



CITY OF
West Linn

PLANNING COMMISSION

Minutes of October 21, 2009

Members present: Chair Michael Babbitt, Vice Chair Robert Martin and Commissioners Laura Horsey, Michael Jones, Charles Lytle, Christine Steel and Dean Wood

Staff present: John Sonnen, Planning Director; Tom Soppe, Associate Planner; Khoi Le, Civil Engineer; and William Monahan, City Attorney

Members absent: None

CALL TO ORDER

Chair Babbitt called the Planning Commission meeting to order in the Council Chambers of City Hall at 7:00 p.m.

APPROVAL OF MINUTES

Jones **moved** to approve the Minutes of September 16, 2009. Lytle **seconded** the motion and it **passed** 5:0. Martin and Wood abstained.

PUBLIC COMMENTS

Lynn Fox, PO Box 236, Marylhurst, Oregon, 97036, representing the Hidden Springs Neighborhood Association, asked if the City Attorney applied substantive due process whenever he advised the City Council, Planning Commission and the staff. Monahan confirmed he gave the City Council advice regarding due process and when he did so he considered the US Constitution, the laws of the State of Oregon and the local code. He suggested that if she wanted an in-depth review she could submit her question in writing to the City Manager. Fox then submitted a letter.

Wayne Horner, 2079 Ridgebrook Drive, had submitted a Testimony Form that indicated he wished to offer testimony regarding PUD-09-01/SUB-09-01/WAP-09-02, however, Chair Babbitt explained the public hearing was closed. Alice Richmond, 3939 Parker Road, had submitted a Testimony Form on which she had checked the box In Support of that application.

PUBLIC HEARINGS

(Note: The staff reports and all related documents for the hearings are available through the Planning Department.)

PUD-09-01/SUB-09-01/WAP-09-02 6-Lot PUD, Subdivision and Water Resources Area Permit at 19650 Suncrest Drive. Continued from June 17 to July 29, 2009 (July meeting cancelled). Re-advertised for September 2, 2009 (September meeting cancelled). Re-advertised for October 7, 2009.

Chair Babbitt opened the hearing. Lytle had previously recused himself from hearing the matter. Horsey declared she had made a second site visit that day. Steel reported that she had driven by the site that evening.

Applicant Rebuttal

Kirsten Van Loo, Emerio Design LLC, 6107 SW Murray Blvd., Ste 147, Beaverton, Oregon 97008, clarified the site plan she had submitted at the previous hearing was the version the conditions of approval should refer to. She conveyed the applicant's requests to correct and clarify them. Condition 15, line 3 should say "conservation," rather than "conversation." Condition 4 should be clarified to indicate the applicant was to underground all new and existing utilities along the project frontage and within the project, but was not obligated to extend undergrounding beyond that. She testified the application in its final form met every standard established by the code. It set aside the majority of the land in private tracts with conservation easements, which was what the City asked for. Her client was willing to do everything they could to protect the laurel hedge and buffer and maintain the value of the property to the south, including planting native species trees on the south property line as part of tree mitigation.

During the questioning period Steel wanted to know how the newly divided Tracts B and C would be treated. Van Loo referred to proposed Conditions 14 and 15. Tract B was east of the creek and Tract C was west of the creek. Both Tracts would be owned by the homeowners association. Both tracts would have conservation easements over them. But the conditions gave the City a trail easement over Tract B and made the City responsible for maintaining Tract B. The homeowners association was to maintain Tract C. The conservation easements prohibited any activity other than that necessary to maintain the land in its natural state. The trail easement allowed the City to install a soft surface trail at some point in the future. The easements traveled with the title to the land. Potential home purchasers would see on the title documents that they were purchasing their lot, plus an undivided one-sixth interest in Tracts B, and C (Open Space); Tract A (water quality facility); and Tract D (private street) and as members of the homeowners association they had a responsibility to maintain those tracts. The homeowners association Covenants, Conditions and Restrictions (CC&Rs) would spell out what those agreements and responsibilities were, including how common areas were to be maintained. Even if one or more of the association members did not step up to financially or physically fulfill their responsibilities to help maintain the tracts, the remaining members were fully responsible for doing so.

Steel observed Condition 15 offered the applicant the option of putting a split rail fence or a wood fence between the homes and the open space area. Van Loo clarified that the applicant

would build a split rail fence and place signage there so residents could enjoy the view. When asked, she confirmed that applicant would concur with removal of the wood fence option.

Horsey referred to Condition 3 regarding tree mitigation and wanted to know specifically what five significant trees were proposed for removal. Van Loo explained there was no way to save the big pine tree in the right-of-way in front of the project because the applicant had to use that area to make required street improvements. One big Douglas fir in front of a garage and three more that were behind the garage and directly in the center of the developable area would be removed (See the list on page 92 of the original staff report).

Babbitt wanted to know why the applicant wanted Condition 4 modified. Van Loo observed it called for undergrounding all new and existing utilities. She explained the applicant wanted it to be very clear they were not required to underground dry or franchise overhead utilities down the street beyond the site frontage. They planned to underground overhead utilities in front of the project and the internal utilities. They were going to work with the City to upsize the water line in the street and extend it several hundred feet beyond the site in each direction, but they did not want to be required to underground offsite dry utilities. Khoi Le, Engineering Department, advised that sometimes the utility company required a developer to extend the undergrounding a few feet further to anything would affect it. He suggested the condition say the developer was responsible for undergrounding dry utilities along the project frontage and anything that affected it.

Staff Comments

Soppe pointed out that the current list of proposed conditions of approval was in the October 21, 2009 staff memorandum. The conditions referred to the new site plan that delineated Tracts B and C. Two conditions had been eliminated. They were no longer necessary because the current version of the site plan showed the stormwater facility outfall out of the drainageway transition area and street trees in a planter strip instead of east of the sidewalk. The staff had not seen any new arguments or changed circumstances in the testimony received since the previous hearing that would cause them to change their recommendation. Soppe recommended revising **Condition 4** to say, **“All new and existing dry utilities along the project frontage and that are affected by the development shall be placed underground.”**

During the questioning period, Soppe explained neighbors wanted to require the applicant to remove nails and treated wood from the drainageway area and to require establishment of a homeowners association with sufficient fees to cover the maintenance responsibilities. Those were not in the recommended conditions of approval. The staff had related the requests to the Commissioners at a work session in case they wanted to put them on the drafted list of conditions.

Martin said if the City did not want the responsibility of maintaining the open space tracts how would the City ensure the homeowners association met its obligation to do that? The staff explained they would examine the title documents to be recorded to ensure they showed the obligations called for in the conditions of approval and those obligations would run with the title to the land. The conditions could go farther than that and specify that the provisions in the documents related to how the homeowners association was to satisfy their obligation to the City were subject to the approval of the City Attorney. Condition 15 provided that if the homeowners association failed to meet its obligation to maintain the conservation easement to City standards the City had a right to enter the area to maintain it and could place a lien on the property. Steel wanted to know if the neighborhood association could volunteer to help maintain the conservation easement? She recalled Karie Oaks had testified that water resource areas benefited a larger number of people than just the adjacent property owners. Babbitt observed the City could legally bind the homeowners association and tie the obligation to ownership of the property, but they could not legally bind the neighborhood association, which would be subject to leadership and membership changes. It was safer to put the obligation on the title and make the homeowners association responsible for it.

Deliberations / Motions

Horseley welcomed the opportunity for the Commissioners to finally raise and discuss issues. The amount of plan flexibility and additional density the PUD had did not balance with the level of public benefit the PUD offered in return. That was because the large tracts the applicant put into conservation easements was not a public benefit they could trade because most of that land would have already been protected from the time of annexation by Chapter 32 riparian resource protection provisions. She indicated she accepted the fact the project was allowed to be a PUD, transfer density, and have R-7 sized lots instead of R-10 sized lots - even without a public benefit to trade - because the site featured Type 1 and 2 lands and the R-7 sized lots carried out the Comprehensive Plan. She suggested the Planning Commission take a look that code later. Horseley was concerned the proposed reduced setbacks and narrow lane created an alley-like arrangement with less room between houses so the development felt too compacted. She was concerned the back row of houses could potentially be facing fences rather than front yards of the front row houses and side yards would face neighbors' rear yards. She said the Planning Commission needed to ensure that the entire perimeter was set back per base zone standards. She pointed out that although the code allowed a PUD to have narrower setbacks, the approval criteria said a proposed PUD was to be a desirable, attractive and stable environment in harmony with the surrounding area through well developed, detailed, planning and by comprehensively correlating the provisions of the code and all applicable adopted plans.

Horseley related that she had visited the site that day to see if there were interesting larger trees and other existing trees than could be easily accommodated by the development. She noticed a fabulous Madrone that likely could be in the front yard of Lot 4 and a cedar tree on the north boundary. She thought they should be categorized as significant trees. She noted the approval criteria also called for preserving existing amenities of the site to the greatest extent possible, and relating the type and design of the development to the topography, landscape features and

natural amenities existing on the site and in the vicinity. She reasoned that if the applicant was getting more than they were giving (because the public benefit they offered was greatly diminished by the fact the land would have been conserved anyway via other codes), the Planning Commission should ask the applicant to step up to meet the higher standards in the approval criteria and detail the plan to preserve amenities at the site. She pointed out on the map on page 81 areas where many trees that were not covered by the conservation easements were to be removed. She said that did not seem to her to meet the criteria to protect existing amenities and do detailed planning to make the development attractive. She acknowledged there was an additional level of effort and cost to meet them, but she thought that was appropriate and it might be offset by a reduced need for mitigation for removed trees. She suggested the Madrone, the cedar tree, and the pine tree in the right-of-way (if there were a way to do it) be preserved for their inherent value, as well as some trees on the north and south boundaries to buffer neighbors. She suggested giving the arborist and Planning Director discretion to decide if some of the six or seven maples along the north boundary should be preserved as a buffer. She said that was the kind of fine-tuning the City should want to see to meet PUD standards. The code allowed density transfer from Type 1 and 2 lands and that resulted in smaller lots. The application met a "literal" section of code concerning setbacks. But the approval criteria in 21.100(B) trumped that. They called for comprehensively correlating the code with all adopted plans. The Comprehensive Plan had a density designation for the area that was equivalent to R-7 and R-10 and both of those zones required larger setbacks than what was proposed. Horsey said the Planning Commission should consider and judge the unusual way the development was planned with a narrow, stubbed lane, smaller setbacks, and homes facing other homes' rear yard fences. The approval criteria was subjective, but it was code and it had to be applied too. That meant the Planning Commission had to interpret what "detailed planning" and "preserving the existing amenities" meant and apply them.

Babbitt and Wood recalled that the City Arborist had looked over the site and designated the significant trees to be saved or considered. Horsey pointed out that not all of the five significant trees the Arborist had identified would be saved because they were not all in convenient places in the plan. So they would be removed and mitigated for. The Tree Inventory showed other trees as large as 12" to 18" caliper and there were a couple of large, distinctive species. It seemed to her they could be accommodated. There were three trees in particular she was suggesting the Arborist look at and designate with the agreement of the Planning Director. There were other trees that could serve a useful screening function. Some were in the 7.5-foot setback area. That fit code intent for a PUD that was in harmony with its surroundings. She opined that to keep them would not require a significant change in the plan. It was better than chopping them all down. To save them would reduce the number of trees the applicant had to mitigate for.

Steel favored keeping trees of any caliper that served a useful function, such as screening neighbors, but she anticipated that even if the developer went to great lengths to save them during grading and construction, trees might still be adversely impacted anyway, or the new homeowners might remove them if they did not fit their landscaping plans. Jones agreed. He

observed the process had been extended many months in this case. He believed the current conditions of approval were adequate. He acknowledged that he and other Commissioners still questioned what a homeowners association could or could not do, but the Planning Commission would have the assurance that their documents would be reviewed by the staff to ensure they addressed the conditions of approval.

Jones **moved** to approve PUD-09-01/SUB-09-01/WAP-09-02 subject to the conditions of approval listed in the October 21, 2009 staff memorandum with the following changes: Condition 4: As revised by staff during the hearing. Condition 15: Correct "conversation" to "conservation." Starting on line 10 strike "or a six-foot wooden fence" and "If the applicant shall choose to construct a split rail fence," and start the next sentence with "One." Wood **seconded** the motion and discussion followed.

Babbitt said his overall concern about the case was that even though the code preferred that protected land be dedicated to the City, the City had decided not to accept it in this particular case and to require the homeowners association to maintain it. He held that was poor policy. He said the representations made by the applicant during the annexation process were likely made because the applicant was aware that the code said dedication was the preferred method and it was historically what the City had done. He asked the Planning Commission to add new Condition 20 to require the language of the CC&Rs to be reviewed by the City Attorney to ensure it met the all the conditions of approval. He indicated he was not suggesting adding any other new conditions to remove nails and treated wood or to establish sufficient homeowners association fees. He did not think it was within the purview of the Planning Commission to address the fees and they should not start setting restrictions on how they designed their homeowners association.

Jones **amended his motion** to include new Condition 20, to require the language of the CC&Rs to be reviewed by the City Attorney to ensure it met the all the conditions of approval. Wood **seconded** and discussion continued.

Martin agreed a legal review was better than the staff review referred to in Condition 15. He said his general feeling was this was a difficult case because the staff and applicant had done a skillful job of making the application comply with the code and it was what the Comprehensive Plan said the City wanted. But the process took a beautiful piece of property and forced the applicant to push six houses very close together and very close to the road. He believed the development could have been moved a little more into Tract C so it was more compatible with the houses around it, which was what people wanted. The problem was the PUD code had a different set of goals than Chapter 32. He saw a need to work on the code so infill development was what the community wanted and fit everything around it. He worried that the City would end up destroying the water resource area by allowing people to walk right next to the stream.

Horsey indicated there was a need to work on the code related to PUDs including looking at the circumstances under which they were allowed. But the existing code had subjective criteria that allowed the Planning Commission to look a little harder at them in exchange for the

additional advantages and flexibility a PUD applicant enjoyed. She believed the applicant, the City Arborist and the Planning Director could work together to fine-tune the plan so the result was a development that reflected the preservation of amenities the approval criteria called for. She stressed the development was a PUD because it had Type 1 and 2 lands on it and not by virtue of additional dedication of land to conservation because that land would have been preserved by the code anyway. Horsey pointed out the code said the purpose of the PUD code was to produce a development that would be as good or better than the results of lot-by-lot development. An example would be trading space for a developed park in exchange for the flexibility of denser clusters. She worried that allowing PUD development made it more attractive to buy land with steep slopes so a developer could have a denser development on the flat portion.

Jones agreed the Planning Commission needed to look at the CDC and how it caused infill to impact the community. He observed the application met every applicable code requirement and the Commissioners had been discussed it at length.

Horsey observed that Condition 12 reiterated the code in order to ensure that the perimeter of the project respected the base zone setbacks. But the drafted condition only covered the west perimeter. So the perimeter to the north had to be addressed. Horsey **moved to amend the motion** to add the following sentence to Condition 12, "The side yard setback of Lots 1 and 6 shall be those of the underlying base zone (R-10) which is 7.5 feet." Soppe explained the staff had inserted Condition 12 to ensure the lots at the front of the project had a 20-foot setback because that was the only place where the applicant proposed a setback that was not to code. Horsey **withdrew her motion to amend**. But she said her attention had been drawn to the perimeter because the neighbors had not likely anticipated at annexation that a narrow side yard would abut their rear yard and no one had anticipated how the project would connect. It showed lack of planning for transportation around annexation that the Planning Commission should discuss at a future work session. Horsey said the applicant had met the explicit elements of the code but not the subjective approval criteria. She held the Planning Commission needed to value the code in its entirety. They should consider the meaning of code language calling for the higher standard of "preserving the amenities of the site." A PUD should have to meet that higher standard in return for flexibility. She suggested that meant the Planning Commission should try to protect a good-sized Port Orford cedar to the north in the setback and a large Madrone that could be in the front yard of Lot 4.

Babbitt invited the applicant to comment on proposed new Condition 20. Van Loo said the applicant concurred.

The vote on the amendment to add Condition 20 to require the homeowners association CC&Rs to be reviewed by the City Attorney to determine they met all the conditions of approval was conducted and it passed 6:0.

Before voting on the amended motion the Commissioners agreed to the staff suggestion to also remove Condition 15 language, "If the applicant chooses to construct a split rail fence," because it reflected their intent.

The amended motion was to approve PUD-09-01/SUB-09-01/WAP-09-02 subject to the conditions of approval listed in the October 21, 2009 staff memorandum with the following changes:

Condition 4: All new and existing dry utilities along the project frontage and that were affected by the development were to be placed underground.

Condition 15: Correct "conversation" to "conservation" on line 3. Sentence starting on line 10 was to read, " A split-rail fence shall be constructed along the western boundary of Tract C." The following sentence was to begin "One or more signs, as necessary..."

Condition 20: A new condition to require the language of the CC&Rs to be reviewed by the City Attorney to ensure it met the all the conditions of approval.

The vote was conducted and the motion **passed** 5:1. Babbitt voted against because of his previously stated concern about the City's policy regarding dedication of land. He announced that all who had completed a sign-in form would have standing in the process.

ITEMS OF INTEREST FROM STAFF (None)

ITEMS OF INTEREST FROM THE PLANNING COMMISSION

Martin recalled cases where citizens had asked that a hearing be continued so they could look at new information and then they had not shown up at the next hearing. He asked why? He noted it put an added burden on the Planning Commission, the staff and the applicant. Horsey said people asked for more time when they saw new material the evening of the hearing and wanted time to review it. If they did not come to the next hearing she assumed they found no issue with the information. But it was vital to allow time for that review to happen. Martin agreed that was a good point. He just wanted people to respect the process and the consequences of it. Horsey contended that the Planning Commission had a history of being lax about allowing new information to be presented in a public hearing without identifying it. Jones disagreed with Horsey's characterization of the Planning Commission and held at no point in the last five years had the Commission been lax in recognizing new material. But there had been times when people asked for a continuance and thereafter did not have the courtesy to follow up. Horsey observed the Planning Commission had inflamed some citizens and suggested the Commission should look into how that happened and how the process might be improved so it was more civil. Babbitt anticipated the Commissioners would discuss that at the upcoming CCI meeting.

An audience member interrupted the meeting to say there was no sign in sheet out in hallway. He asked her to be quiet and respect the Planning Commission, but he also pointed out the "Planning Commission Sign In/Testimony Form" was available on a clipboard. Babbitt reminded those who would speak to the Commission that the rules were that anyone who spoke to the

Planning Commission had to speak to the Commission as a whole and respect individual members.

Lytle referred to the Suncrest application and said he objected to the City's decision to use a homeowners association to avoid the responsibility of taking care of land. He knew what a burden and expense that was because he served on his own homeowners' association board. He said the same thing happened with stormwater management and it was a nationwide problem. He hoped that West Linn might be one of the first cities to address it. He suggested the Commissioners discuss the matter at a work session. Wood agreed. He said people moved in without knowing what they were getting into. But if the City preferred not to take ownership of the open space it had been a good compromise to have the City take care of the area by the stream and have the homeowners association care for the sloped area, which might not require as much maintenance.

Babbitt recalled the Suncrest development applicant had explained she had tried to give the staff the updated map earlier, but they had asked her to wait until the hearing so multiple site maps would not confuse people. That had raised the issue of new evidence. He asked if the staff could fashion a better process to track such submittals. He also asked the staff to schedule a work session to advise the Commissioners regarding the issue of reconciling the PUD code with other code chapters.

ADJOURNMENT OF PLANNING COMMISSION

There being no other business, Chair Babbitt adjourned the Planning Commission meeting at approximately 9:00 p.m.

APPROVED:



Michael Babbitt, Chair
Bob Martin, Vice Chair

1/6/2010

Date