



PLANNING COMMISSION / COMMISSION FOR CITIZEN INVOLVEMENT

Minutes of September 15, 2010

- Draft -

Members present: Vice Chair Michael Jones and Commissioners Michael Babbitt, Laura Horsey, Christine Steel, Jennifer Tan and Dean Wood
Members absent: Chair Robert Martin
Staff present: John Sonnen, Planning Director; Tom Soppe, Associate Planner; and Khoi Le, Civil Engineer

CALL TO ORDER

Vice Chair Jones called the Planning Commission meeting to order in the Council Chambers of City Hall at 7:30 p.m.

APPROVAL OF MINUTES

Commissioner Babbitt **moved** to approve the Minutes of June 2, 2010. Commissioner Horsey seconded the motion and it **passed** 4:0:2. Commissioners Tan and Wood abstained. Commissioner Steel corrected the date on the June 16th draft before Commissioner Babbitt **moved** to approve the Minutes of June 16 and July 7, 2010. Commissioner Steel **seconded** the motion and it **passed** 6:0.

PUBLIC COMMENTS

Alice Richmond, 3939 Parker Rd., encouraged everyone to attend the West Linn Oktoberfest.

PUBLIC HEARINGS

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

MISC-10-15, Request to extend approval of a 6-Lot Subdivision at 4111 Elmran Drive

Vice Chair Jones opened the public hearing and outlined the applicable procedure and criteria. He asked the Commissioners to declare any conflict of interest, bias, or ex parte contact. Babbitt and Jones were on the Commission during the original hearing. Tan recused because the applicant was a good friend. Horsey reported that her family had friends who resided nearby but she could decide the application without bias. Wood, Horsey Steel and Vice Chair Jones each reported he/she had made a site visit. When invited by the Vice Chair, no one present challenged the jurisdiction of the Planning Commission or the ability of any individual Commissioner to hear the matter.

Staff Report

Tom Soppe, Associate Planner, presented the staff report (see the Staff Memorandum dated September 1, 2010). He advised that the application was eligible for extension. It could be granted if the application conformed to the code in force at the time of approval as well as current code, and if any errors, omissions or changes in facts since the original approval were addressed. One correction to be made was that Elmran Drive was a Collector Street not a Local Street. That meant the sidewalk had to be six feet wide. The Lot 3 driveway stem width was proposed by staff to be conditioned to be 15 feet instead of 12 feet to conform to R-10 zone standards. The development's lot lines had been tweaked to ensure all the lots met the zone's 10,000 square foot lot size requirement because the originally approved project had erroneously included access easements in the calculation of lot size. The staff recommended approval of the extension subject to four conditions of approval that would ensure it conformed to the code.

During the questioning period, Soppe confirmed the lot line modifications lengthened the driveway stem of Lot 3. Horsey was concerned about safety and congestion. She asked if the accesses met the required distance from the intersection and the code's driveway spacing requirements. KHoi Le, Engineering Department, advised that Elmran Drive was a collector street but the posted speed of 25 mph was more like the speed limit on a local street, so the distance from the intersection could be reduced. He confirmed the plan met the 75-foot driveway-to-driveway spacing requirement.

Applicant

Melynda Retallack, Canyon Development LLC, 221 Molalla Ave., Ste. 220, Oregon City, Oregon 97045, explained the applicant had stopped work on the project because the housing market crashed, but hoped to start building in the spring. Horsey asked if the applicant would have designed the site plan with different driveway accesses if there had been a stricter limit on the number of dwellings served by a private drive. Retallack explained in that case it would have been difficult to design access to the corner lot from a private drive.

Proponents

Alice Richmond, 3939 Parker Rd., held that the applicant should not have to bear the burden of correcting errors made by the City in the original approval.

Neither For nor Against

Michael Berger, 4081 Elmran Dr., indicated he supported the development but he asked the Planning Commission to address removal of Tree #2, which he feared would fall on his house if several other trees that currently protected it were removed in order to build on Lot 1. Vice Chair Jones explained that was outside the scope of the current hearing, but Berger could discuss what was to happen to the trees with the staff.

Opponents

Greg Morse, 18335 Nixon Ave., submitted written testimony. He held the current application did not address a deficiency in the original approval. The code required the applicant to provide evidence from a registered geotechnical engineer regarding landslide potential, but it had not been provided. He pointed out the Rapidly Moving Landslide Hazard Areas map showed a potential slide hazard on the site that was also near his home. Babbitt pointed out the original hearing record contained a geotechnical report dated July 25, 2007. Vice Chair Jones announced a five-minute recess and thereafter reconvened the hearing.

Rebuttal

Retallack pointed out the applicant had submitted a geotechnical report dated July 25, 2007 as part of the original application. She read aloud a notation in it: "Due to the relatively level surface topography on the majority of the site the risk of slope instability due to seismic forces on the site is considered low. However, due to the steep cut slope located on the eastern side of the site the slope should be considered to have a high probability of slope instability in the case of a seismic event. As such, all structures and critical infrastructure should be located a minimum of twenty feet from the top of the slope." Retallack indicated the applicant had followed that recommendation and laid out the site putting the tree protection area on the steeper section of the slope and arranging the lots so that any new future home would have to be at least 20 feet back from the slope because that was the minimum rear yard setback. She recalled that concern about slope stability was one of the reasons the original approval kept the sidewalk off Lower Elmran Drive.

Horsey agreed that addressed the concern about slope stability on Lots 3 and 4, but she noted the Morse submittal indicted a potential risk to Lot 5 and a nearby lot as well. Retallack pointed out that the site was designed to follow the geotechnical report recommendation to keep development twenty feet back from where the slope started breaking off down the hill as shown by a dashed line in Sheet C 4.0 on page 112 of the original application. It was likely it did not extend to Lot 5 because the slope started getting pretty shallow there. She confirmed that bore tests had been done along the entire slope and erosion control measures were already in place on the site.

Deliberations

Vice Chair Jones closed the public hearing. Planning Director Sonnen confirmed that the Commissioners could opt to add a condition of approval that the buildings on Lots 3 and 4 had to be at least twenty feet back from the top of the slope if they wanted to ensure that subsequent property owners would be aware of it. The justification could be that the "omission" to be addressed in the current hearing was that although it was addressed in the geotechnical report in the original record, it should have been added to the original conditions of approval as well. Vice Chair Jones and Commissioner Babbitt questioned whether that was

necessary or within the scope of the current hearing since the original record contained Carlson's July 25, 2007 geotechnical report specifying the 20-foot slope setback, and testimony at the current hearing put the staff on notice to be aware of two potentially serious issues, even if they could not be considered during the extension hearing. Soppe recalled the original staff report discussed the impact of the sidewalk on the slope, but the 20-foot slope setback was likely just addressed in the consultants' note. Horsey advised that it would be better if the conditions of approval referred to the drawing. Sonnen advised that if this were a new application he would require the setback to be shown on the final plat so it would be easier for the building inspector and potential buyers to spot. But that issue was likely beyond the scope of the current hearing, as it was not an error or omission.

Each Commissioner discussed the extension. Steel indicated she was inclined to approve it. She sympathized with Mr. Morse, but acknowledged the City could not control nature and if the slope slid onto Lower Elmran Drive below Lot 3 the City would have to clean it up. Wood indicated he was inclined to approve the extension. It was clear that geotechnical considerations were discussed during the original review so it was not an oversight and not a part of the current review. Horsey indicated she was inclined to approve the extension due to its narrow scope and the fact the staff had looked for and corrected errors in the original approval. Babbitt indicated he could approve the application because with the additional conditions of approval recommended by the staff it met all the applicable approval criteria. Jones concurred with all the other Commissioners.

Commissioner Babbitt **moved** to approve MISC-10-15 subject to conditions of approval 1 – 4 in the staff report. Steel **seconded** the motion and discussion followed. Babbitt **amended his motion** to correct Condition 4 so it required the stub to be 15 feet instead of 16 feet wide and Steel **accepted the modified motion**. The vote was conducted and the motion **passed** 5:0. The Planning Commission recessed and then reconvened the meeting at 9:00 p.m.

MISC-10-12, request to extend approval of a 6-Lot Subdivision at 2929 Parker Road

Vice Chair Jones opened the public hearing and outlined the applicable criteria and procedure. He asked the Commissioners to declare any conflict of interest, bias, or ex parte contact. Wood, Horsey, Steel, Tan and Jones each reported he/she had visited the site. Babbitt and Jones were on the Planning Commission when it approved the original application. Tan lived near the site, but declared she had no bias. When invited by the Chair, no one in the audience challenged the jurisdiction of the Planning Commission or the ability of any individual Commissioner to hear the matter.

Staff Report

Tom Soppe, Associate Planner, presented the staff report (see the August 18, 2010 Staff Report and the September 1, 2010 Staff Memorandum). The original approval was in 2006. The ownership had changed since then. The requested extension would extend approval for an additional two years beyond the original approval deadline. Soppe advised the approval was

eligible for extension. The staff had found an error in the original approval that allowed the depth of two of the six lots to violate R-10 zone standards. The new site plan corrected that. Since the original approval code changes had been adopted that called for more stringent natural resources protection. Because of those changes additional transition area was required on Lots 5 and 6. A map in the staff report showed the new delineation.

Since the original approval most of the infrastructure had been built. It was consistent with the old code and the original conditions of approval. In this application the staff treated the built environment as “existing conditions” that did not have to be moved or mitigated for. The original approval protected natural resources by placing them in a separate tract. But the new code required an expanded transition area that included the area of the driveway that was to serve Lots 5 and 6. The applicant proposed to protect that area with a conservation easement instead of adding it to the original tract. No development would be allowed in the conservation easement except for the driveway and it had to be mitigated for under the new code. Mitigation would be done off site in the Fields Bridge Park wetlands mitigation area. A color-coded map showed the expanded transition area in orange. It extended from the resource protection tract on the west side of the site to a few feet east of the driveway. The 15-foot structural setback from the transition area (which was required by Chapter 32) was shown in red. The staff calculated that even under the new resource protection regulations the house on Lot 6 could be as large as 3,300 square feet. The recommended conditions of approval required the applicant to address invasive species and enhance the transition area. The staff recommended approval of the application subject to the recommended conditions of approval.

During the discussion that followed the Commissioners observed that the final plat had not yet been recorded. They asked the staff to tell them if they would have taken a different approach if the original approval had expired and an applicant had submitted a completely new subdivision application for the same site. Would a driveway have still been allowed over the expanded transition area? The staff anticipated in such a case they would categorize the built environment as “existing conditions” and they would consider the driveway area a degraded resource area. That was similar to how they were addressing the current application. They advised that the City could not require an applicant to remove the driveway or require mitigation for what exists, so they would have to work around it. In the hypothetical case they would ask the applicant to include the expanded transition area in the separate tract. That would likely mean that the area of Lots 5 and 6 would have to be combined into a single lot to meet the lot size standards. Soppe also advised that if the original subdivision approval expired an applicant could submit an application for a Planned Unit Development (PUD) on the site that would allow them to have more, smaller, lots. In a PUD application Chapter 32-protected resource areas of a site could be factored into the density transfer calculation. Horsey wanted to know if the applicant was forced to combine Lots 5 and 6 into one lot would that be considered a significant enough change to the original approval to make it ineligible for the extension. Sonnen confirmed it would then have to be treated as a new application because the extension code put a 10% change limit on extension applications.

The staff clarified for the Commissioners that the area of access easements was subtracted from the lot size calculation but the area of a transition area easement was included in the lot size calculation. Soppe clarified that the potential size of a house on Lot 6 was controlled by the R-10 zone's allowable lot coverage and Floor Area Ratio standards, which were based on 10,000 square foot lot size.

Soppe discussed the built infrastructure. The new public street had been paved and the shared driveway was currently paved up to the north end of Lot 5. The driveway was on a part of the newly expanded transition area as it went across Lot 5 and it would also be in transition area when it continued onto Lot 6. The code allowed the pedestrian/bike path and the shared driveway to be in an access easement and that had been approved in the original application.

The staff explained that Chapter 32 called for undeveloped transition area to be either granted as a public tract or protected by a conservation easement. The original approval put the Open Space in a separate tract to be dedicated to the City because the applicant had offered to do that. But the applicant had not offered to put the additional area of expanded transition area in the tract and the City could not force him to do that unless it could demonstrate such a requirement was a roughly proportional exaction to the impact of the proposed development. It potentially reduced the number of lots in the subdivision. The staff had discussed that with the City Attorney and they had not been able to determine they could make the case for a requirement to place the additional transition area in a separate tract. For that reason they recommended allowing the applicant to put it in a conservation easement. When the Commissioners asked who would be responsible for maintaining the easement Soppe recommended a condition of approval that made the owners responsible for maintaining it for the benefit of the City. Maintenance would be enforceable by the City. He assured the Commissioners that the original condition that required the pedestrian easement and the new condition that required the conservation easement did not conflict with each other.

Applicant

Ben Altman, SFA Design Group, 9020 SW Washington Square Dr., Ste. 350, represented the applicant. He said that for all practical purposes the subdivision was 99% complete. The applicant was working through a checklist of 27 items the Engineering Department wanted addressed. He and the staff had a mutual understanding that all existing infrastructure was to be treated as "existing conditions" and all changes from this point forward would have to comply with the new code. He clarified that the driveway for Lot 6 had been constructed to the point that it was graded and graveled but not yet paved. He advised that the applicant would not be able to have the same number of lots if the expanded part of the transition area had to be included in the Open Space Tract. He held it made more sense to put it in a conservation easement. When asked he said he understood that the applicant anticipated he and the staff would fashion a written agreement that would give either four or all six homeowners the responsibility for maintaining it as common area. The applicant still needed to clarify with the staff what could or could not occur in the narrow strip of easement area on the east side of the

driveway. He confirmed the applicant could agree to the recommended condition to record the conservation easement.

During the questioning period, Altman was asked if the conservation easement would appear on a title report. He anticipated it would just list the easements and refer the reader to the easement documents for more details. Steel was concerned that most homeowners would not look at the final plat. Horsey observed that the owner of Lot 6 benefited the most from the transition easement because it contributed to his lot size.

Proponents

Alice Richmond, 3939 Parker Rd., supported the extension of approval for the six-lot subdivision. She testified that the neighborhood association had agreed to support it after they heard that the subdivision was already platted and nothing would be changed. She pointed out the applicant had already reduced the number of lots from eight lots. She recalled the site used to be covered by blackberries and looked better now. She observed the subdivision would likely already be built as originally approved if the crash in the economy had not created a hardship for the applicant.

Opponents

Scott Supperstein, 4740 Coho Lane, testified that the original owner had presented a plan to the Parker Crest Neighborhood Association and modified it for them. The Association agreed to support the extension application after they were told it had not been changed. They had not been aware that some major changes were proposed until now. Supperstein recalled the originally approved plan was a very nice plan with better-sized lots. It preserved the part of the wetlands that needed to be protected. But the new plan protected a field that did not need to be protected. In order to protect the field, the lots and houses had to be smaller; the setback requirements placed the houses farther back on the lots where they would impact the existing houses behind them, including his. The new plan created an issue of who should be responsible for maintaining or landscaping a field. He suggested the Planning Commission either deny the extension or table the application until the applicant obtained a variance from Chapter 32 requirements that would allow him to build the originally approved plan.

Babbitt questioned whether the Planning Commission could or should do that. It would change a previous Planning Commission's judgment call. Vice Chair Jones indicated he was familiar with the site and he agreed it was 99% constructed. There were six engineered lots and the wetland, which was already protected. He questioned whether there was a need to reduce the buildable size of a house on a lot that was already engineered or a need to create a conservation easement to conserve gravel. He polled the other Commissioners.

Wood was undecided. He recalled the tradeoff for granting an extension of approval was that the project had to meet the new code. But in this case the lot was already defined, graded and engineered. Horsey was prepared to approve the extension, but she cautioned against basing

approval on a layperson's understanding of what a riparian area was supposed to look like or how it functioned. Even if it were un-vegetated land, one of its functions might be to absorb water. Tan agreed with Horsey about basing the decision on a layperson's assessment, but the gravel she saw there made her question whether the City was conserving something just for the sake of being able to say it was technically complying with Chapter 32. Babbitt observed the overall project was almost complete and the driveway on Lot 6 had already been graded and graveled. He was inclined to grandfather that driveway in too. He hoped the applicant would address Supperstein's issue of the proximity of houses during rebuttal.

Additional Testimony

Vice Chair Jones invited additional testimony. Supperstein explained he found it hard to believe that if an area were important enough to conserve, the City would allow a trail through the middle of it. He reasoned that the new aspects of the application that addressed the new code in Chapter 32 were within the scope of the hearing and the Planning Commission had the authority to suggest that the applicant apply for a variance. The variance review would examine whether the application made sense from a practical perspective and if Chapter 32 safeguards were even important in this case.

Rebuttal

Altman said part of the problem was that when Chapter 32 was amended those who fashioned it had not anticipated that it would be applied to a 99% complete project. He said a variance would be totally inappropriate and the applicant had no intention of applying for one. He said applying Chapter 32 protections by extending the transition area to the "wrong" side of the driveway did not make sense. But the net benefit of the application to the City was that the opportunities for onsite mitigation had been maxed out and it would be done in a City park.

The applicant's representative advised that to a certain extent the expansion of the transition area at the front of the lots did reduce buildable lot area, but how close a house could be to the rear property line (and Supperstein's property) was established by development standards that established the rear setback, not by the front conservation easement. A lot buyer could decide to position the house anywhere within the box the required setbacks created in order to have a bigger or smaller front or back yard. The size of the house was also controlled by zone standards that set allowable FAR and lot coverage for an R-10 sized lot. He advised there could be a fairly large house footprint on that lot.

Altman suggested that if the Commissioners found it did not make sense to have the conservation easement on the "wrong" side of the driveway, they could find that the general intent of Chapter 32 was met by the mitigation for the improvements done in the expanded transition area and remove the condition that placed it in a conservation easement. That would partially address Supperstein's concern that the conservation easement was reducing the buildable portion of the lot and at the same time it would keep the benefit of the offsite

mitigation and eliminate the strip of “no man’s land” and the issue of who owned it and what could be done with it.

Vice Chair Jones closed the public hearing. Babbitt recalled those who had participated in the work sessions that developed the extension code did not intend it to apply in a case like this. He acknowledged that the Commissioners were not conservation experts, but he did not believe it made sense to put the strip of land east of the driveway in the conservation easement. To remove it from the easement would eliminate the issues of who was to maintain it and whether it forced a house back on the lot. He was concerned that the application had changed so much that the neighborhood association should review those changes. Horsey advised it was a much bigger issue and a bad precedent to try to solve a new code issue with a variance. In this particular case the site was so close to being completed that the justification for removing the conservation easement from the east side of the driveway could be because of the degree of completion, not because of a variance. But she clarified that she still preferred the original extension proposal. Vice Chair Jones did not support the variance suggestion either. It was beyond the scope of the review. He explained that the staff and applicant had come up with a pretty good plan that he was willing to approve. Steel suggested language be added to Condition 3 to explain the logic that the east side of the driveway on Lots 5 and 6 was not included in the transition area easement due to the level of construction that had already taken place. Horsey was not prepared to agree to that until the Commissioners learned what they would be giving up by doing that. Babbitt did not support the variance suggestion. The project should be dealt with as a whole and the driveway area possibly grandfathered in. He was inclined to agree with Steel that logic needed to be applied in this case. He suggested the driveway would make a clean delineation line. The area the Commissioners were discussing was a narrow strip about five feet wide on the east side of the driveway. It would be hard to enforce the conservation easement on it and the lot owners would do what they wanted on it whether it was called a transition area or not. The area from west of the driveway to the resource protection tract would be the conservation easement. The off site mitigation requirement would still be in effect. Throughout this discussion many Commissioners indicated they were not sure what the red line along the driveway represented. Soppe pointed to the color-coded map and clarified that the conservation easement was orange and the red area showed the required structural setback for the house and was not an easement of any kind. He observed there was only a narrow strip of orange land east of the proposed driveway.

The record did not contain hydrological information. Sonnen related that some jurisdictions’ codes used hydrological testing to determine whether or not an area was contributing to the hydrological environment but West Linn’s code did not. The grading map’s topographic lines (see Page 176 of the staff report) seemed to indicate that flows from the strip along the east side of the driveway area likely drained downslope toward Parker Road and not directly toward the wetland. Subsurface flows typically mimicked the topographic slope, but there was no evidence in the record to confirm where the flows went. He suggested that if the Commissioners wanted to make the case that Chapter 32 requirements did not apply to Lots 5 and 6 they could find that the record showed those lots were essentially built and the City would get some off site mitigation to compensate for it. Horsey and Babbitt each indicated

they could agree with that finding. It made practical sense. There would be no need to have to assess the value as a riparian area. Tan agreed that since it had been graveled and construction had occurred on Lots 5 and 6 and the area should be grandfathered in like the rest of the completed construction. Steel indicated she agreed.

Vice Chair Jones summarized the consensus he heard was to approve the extension and recognize that Lots 5 and 6 were essentially built to completion. Any off site mitigation recommended by the staff should occur as recommended. The small portion of the transition area that extended along the east side of the driveway was essentially unenforceable and the Commission should not create an unenforceable conservation easement. He explained that he personally felt that the recommendation that had been crafted by the staff with the applicant was fine, but he understood the others' desire to change the conservation easement along the driveway to make it easier for homeowners to understand where the conservation easement started, so he could agree to that, too. Wood was undecided. He saw it as a judgment call how complete the lots actually were and he observed that the Commissioners were not experts on impact on riparian areas.

Vice Chair Jones announced a five-minute break to allow the staff to craft changes in the conditions of approval. When he reconvened the hearing Soppe read the full set of five recommended conditions aloud. The staff had modified recommended Condition 3 so it no longer put all of the transition area that was not already in Tracts A and B or the public right-of-way into the conservation easement, but it put all of the transition area lying west of the driveway on Lots 3-6 that was not in Tracts A or B or the proposed Chinook Court public right-of-way into the conservation easement. It also specified the easement was to be recorded on the final plat filed with Clackamas County. The remaining conditions remained unchanged.

At 11:00 p.m. Commissioner Babbitt **moved** to continue the meeting past 11:00 p.m. Commissioner Steel **seconded** the motion and it **passed** 6:0.

Horsey wanted more clarity regarding what areas the offsite mitigation was for. Soppe explained that changing Condition 3 to remove the transition easement area on the east side of the driveway meant that strip of land now had to be mitigated for because it was no longer in a conservation easement.

The Commissioners still questioned what the red line on the map represented and if it would shift as a result of shifting the orange transition area. Soppe clarified that the red line showed where the 15-foot structural setback from the transition area was. It was a Chapter 32-required setback - not a transition area or easement. When the Commissioners shifted the edge of the (orange) transition area so it was the same as the west edge of the driveway the structural setback moved relative to it and was now 15 feet from the west edge of the driveway, which was all within the driveway. That freed up all of the land on the east side of the driveway for use by Lot 6. Vice Chair Jones commented that the change in the structural setback was not like a variance because Chapter 32 required the setback.

Soppe read aloud the revised language for Condition 3 (see motion below) and Vice Chair Jones reopened the public hearing to hear the applicant's comments regarding the change in conditions. Altman confirmed the applicant would agree to them and Vice Chair Jones closed the public hearing.

Deliberations

Commissioner Babbitt **moved** to approve MISC 10-12 subject to Conditions of Approval 1-5 in the staff report, but to modify Condition 3 as follows:

Condition 3: Tracts and Easements Containing Water Resources and Transition Area.
To ensure protection of water resources on site and their transition areas as currently delineated pursuant to CDC Section 32.050(E), all of the transition area lying west of the driveway on lots 3-6 that is not in Tracts A or B or the proposed Chinook Court public right-of-way as delineated on the applicant's site plan (Updated Tentative Plat, Sheet 1 of 5, date stamped received July 20, 2010) located in Exhibit PC-4 on page 32, shall be placed in a conservation easement. All transition area that is not contained in the conservation easement or tract shall be mitigated for off site. The easement shall be recorded with Clackamas County and shall be recorded on the final plat.

Commissioner Horsey **seconded** the motion and it **passed** 6:0.

ITEMS OF INTEREST FROM STAFF (None)

ITEMS OF INTEREST FROM THE PLANNING COMMISSION

Sonnen planned to forward the City Attorney's advice regarding how the Planning Commission could address an issue of a variance during an extension application review.

ADJOURNMENT

There being no other business, Vice Chair Jones adjourned the Planning Commission meeting at 11.23 p.m.

APPROVED:

Michael Jones, Vice Chair

Date