

**FINDINGS OF FACT AND DECISION OF
THE CITY OF EUGENE HEARINGS OFFICIAL**

Appeal of Planning Director Decision
Approving a Minor Partition Resulting in the Creation of Two Parcels
PT 06-43

Subject Property/Location: 933 West 13th Avenue, Eugene

Zoning: Medium Density Residential (R-2)

Appeal: Paul Conte and Rene Kane, on behalf of the Jefferson Westside Neighbors
(Appellants)

Relevant Dates: The partition application was approved by the planning director on September 8, 2006. A timely appeal was filed on September 26, 2006. The record was held open for additional testimony and evidence, until November 1, 2006. The applicant provided final legal argument in support of the application on November 8, 2006. The applicant agreed to toll the time for issuance of the Hearings Official's decision until November 27, 2006. The decision is issued on November 27, 2006, in accordance with EC 9.030(7)(d).

CONCLUSION: The planning director's decision is affirmed in part and reversed in part.

Findings of Facts and Conclusions of Law: The Hearings Official's decision is based on the following findings of fact and conclusions of law:

Site Information:

The subject property includes approximately 10,715 square feet, and is developed with a single-family bungalow style dwelling. The applicants seek approval to partition the property into an approximately 7,490 square foot parcel (Parcel 1) and an approximately 3,226 square foot parcel (Parcel 2.) The existing dwelling is proposed to remain on Parcel 2. It is anticipated that Parcel 2 is to be developed with a multi-family structure.

The area surrounding the subject property is comprised of a variety of modest single-family dwellings, interspersed with multi-family units.

As noted above, the subject property is zoned R-2, which allows between two and seven dwelling units on the subject property if it is partitioned into two parcels. To preserve the existing dwelling in the most cost-effective manner, the applicant proposes to develop Parcel 1 with a four-plex, resulting in five dwelling units on the subject property as a whole.

Appeal:

The notice of appeal alleges 15 errors in the planning director's decision. The errors are summarized and addressed, below:

1. Procedural Issues (Appeal Issues 1, 2 and 3 (part))

The applicants submitted their application and tentative plan to the city for review on June 9, 2006 and the application was deemed complete by city staff on July 26, 2006. In this context, "deemed complete" means that city staff reviewed the application, identified areas where additional evidence/information was needed to review the application, and the applicant either supplied that information, or informed the city that it would not provide the identified information. *See* 227.178(2).

Notice of the proposed application was provided to neighbors and the Westside Neighbors, the local neighborhood association, on July 28, 2006. The notice established a 14-day deadline, until August 11, 2006, for interested persons to submit comments regarding the application. The applicant submitted additional information in support of the application on August 9, 2006. On August 11, 2006, Westside Neighbors submitted testimony in opposition to the application as it was described in the July 28, 2006 notice. They did not become aware that additional information had been supplied by the applicant until after the August, 11, 2006 deadline. Once the neighbors became aware of the August 9, 2006 submittal, Paul Conte, on behalf of Westside Neighbors, requested that the planning director re-open the record to accept additional comments regarding the revised application. The planning director declined to re-open the record. On September 8, 2006, the planning director approved the application, relying in part on the evidence supplied by the applicant in its August 9, 2006 submittal.

Appellants argue that the city's procedures must be applied to allow for meaningful comment. Appellants assert that the city erred by (1) allowing the applicant to submit additional information in support of the application after notice of the application was sent, (2) declining to accept additional testimony in opposition to the application that responded to the August 9, 2006 information provided by the applicant and (3) using additional information submitted by the applicant after the notice was sent out to approve the application.

The city responds that its processes do not require that the planning director either decline to accept new information from the applicant after the notice has been sent, or re-open the record to allow for additional public comment if the applicant does submit new information in the interval between the notice and the comment deadline. To the extent the planning director's failure to extend the time for public comment to address new information was error, the planning director asserts that the error is cured by the appeals process.

This matter is a "limited land use decision" as that term is defined in ORS 197.015(13)(a) ("limited land use decision" is a "final decision or determination made by

a local government pertaining to a site within an urban growth boundary that concerns * * * the approval or denial of a tentative * * * partition plan * * *.”) Limited land use decisions are reviewed according to city procedures that implement ORS 197.195. Eugene’s limited land use procedures are set out in EC 9.7200 through 9.7230. The notice requirements include a statement that informed interested persons that “copies of all evidence relied upon by the applicant are available for review * * *.” By implication, the onus is on interested parties to review the city’s files frequently, to assure themselves that they have reviewed all of the evidence supplied by the applicant before submitting their comments. While the city’s process may not permit extensive public comment, the planning director’s actions in this case are consistent with the code provisions. Accordingly, the planning director did not err by accepting new evidence by the applicant during the 14-day comment period, by refusing to reopen the record to accept comments regarding the new evidence, or by making a decision based in part on the applicant’s August 9, 2006 submittal.

2. Evaluation of the effect of a four-plex development on the property (Appeal Issues 3 (part) and 4)

The application identifies that a four-plex is to be developed on proposed Parcel 1. *Tentative Partition application 2*. However, the planning director did not evaluate the proposed partition application to address four-plex development standards, concluding that the applicants’ development plans for Parcel 1 are tentative and can be addressed through other, later development reviews.

Appellants argue that the planning director erred in failing to address the siting of a four-plex on proposed Parcel 1, noting that if the parcel is developed with a four-plex, residents will use the 12th Avenue alley for access, and the impact of that use needs to be evaluated to ensure that it is consistent with city access and street connectivity standards.

The city responds that while the applicant may have alluded to the development of a four-plex on Parcel 1, detailed designs have not been submitted for the planning director’s evaluation. The city asserts that the partition phase is not the appropriate time to review those development considerations, and requests that, if the Hearings Official does conclude that the planning director erred in failing to evaluate the proposed four-plex in the context of this decision, that the Hearings Official adopt a condition of approval that explicitly defers approval of an particular development to a later review process.

This issue was raised and decided by the Land Use Board of Appeals (LUBA) in *McKeown v. City of Eugene*, 49 Or LUBA 494 (2004). There, the applicant proposed to partition a property into two parcels. The parcel was already developed with two structures, and those structures, along with access easements for one of the structures, were depicted on the tentative plan. Opponents to the development raised issues regarding the appropriateness of the development that had occurred on the property. The Hearings Official in that case declined to consider the structures, concluding that their status could be evaluated in a later proceeding. LUBA held that such a deferral was

inappropriate, as EC 9.8215(1)(j) requires that an applicant demonstrate compliance with “all applicable development standards for features explicitly included in the application.”

The applicant asserts that the situation here is different than in *McKeown*, because there the partition plan drawing depicted the structural footprints, and included proposed alternatives to assure that the structures themselves complied with appropriate setbacks. That argument is not well taken. The partition application includes all documents provided by the applicant in support of the application. The application specifically identifies a four-plex as a development feature. Accordingly, the planning director’s decision must address the development standards that apply to a four-plex when evaluating the applicant’s partition.

These bases for appeal are sustained.

3. Increased use of the alley for access (Appeal Issue 5)

If the property is not partitioned, the applicant may redevelop the lot with up to seven dwelling units. Those units could either have access from West 13th Avenue or from the alley that abuts the property. The planning director concluded that the proposed partition would not result in additional use of the alley than would be allowed under the current property configuration because up to seven dwellings could potentially take access from the alley and, as proposed, up to five units could take access from the alley (the units developed on proposed Parcel 1.) The planning director reached that conclusion because the proposed parcel configuration leaves proposed Parcel 2 with no alley frontage.

Appellants argue that the proposed partition would allow up to eight dwelling units on the property (five on Parcel 1 and three on Parcel 2). Appellants assert that if the parcels are reconfigured at some point (either through an access easement across Parcel 1 for the benefit of Parcel 2, or through a lot line adjustment), the alley would provide primary or secondary access to more units than are allowed if the parcel remains one development site. Accordingly, appellants contend that the planning director’s decision must evaluate the impacts of that additional unit on the alley in the context of this decision.

The application is based on the proposed partition plan, which depicts one parcel that has exclusive vehicular access from West 13th Avenue and one parcel that will have vehicular access from the alley. The planning director did not err in evaluating the impacts of that parcel configuration on abutting accessways. The types of scenarios posed by appellants would be subject to a separate city review, and are not part of this application.

The fifth basis for appeal is denied.

4. Stormwater Standards (Appeal Issues 6 and 12)

EC 9.8215 requires a demonstration that the proposed partition complies with EC 9.6500 through 9.6510 Public Improvement standards. EC 9.6510 requires, in relevant part, that

“[a] applicant proposing new development must submit documentation to the City showing the stormwater drainage facilities into which the proposed development will drain. The documentation must establish that the new development will drain into existing stormwater drainage facilities that, considering all developments that have received tentative or final plan approval as of the date the developer submits a complete application, have the capacity to handle the stormwater drainage that will be generated by the proposed new development, or if the applicant cannot establish that existing stormwater drainage facilities have such capacity, the applicant must construct storm drainage facilities to accommodate the stormwater drainage from the proposed development.”

The planning director’s findings state:

“With regards to EC 9.6510, Stormwater Drainage, Public Works staff confirms that the applicant’s proposal to direct stormwater runoff towards weepholes in the curb along West 13th Avenue is acceptable; [h]owever, storm drainage flowing from Parcel 1 across Parcel 2 must be located within a private storm drainage easement. * * *” The planning director’s decision imposed a condition of approval to that effect. *Planning Director’s decision*, 7, 12.

Appellants argue that the applicants failed to satisfy EC 9.7085 (during quasi-judicial hearings, the burden of proof is on the applicant) because there is no evidence in the record as to the amount of stormwater drainage that is likely to be generated by the proposed development, or whether there is capacity in the existing systems to accommodate it. Appellants note that there is evidence in the record that the existing stormwater system is inadequate to accommodate *existing* development. Therefore, the appellants argue, the planning director erred by concluding that the standard has been satisfied.

The city responds that EC 9.7085 does not apply to limited land use decisions. Accordingly, the city requests that this appeal issue be denied. The applicants assert that the Public Works evaluated the application, including the proposed four-plex development, and agreed with the applicants that the proposed stormwater drainage plan is feasible, deferring to the building permit phase detailed engineering drawings that will assure compliance.

In all quasi-judicial land use applications, such as the application at issue here, the burden of proof is on the applicant to demonstrate that all applicable approval standards have been met or can be met through the imposition of conditions. *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973). Therefore, while the reference to a particular Eugene Code provision that applies to quasi-judicial hearings may not be relevant to this appeal, the Hearings Official concludes that the appellants’ argument--that the planning director’s decision that the proposed partition is consistent with EC 9.6510 is not supported by substantial evidence--is adequately articulated.

The Hearings Official has reviewed the evidence in the record, and concludes that the applicant has not provided evidence as to the amount of stormwater that is likely to be generated by the proposed development (including the four-plex), nor is there evidence in the record to support a finding that the additional stormwater can be accommodated by the drainage plan proposed. The applicants do not cite particular Public Works staff comments that support their assertion that Public Works staff considered the impact of the proposed four-plex and, given planning staff's assertions that the four-plex *was not* considered, such evidence is needed to assure that the stormwater impact of the four-plex have been adequately addressed.

This basis for appeal is sustained.

5. Consistency with EC 9.2750 (Maximum Density Standards) and with Metro Plan Policy A.9. (Appeal Issue 7)

EC 9.8215(1)(a) requires a demonstration that the proposed partition is satisfies applicable R-2 density requirements. EC Table 9.2750 provides that the maximum net density is 28 units per acre. EC Table 9.2750 implements Metro Plan Policy A.9, which establishes a density range for properties subject to the Medium Density Residential designation from 14.28 to 28.56 units per net acre. The subject property includes approximately one-quarter acre; thus, up to seven units can be accommodated on the subject property in its current configuration.

Appellants assert that if the proposed partition is approved, and five units are permitted on Parcel 1 and three units are permitted on Parcel 2, the resulting density is inconsistent with the allowed maximum density set out in the EC and Metro Plan because five units on Parcel 1 yields a net density per acre of 29.08, and three units on Parcel 2 yields a net density per acre of 40.51, both of which exceed the maximum density range for medium density residential development.

The city responds that because the proposal involves a partition only, the applicant need only demonstrate that relevant density ranges can be accommodated on the resulting parcels. The planning director's decision concludes that the proposed parcel sizes will not result in development density exceeding applicable density ranges.

The Hearings Official agrees with the planning director that this standard is satisfied, but for different reasons. The partition application proposes to retain the existing dwelling on Parcel 2 and to develop four residential units on Parcel 1. That development proposal will result in a net density of approximately 20 units per acre, which is within the allowed density range set out in the EC and in the Metro Plan. The hypothetical additional density that may be accommodated if further development is proposed on the resulting parcels must be evaluated in future applications and is not at issue here.

This basis for appeal is denied.

6. Alley Access--EC 9.8215(1)(a) (Appeal Issue 8)

As proposed, development on proposed Parcel 1 will use the alley for vehicular access. Appellants assert that the proposed parcel configuration is not consistent with 2001 EC updates that appellants assert are intended to prohibit the creation of new parcels with alley-only access. In support of that assertion, appellants provide copies of written testimony from city councilors explaining their understanding of the code provisions when they voted for new land division standards.

The city and the applicants respond that the code prohibits the creation of new parcels that have its sole frontage on an alley. The city and applicants cite the definition of "Alley Access Lot/Parcel" set out in EC 9.0500, which defines such a parcel configuration as a parcel "abutting an alley and not abutting a street and created from the rear portion of an existing lot or parcel." In this case, proposed Parcel 1 has a 20-foot wide frontage on West 13th Avenue, which means that, by definition, the parcel is *not* an alley access parcel.

While there are many possible policy reasons for prohibiting alley-only *access*, the difficulty the Hearings Official has with the appellants' arguments is that the code provisions cited by appellants do not specifically prohibit the creation of new parcels with alley-only access. The applicable code provisions require public street *frontage*, not necessarily *access from the street where the parcel fronts*. Here, proposed Parcel 1 has frontage on a public street that conforms to R-2 frontage standards. Accordingly, the planning director did not err in concluding that an alley access parcel will not be created if this partition is approved.

This basis for appeal is denied.

7. Minimum Parcel Width Standards (Appeal Issue 9)

Proposed Parcel 1 is shaped like a flag, with the pole portion of the parcel providing 20 feet of frontage on West 13th Avenue. The pole width narrows to 13 feet, 10 inches along the eastern boundary of the property until it reaches the main portion of the proposed parcel. Apparently, Parcel 1 was configured in this way to satisfy EC Table 9.2760 frontage standards for new parcels within the R-2 zone. Despite its flag configuration, the applicant and the city do not consider Parcel 1 to be a "flag lot" subject to special design standards because the proposed parcel does not fall within the city's definition of "flag lot" set out in EC 9.0500. Nor do the applicants and the city believe the city's specific flag lot standards set out in EC 9.2775, because those standards apply only to property zoned R-1. EC 9.0500 defines flag lot as "a lot with less frontage on a public street than is generally required by this land use code and where that frontage serves primarily as a vehicular access corridor. * * *" The planning director's decision apparently concludes that proposed Parcel 1 is not a flag lot because, unlike the city's flag lot definition, Parcel 1 meets the applicable 20 foot frontage standard and the applicant does not intend to use the flag portion of the lot for vehicular access. (If the city does consider proposed Parcel 1 to be a "flag lot" because the applicant could potentially obtain access to West 13th

through the pole portion, then the Hearings Official agrees with the opponents that the partition could not be approved because Table 9.2750 limits the creation of flag lots to parcels that exceed 13,500 square feet prior to the land division, and the subject property includes less than 13,500 square feet.) Because the standards for R-1 zoned flag lots do not apply, the planning director's decision defaults to the dimensional standards set out at EC 9.0500 ("lot width" is "[t]he horizontal distance between the midpoints of the side property lines. Where more than one side property line exists along a given side yard, the combined length of the side property line shall be used to determine the mid-point. * * *") In addition, the applicable standards set out at Table 9.2760 require only 20 feet of frontage--there are no standards requiring a minimum flagpole width for newly created flag lots in the R-2 zone .

The appellants, supported by numerous other neighborhood associations in Eugene, argue that while the proposal appears to meet the letter of the code by providing the required minimum frontage, the code clearly intends that the frontage width be maintained for the whole length of the parcel. Appellants provide a range of development scenarios, including one where the minimum frontage is provided, narrowing to one inch along the majority of the parcel, as an example of why the applicants' proposed parcel configuration is absurd and undermines the intent of the code.

The applicants respond that the planning director correctly interpreted the code standard to apply to a one dimensional measurement--the width of the property line at the point it reaches the street, rather than a two dimensional standard that requires that both the width and length of the parcel meet the frontage requirements. The Applicants point out that other code standards establish how minimum lot *width* standards can be satisfied, and argue that the evidence shows that those standards have been met with the proposed parcel configuration.

It can be fairly said that is it unlikely that the council anticipated that the 2001 code revisions could result in the situation present in this appeal. However, the applicant is correct that the city's code defines "lot frontage" as "that portion of a single lot abutting the street" and provides that a "lot side line" is "any lot or parcel line that is not a lot or parcel front or rear line." EC 9.0500. The definition of side lot line implies that there can be more than two side lot lines. In addition the definition of lot width anticipates that in some cases, a lot may have side lot lines of different widths. The lot frontage standards include no such variables. Accordingly, the Hearings Official concludes that the planning director did not err by interpreting the standards as he did.

With respect to opponents' arguments that if the planning director's interpretation is upheld, side property lines can be as narrow as one inch, the Hearings Official finds that the interior setback provisions limit how narrow a lot can be. In this case, the applicable setback standard is five feet from each line, meaning that at its narrowest, the portion of Parcel 1 will have 10 inches that can be developed within the setbacks. The Hearings Official also notes that EC 9.6745(8) permits utilities to be placed within setbacks. Therefore, while it may be that the portion of the property that connects proposed Parcel

1 to West 13th Avenue cannot be developed with a driveway, it could be developed with utility and sidewalk connections to support the proposed four-plex development.

This basis for appeal is denied.

9. Street connectivity standards (Appeal Issues 10 and 11)

The West 12th Alley (the alley) is an existing 14-foot wide right of way. For three of the westernmost lots that abut the alley, the alley is graveled. For the remaining six lots, the alley is paved with a nine-foot wide asphalt surface.

EC 9.8215(1)(b) requires a demonstration that applicable street connectivity standards have been met. EC 9.6815 set out the city's street connectivity standards. EC Table 9.6870 provides that where an alley provides the primary access for a development, the right of way width must be 20 feet wide, and the paving width must be 12 feet wide for one-way traffic and 20 feet wide for two-way traffic. Exceptions to those standards may be granted in certain circumstances. EC 9.6815(2)(g).

The planning director concluded that the standards have been met with respect to West 13th Avenue, which is fully developed to city standards for one-way arterial streets. The director's decision concedes that the street connection for proposed Parcel 1 would be unlikely to be approved for vehicular access, but concluded that the standard had nevertheless been met because proposed Parcel 1 can use the alley for vehicular access. The planning director also concluded that connectivity standards have been met with respect to the alley, despite its substandard width and paving, because the proposed development would result in fewer vehicles using the alley for access than could *potentially* use the access if the property as it is currently configured. In addition, the planning director concluded that the city could not require that the developer improve the entire length of the alley to meet city standards, because such an exaction would exceed the constitutional limits for exactions set out in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 304 (1994), where the US Supreme Court held that a dedications of private property for public purposes could be upheld only if the exaction is roughly proportional in nature and scale to the impact the proposed development has on the public infrastructure. Accordingly, the planning director imposed a special development setback standard, that allows for full development of the alley at applicable standards at some future date.

Appellants argue that the planning director misapplied the standard to compare the impact of a theoretical development density on the entire property against the impact a proposed four-plex on an alley access. In addition, appellants argue that the planning director erred by not requiring that the applicant demonstrate that the proposed parcels will take vehicular access from a street, as is required by EC 9.6815(2)(b). As appellants, note, the definition of street in EC 9.0500 specifically excludes alleys. Finally, opponents note that the alley is inadequate to handle the traffic generated by existing development on the block.

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 parcel configuration and the development that will occur on those parcels if the application is approved. The applicants have 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 include "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.

In addition, to the extent the planning director concluded that exactions or development requirements could not be imposed because the proposed development is less dense than what could be proposed if the parcel remains in its current configuration, again that is the incorrect comparison. The question is whether city's exactions are roughly proportional to the *impact of the proposed development*. Here, there is no evidence as to the number of property owners on the street who use the alley for primary vehicular access, or evidence regarding the proportional effect of a four-plex on the alley use. In addition, while the applicants assert that any city condition of approval that would require the applicants to fully improve the alley to city standards would necessarily be an unconstitutional taking because they own one of nine lots that face the alley and would generate no more than 4/9s of the potential traffic, that assertion appears to be based on the belief that the *Dolan* standard requires a close to 1:1 ratio between the cost of the improvement and the impact the development causes. As LUBA concluded in *McClure v. City of Springfield*, 37 Or LUBA 759 (2000), no such precise ratio is required.

This basis for appeal is sustained.

10. Creation of a new nonconforming situation, in violation of EC 9.8215(2). (Appeal Issue 13)

For the reasons set out above, appellants assert that if the proposed partition is approved, new nonconforming situations with respect to R-2 lot standards, streets and alleys, stormwater and special setbacks will be created.

To the extent this issue is not addressed in the preceding analysis, the Hearings Official concludes that it is not sufficiently developed to provide a response.

This basis for appeal is denied.

11. Fire Separation Standards (Appeal Issue 14)

The planning director concluded that setback standards could be met through in imposition of conditions of approval that require either a one-hour fire separation wall, a fire setback between structures on Parcels 1 and 2 or by a property line adjustment to accommodate those setbacks. Appellants argue that if the Hearings Official concludes that the lot width standards have not been met, then this condition of approval must be

modified to delete the reference to a property line adjustment. In the alternative, appellants argue that the planning director must adopt findings to show that the lot dimensional standards can be met even if the property line adjustment is proposed.

The Hearings Official has concluded that the planning director did not misapply the lot width standards for proposed Parcel 1. However, the Hearings Official also concluded that the planning director erred by failing to consider the impact of a four-plex development on proposed Parcel 1. To the extent four-plex development standards impose special fire setback requirements from parcel boundaries, those requirements should be addressed in a decision regarding the partition.

This basis for appeal is sustained, in part.

12. Consistency with Applicable WestSide Neighborhood Plan Policies (Appeal Issue 15)

EC 9.8215(1)(k) requires a demonstration that the proposed development complies with applicable refinement plan policies. The Westside Neighborhood Plan is the applicable refinement plan, and EC 9.9680 set out the applicable plan policies. One of those policies requires that the city “[p]revent erosion of the neighborhood’s residential character.”

The planning director concluded that this criterion was satisfied because the existing single family dwelling on proposed Parcel 2 is to be preserved, consistent with EC 9.9680(2), which provides that “[t]he City shall encourage actions that will preserve existing residential structures * * *.” In addition, the planning director concluded that it was premature to evaluate the impact of a four-plex on the neighborhood character and, consequently, the mere creation of an additional residential parcel in the area did not erode the “neighborhood’s residential character” within the meaning of the policy.

As stated earlier, the development proposal includes a four-plex, which will take vehicular access from the alley. The planning director must consider evidence and testimony regarding the impact of that development when evaluating whether the proposed partition satisfies EC 9.8215(1)(k).

This basis for appeal is sustained.

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For the reasons stated above, the planning director's decision is affirmed in part and reversed in part.

Dated this 27th day of November, 2006.

Anne Corcoran Briggs
Hearings Official

Pursuant to EC 9.030(7)(d), the Hearings Official's decision is the final decision of the city. Appeals of this decision may be filed with the Land Use Board of Appeals, in accordance with ORS 197.825 et seq.