

Jefferson Westside Neighbors
Testimony and response to
Planning Commission public hearing
on Jefferson “Area 15” plan and code amendments

December 12, 2006

The Jefferson Westside Neighbors (JWN) has previously submitted testimony in support of the proposed amendments. The following testimony provide comments in response to planning commissioners’ questions, staff comments, and other public testimony.

Maximum R-2 density in 1982-1983

We confirmed with staff that JWN’s prior testimony accurately stated the maximum R-2 density during the 1982-1983 period when the Jefferson/Far West Refinement Plan (J/FW RP) was deliberated and adopted by City Council.

The figures presented by staff during the discussion were incorrect.

The maximum R-2 density was established in ordinance 18971, section 9 (amending 9.336 R-2 definition) and section 16 (amending 9.546 Lot area; Lot Area Per Dwelling Unit) as 2,650 s.f. per dwelling unit.

Mathematically, this is approximately 16.4 dwelling units per net acre (du/na), but it is essential to understand that *the zoning code in 1983 had nothing resembling current zoning code’s “round up” provision*, which greatly inflates the effective allowable density, especially on small parcels, such as those in Area 15.

As we explained in our prior testimony, the equivalent maximum density under the current R-2 calculation method is approximately 9.7 du/na.

Estimating additional dwelling units

Staff discussed the question of what net difference the proposed amendments might have on the number of future dwelling units that would be added to Area 15.

Staff has addressed the legal criteria that may be related to this question in their findings, and staff correctly found the proposed amendments comply with the standards.

In terms of the practical impacts the proposed amendments may have, there are several important points to consider:

- Because the amendments sunset on July 1, 2008, the period of any analysis is only eighteen months or less. This temporary action will have no long term effect, and based on informal observations of the rate of development in the area, the number of new units that would be built in this time interval would be small under either designation. Hence the net difference is likely to be minor and should not be a factor in this *temporary* action.
- During the 2004-2005 “Chambers Revisited” project, data on residential development was collected and analyzed for the area within the “East Traditional

Neighborhood (ETN, now the S-C/R-2 subarea of the Chambers Special Area Zone).¹ This area has about the same number of lots (265) and has a similar historical character (single-family, detached, grid-pattern, etc.) as Area 15. The main difference is that the ETN had been zoned R-2 for many years prior to the study.

An analysis of infill development in the ETN area showed that only 27 lots had been developed with infill that resulted in three or more dwelling units on the lot. Quoting from the report:

“The impact from these developments is starkly different than the impact of the 200 or so lots that have been historically developed with one or two dwellings.

The cost has been high. Of the 27 lots, 19 of them have “severe” negative impacts on adjacent properties, and 6 of them have “substantial” negative impacts.

The “benefit” has been low – only 36 more dwelling units than the approximately 330 that would exist if these infill developments had been limited to two units per lot.”²

Based on this analysis of a comparable area, the most likely scenario if Area 15 remains designated “Medium Density Residential” (MDR) for the next eighteen months is a handful of infill developments producing a miniscule net gain in dwellings, but causing significant negative impacts on the blocks where they are built.

- Producing reliable projections of the number of units that will be built under alternative refinement plan scenarios in an almost fully built-out area, such as Area 15, is extremely difficult. In the case of Area 15, the maximum density allowed by R-2 standards is so high that it has little bearing on the number of units that could actually be built under existing site constraints and R-2 and Multiple-Family development standards, such as height and setback restrictions, open space requirements, etc.

Further complicating any estimate is the fact that the number of *economically-feasible* units, based on variable market conditions, is likely to be significantly less than the number of physically possible units.

Finally, in the specific case of Area 15, any realistic projection for the next eighteen months would have to account for the dampening effect of almost certain strong resident opposition to any upzoning to R-2. We note the JWN has adopted several motions expressing such opposition, and has appealed the recent Planning Director’s interpretation of the current Area 15 policy.

In actuality, neither staff nor we can provide *any* reliable estimate of how many more units would actually be built under a Low Density Residential (LDR)

¹ See Section V of the **Chambers Revisited Neighbors’ Report**, included in public testimony during the City Council hearings on the Chambers Special Area Zone and available on-line at cnrNeighbors.org.

² See page 48 of the report.

designation, nor *any* reliable estimate of how many more units would actually be built under a MDR designation; and thus there is simply *no* credible basis for an estimate of any net difference.

The best basis for any estimate remains the “Chambers Revisited” analysis, which suggests any net difference over the next eighteen months would be insignificant in relation to Eugene’s housing supply and needs, and should not be a factor in this decision.

Measure 37 and amendment and the sunset date

Davidc submitted testimony claiming that, due to the sunset clause, “these changes will expire before they actually apply to existing property owners.”

This is wrong. The new policies and code will apply to all properties, *as of their effective date*.³

Of course, Measure 37 looms over every new land use regulation, and the City cannot simply stop taking any action for fear there may be an Measure 37 claim. Planning staff and the City attorney, as well as City Council, were all well aware of Measure 37 when staff recommended these amendments as the most effective approach, and Council initiated the amendments. Measure 37 is thus no reason for the Planning Commission to recommend Council not adopt the proposed amendments.

We would also note that in this particular situation, there are favorable conditions with respect to any potential Measure 37 claim:

- Property owners are currently limited to development allowed by the existing zoning of their property. Changing the Metro and J/FW RP designations will not change any zoning. Thus, there is a colorable legal argument that the allowable development after the redesignation is the *same* before and after the action, which would preclude a approval of a Measure 37 claim.
- Also not that any owner who applies for a zone change *before* the effective date of these amendments would have their application processed by the *current* regulations. Thus, they would have no need for, nor any cause for, a Measure 37 claim.
- Finally, Eugene Ordinance 20331, which sets forth the process for handling Measure 37 claims allows the City to impose the same regulations in effect *when an owner bought the property*:

2.090 (4). If the city council removes or modifies the challenged land use regulation, the council may as part of the decision re-impose with respect to the subject property, all of the land use regulations in effect at the time the claimant acquired the property

³ Mr. Hinkley testified at the hearing regarding a Measure 37 “two year window.” The Measure 37 rules to which the “window” refers do *not* limit Measure 37 claims on new ordinances; the rules merely require the claimant be denied approval for a land use action before filing a M37 claim. Thus, there is no basis for the claim that this “window” makes the proposed amendments ineffective just because the amendments sunset in eighteen months.

For almost all parcels in the entire “redesignated” area (south of Amazon), this would mean the LDR designation and R-1 zoning that was in effect prior to 2006 would apply, thus rendering a Measure 37 waiver meaningless.

Mr. Hinkley also asserted “it should be extremely difficult to prove that design standards reduced the value of a piece of property opening the way for a Measure 37 claim.”

There is simply no legal basis for this conclusion.

Measure 37 does not distinguish the *type* of regulation. A design standard, such as maximum building height, that limits what can be developed has equal legal weight as a maximum density standard. “Design” vs. “density” is a distinction without a difference in the context of Measure 37 claims and should have no bearing on the decision at hand.

Growth Management policies

Mr. Hinkley also submitted testimony that the proposed amendments do not comply with Eugene Growth Management policies.

Staff and the City attorney have correctly found that the Growth Management policies are not part of the approval criteria, and the proposed amendments are not required to comply with the cited policies.

Mr. Hinkley’s testimony cited the Growth Management section stating that the policies should “guide the work” of City staff. Policies that “guide” work are obviously not necessarily mandatory criteria for approval of a land use action, and the testimony’s assertion that the amendments must comply with Growth Management policies has no legal basis.

As to the policies themselves, Policy 6 is the pivotal policy relevant to the proposed actions, and it clearly directs that City actions maintain the character and livability of individual neighborhoods.

A quick review of the other policies cited in testimony makes clear they do not “trump” this requirement. Nor do the proposed amendments conflict with any of these policies:

- Policy 1 directs the City to “take actions to increase density ...” This policy does not contain any language restricting other types of actions.
- Policy 2 directs the City to “encourage in-fill ...” This policy is aspirational, not proscriptive, and does not contain any language restricting other types of actions.
- Policy 5 directs the City to “Work cooperatively with Metro Area partners ... to avoid urban sprawl ...” This policy is aspirational, not proscriptive, and does not contain any language restricting other types of actions.
- Policy 6 – “Increase the density of new housing development while maintaining the character and livability of individual neighborhoods.” This policy is

specifically directed at density of “new housing development” and protecting all neighborhoods.

The proscriptive (“while *maintaining*”, e.g., not “while *considering*”) clause, which directs the City to maintain neighborhood character and livability, obviously must be interpreted as a *constraint* on other actions, or there would be no purpose in including the clause.

The proposed amendments will help protect an established neighborhood by limiting *infill* (not *new*) development and thus would comply fully with this policy, if that were required.

- Policy 7 directs the City to “Provide for a greater variety of housing types.” This policy does not contain any language restricting other types of actions.
- Policy 8 directs the City to “Promote the construction of affordable housing” This policy is essentially aspirational, not proscriptive, and does not contain any language restricting other types of actions.
- Policy 10 directs the City to “Encourage the creation of transportation-efficient land use pattern ...” This policy is aspirational, not proscriptive, and does not contain any language restricting other types of actions.

Even irrespective of their not being approval criteria, the cited policies present no conflict with the proposed amendments.

For good reason, Council did not make Growth Management policies part of the approval criteria to be applied to each individual land use action. Council has taken a broader view with these policies and intends they be used to “guide” an interrelated set of actions consistent with the polices. An excellent example is Council’s initiation of the interrelated “Opportunity Siting” and “Infill Compatibility Standards” programs.

Approval criteria

Mr. Hinkley also submitted testimony that the proposed amendments do not comply with adopted approval criteria.

Staff has correctly found the amendments do meet approval criteria.

We would add to staff’s findings that the amendments to the J/FW RP also address the following two items in approval criteria EC 9.8424(2):

(c) *New or amended community policies.*

Council’s September 11, 2006 motion explicitly directs the policy for this area be amended, and thereby is essentially establishing a new policy.

In addition, on July 20, 2005, City Council adopted a motion that explicitly replaced the prior “blanket zoning” policy with opportunity siting. From the motion:

...Instead of blanket zoning that permits multiple units on all MUZD residential parcels; density is obtained by selective projects developed compatibly at very high densities. This maintains the character and fabric of the existing neighborhood while providing a variety of housing

types to serve different populations, and increasing the overall net density of the area. ...

Then on December 14, 2005 Council adopted a motion directing staff to work on infill compatibility standards as a complimentary program to “opportunity siting” that (finally) implements existing policies to protect neighborhoods. Council then funded these new policies and made them priorities in the work plan.

(e) A change in circumstances in a substantial manner that was not anticipated at the time the refinement plan was adopted.

The density and scale of development allowed by the R-2 zone has changed substantially since the J/FW RP was adopted in 1983. Most notably, the average number of dwelling units allowed on parcels in the subject area has approximately *tripled* since that time. There is no evidence this substantial change was anticipated at the time the refinement plan was adopted.

In addition, the November 15, 2006 code interpretation of the J/FW RP policy covering the subject area (file CI 06-13) has voided any limit on density allowed by “medium density” (i.e., R-2) standards – a staff action that was neither intended nor anticipated by the policy’s explicit “low- to medium-density” designation of the area.

Further, this same code interpretation voided any application of the policy’s requirement for block plans or site reviews that assure up-zonings and subsequent development maintain the character of the area, as the plan clearly intends. This staff action was likewise neither intended nor anticipated by the policy.

“Bottom up” planning

Mr. Hinkley also submitted testimony opposing the proposed amendments based on a novel theory that the “proposal is being driven from the bottom up.”

There’s no merit to this claim nor any legal relevance to Mr. Hinkley’s “bottom up” theory.

The testimony asserts the primary action among the three proposed amendments is the amendment to Eugene Code. This is wrong. The primary action is to amend the J/FW RP, which is the legal and appropriate instrument where City Council establishes area-specific policy.

This requires a Metro Plan amendment for consistency. While the Metro Plan establishes an “overall framework”⁴, local governments are responsible for area-specific policies, such as the case here. The Metro Plan in no way envisions that only the three-jurisdiction metro planning body will make “top down” policy decisions about specific 15-block areas in Eugene.

⁴ Metro Plan 1-1

The need to amend Eugene Code is a legal formality so that refinement plan policies can be applied in “limited land use” cases (e.g., lot partitions, subdivisions, and site review). The policies in EC 9.9500 to 9.9710 are simply copied from the refinement plans.⁵

Much of the rest of Mr.Hinkley’s related testimony attempts to apply some claimed theory of “top down” planning to misconstrue statewide and Metro Plan policies related to *comprehensive planning* as if they prohibited Eugene from taking specific actions, such as those proposed, because some such action might reduce density in a particular area or have other area-specific effects.

For the most part, statewide and Metro Plan policies can’t be so narrowly applied or they would act as a “ratchet” in which changes that increased density in any specific area would be allowed, but changes that might reduce density in a particular area would be prohibited.

We would also point out that if statewide and Metro Plan policies were applied this way, they would also effectively prohibit almost all ordinances to protect natural resources, establish parks, and so on. Each of these actions individually may reduce density (even to the point of prohibiting housing altogether). However, in a comprehensive planning context, they are essential to healthy, livable communities. Statewide and Metro Plan policies – read sensibly – provide for a balance of actions that may effect overall density and other factors.

Large parcels

Charles Biggs raised concerns during oral testimony about developing “large parcels” in Area 15.

There are only two large parcels – the Lighthouse Temple block, and O’Hara School and playground – and neither of them are likely to be developed as residential in the next 18 months. Both these parcels are designated “* Major Religious Facilities” on the J/FW RP Land Use Diagram.

Legislative and zoning history

This is a topic that has been poorly explained in the past, and the JWN has gone to some effort to correct the record.

A few facts to note:

- There have been three zone changes (four parcels) from R-1 to R-2/SR in Area 15 *north* of the Amazon Canal. Since this area was (and is) designated MDR in the Metro Plan, there was never an issue of conflict with the Metro Plan.
- The “debate” has been over what happened and why in the “redesignated” area, *south* of the Amazon Canal.

In this area, there was one zone change to R-2/SR (“Berg”, Z 84-20).

⁵ Only policies that constitute mandatory approval criteria (as in the Area 15 policy) are included in Eugene Code.

There was also a zone change to R-2/10 that staff (incorrectly, as it turned out) found during the application process did *not* trigger the Area 15 policy requirement for site review (/SR) because (staff interpreted) R-2/10 would not exceed the “10 dwellings per acre” threshold in the Area 15 policy.

In *both* cases, the change to the R-2 base zone should not have been allowed because it conflicted with the Metro Plan’s LDR designation. Staff and the hearings official simply erred, but there was no opposing testimony to raise the issue at the time.

Only in 2004 when residents presented the Metro Plan conflict argument in the “Taylor” zone change (Z 04-19), was the correct application of the law established. In denying the zone change to R-2/14, the hearings official correctly held that *any* upzoning to R-2, *regardless of overlays*, conflicted with the Metro Plan LDR designation for this area.

That finding *should* have prevented the other two zone changes in the LDR-designated area, but the issue wasn’t raised at the time.

It’s also important to note that even in the very first case (“Berg” in 1984), the Eugene Code criteria explicitly stated that *the Metro Plan prevails over the refinement plan.* So it doesn’t matter whether some later LUBA or court action also imposed this requirement – Eugene Code had *already* incorporated the rule in the zone change criteria.

The *only* reason the two upzonings to R-2 in the redesignated area were allowed was because the role of “R-2” as Eugene’s implementation of the Metro Plan MDR was not properly recognized by staff, and no other party presented the argument until the “Taylor” case.

Thus, the main point regarding the “redesignated” area: Zone changes to an R-2 base zone have never been legal in this area until early 2006 when the MDR (re)designation became effective after the Land Use Code Update appeal was dropped.

Could Council have taken a different action in 2004?

Commissioner McCown asked an important, related question about Council’s approval in 2004 of the “housekeeping” redesignation. He asked whether Council *could* have taken an alternative action to eliminate the conflict between the Metro Plan and the J/FW RP.

The answer is “Yes” – Council could have approved either of the following alternatives:

- Leave the Metro Plan LDR designation *unchanged*. Amend J/FW RP and code to designate Area 15 as LDR.

This would have produced essentially the same outcome as the currently proposed amendments will achieve – so, obviously this was an alternative available to Council in 2004, as well.

- Change the Metro Plan MDR designation *and* amend the J/FW RP and/or code to implement specific new policy and development standards that would limit density e.g., below the R-2 maximum) and/or establish development standards to assure “maintaining the character of the area,” as the J/FW RP requires.

This would have produced essentially the same outcome as what is envisioned as the *long-term* solution for Area 15 that will (hopefully) be a result of the “Infill Compatibility Standards” program that’s underway.

In the past, there has been some confusion to the effect that the law “required” Council to amend the Metro Plan designation to make it MDR. This isn’t correct, and either of the above alternative actions could have been taken by Council in 2004

The law does require that the Metro Plan *prevail* over conflicting refinement plan policies, and therefore it makes sense to amend one or both plans if they are in conflict. But the law obviously lets the Council decide which policy(ies) (e.g., LDR or MDR designation) will ultimately be reflected in both plans (and code).

Thank you for your consideration.

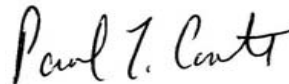
Please contact either of us if we can be of assistance.

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