhood being replaced by a dense, high-rise neighborhood such as can be found in downtown San Francisco or by a semi-rural neighborhood such as Laurel Hill Valley in Eugene.<sup>28</sup>

Staff's attempt to call into question Policy 1's clear imperative that approval of this land use action must assure the neighborhood character is not eroded is baseless.

Policy 1 requires all forms of residential development to not erode the character of the neighborhood, and appellants have presented substantial evidence that the potential and intended development on Parcel 1 does not comply. Therefore, the decision must be reversed.

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Appellants note that applicant presented no rebuttal at the appeal hearing to appellants' testimony that applicant's "Area Study" does not cover the entire Central Residential Area of the Westside Refinement Plan and is therefore inadequate to support applicant's claim of compliance with EC 9.9680(1)(a).

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In addition to the substantial testimony appellants have already submitted on this issue, appellants have conducted further study of the surrounding area. We conducted a foot survey of all lots and development in the 15-block area bounded by W. 10th and 13th Avenues and Madison and Tyler Streets. The subject parcel is surrounded on the east, north, and west by these blocks.

The surveyed area includes approximately 253 parcels. There were *no* multi-family developments (3 or more units) on lots configured like Parcel 1, i.e., a flag-shaped lot with a constricted "pole". There were no multi-family

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<sup>28</sup> Appellant Paul Conte, who was one of the participants who wrote the Westside Neighborhood Plan, states unequivocally that Policy 1 was intended to be interpreted as preventing erosion of the *particular* residential character of the neighborhood, and *not* merely to prevent conversion from residential uses to commercial uses.

developments on flag lots. And there were no multi-family developments on lots accessible only from an alley. *All* multi-family development in the surveyed area had frontage on one or more streets and were on full-sized lots or larger.

In other words, there is *no other development* in the surrounding area like that which applicant intends to build. Again, these basic facts would have been easy for the staff to determine during their evaluation of the application.

#### **Appeal item 9. Lot configuration conflicts with Metro Plan policies**

Appellants note that the circumstances set forth under ORS 197.829(1) apply to this appeal item (as well as Appeal Item 2, as cited in the January 23, 2008 Appeal Testimony), and that LUBA is required to reverse or remand a city's decision or code interpretation if it:

- (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation;

Accordingly, the Planning Director erred in allowing a partition that produces results inconsistent with the express language of the Eugene-Springfield Metropolitan Plan.

## CONCLUSION

At almost every turn in this attempt at a “do-over” of the proposed lot partition, applicant and staff have relied on shielding the intended fourplex development from scrutiny, selectively and contortedly interpreting approval standards, and “deferring” compliance to a subsequent process that both applicant and staff knows will not actually apply the same criteria.

Yet, in plain view of the affected residents, this application remains nothing more than an attempt to build a fourplex on a lot that has its only access from a degraded and unsafe alley.

Nor do the contortions by applicant and staff at all hide from residents that the partition and intended development conflicts head on with City Council’s action to protect the neighborhood from exactly this form of incompatible development and the result of approving this application would egregiously violate the neighborhood’s vision and adopted policies.

Appellants have not relied, however, on a generalized indictment of this proposal. We have met every twist and turn by the applicant and staff with solid evidence and legal arguments. And we have countered staff’s casual dismissal of the need for credible analysis of the impacts with hard data and thorough consideration of the implications.

To others, this lot partition may seem like such a small action as to not warrant the substantial cost and effort put forth by residents and the neighborhood association to oppose its approval. But, as appellants have shown in our data, approval of this application will rip apart the underlying fabric of our grid-pattern neighborhood and expose almost every block to the predatory practices of developers such as reflected in this application.

On an even broader scale, and the reason other neighborhood associations joined in our opposition during the first appeal (and remain in support of the JWN’s continued efforts) – If this application is approved, it will sanction a decision process that falls far short of the standards of fairness, independence, and credibility that Eugene residents expect of the Planning Director and her staff.

We respectfully ask only that the Hearings Official apply the approval criteria in the way they are adopted and the way they are intended to be applied. That is all that’s necessary to serve the principles at the heart of this decision.

Respectfully submitted this 30th day of January 2008.

**FOR JEFFERSON WESTSIDE NEIGHBORS**



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Rene Kane

**Chair**

**AS RESIDENTS**

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Charles R. Snyder  
990 W. 12<sup>th</sup> Avenue  
Eugene, OR 97402

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Paul T. Conte  
1461 W. 10<sup>th</sup> Avenue  
Eugene, OR 97402