

**WEST LINN CITY COUNCIL  
FINAL DECISION NOTICE  
AP-08-01**

**IN THE MATTER ON REMAND FROM THE LAND USE BOARD OF APPEALS TO  
ADDRESS SPECIFIC ISSUES RELATED TO THE CITY'S APPROVAL OF A DESIGN  
REVIEW AND WATER RESOURCE AREA PERMIT FOR AN OFFICE BUILDING AT  
5750 HOOD STREET**

At its regular meeting on Tuesday, December 30, 2008, the West Linn City Council held a limited public hearing to respond to a remand from the Oregon Land Use Board of Appeals (LUBA). The remanded decision was an approval of a 4,200 square foot office building on property located at 5750 Hood Street, north of Burns Street (DR 07-10 and NDW 07-08). The approval criteria of Chapters 55 (Design Review) and Chapter 32 (Water Resource Areas) of the Community Development Code (CDC) applied to the original decision. However, this hearing was limited to discussion of the two issues upon which LUBA remanded the decision:

- 1) Determination of whether the project, with minor revisions proposed by the applicant, satisfies CDC 32.090(A), which allows up to 5,000 square feet of the site within a water resource area to be developed, and
- 2) Determination of whether the outdoor parking area and downhill retaining wall, with minor revisions proposed by the applicant, satisfy all applicable rear yard setback requirements, including CDC 21.070(A)(4)(c) and 34.060.

The Council also considered any other issues related to the approval criteria only to the extent the applicant's specific minor changes to the proposal after the approval was remanded by LUBA called into question compliance with any other relevant approval criterion.

The hearing was conducted pursuant to the provisions of CDC Chapter 99.

The hearing was opened by Mayor King and commenced with a staff report presented by Chris Kerr, Senior Planner. The applicant made a presentation, then the appellant made a presentation, then all public testimony was heard.

A motion was made by Councilor Burgess and seconded by Councilor Jones to affirm the approval of the project subject to amendments to conditions of approval No. 1, No. 2, and No. 11 as provided herein, as well as a new condition (No. 12); and also including the findings of fact set forth in this document. The motion passed with four in favor (Burgess, Jones, Eberle, Carson) and one opposed (King).

Based on the entire record, including without limitation the evidence submitted before and at the public hearing on this matter, the City Council makes the following findings of fact. Each finding herein is intended to support the whole decision, and no finding in this document is limited by the heading or caption under which it appears or is cross-referenced, these being solely for the convenience of the reader.

## Project History

- A. The project that is the subject of this notice received final City approval following a hearing of the City Council on March 17, 2008, on an appeal of the City Planning Commission's approval of the project. The City Council voted 2-2 to overturn the appeal, which pursuant to the CDC resulted in the Planning Commission approval being upheld.
- B. The City's approval of the project was appealed to LUBA. In a Final Opinion and Order dated October 7, 2008, LUBA remanded the approval to the City on two specific grounds, which are the issues considered by the Council at the December 30, 2008 hearing as described above.
- C. Subsequent to the remand, the applicant submitted additional evidence relevant to the issues considered at the December 30, 2008 hearing, including a revised site plan for the project that: (1) eliminates the proposed pedestrian walkway on the south side of the building; (2) reduces the disturbed area associated with the surface parking in the rear (west) portion of the site; and (3) modifies the storm water detention facilities for the project.

## Issue No. 1 – Maximum Square Footage

- D. Walkways and sidewalks are included in the calculation of disturbed area required by CDC 32.090(A). Although development under CDC 32.090(A) includes "access roads and driveways" but does not specifically mention walkways and sidewalks, the inclusion of "access roads and driveways" does not mean that other, unnamed types of development are excluded from the scope of 32.090(A). The definition of "development" in CDC 2.030, which includes "paving, filling, grading or site clearing," clearly contemplates that permanent walkways and sidewalks are considered development and thus subject to the 5,000 square foot limitation of CDC 32.090(A).
- E. Storm water drainage facilities, even if underground, come within the definition of "development" and therefore are included in the calculation of disturbed area required by CDC 32.090(A).
- F. Areas temporarily disturbed during construction, but re-vegetated to a natural state, are not included in the calculation of disturbed area required by CDC 32.090(A). CDC Chapter 32, and in particular Section 32.090, are silent on whether the development area includes areas of temporary disturbance associated with construction activities in the permanent disturbance area. However, CDC 32.050(K), one of the approval criteria for water resource area permits, states that "vegetative improvements to areas within the water resource area may be required ... if portions of the site within the water resource area are disturbed during the development process." This criterion also requires a re-vegetation plan pursuant to CDC 32.080 that will result in the water resource area having a combination of native trees, shrubs, and groundcover on more than 80% of its area, and more than 50% tree canopy coverage in its area. The intent of this re-vegetation requirement is to return the areas of temporary disturbance to a natural state consistent with the rest of the water resource area. Given this re-vegetation requirement, areas within the water resource setback area that are temporarily disturbed and re-vegetated to

a native state are not “development” and therefore not considered part of the disturbed area for purposes of CDC 32.090(A).

- G. Improvements to the public right of way as part of a project are not on the subject property, and thus are not considered part of the disturbed area for purposes of CDC 32.090(A). While CDC 32.090(A) includes within the 5,000 allowed square feet “access roads and driveways,” these are implicitly those roads and driveways on the site itself, not adjacent public streets that are owned by the public. With respect to this project, improvements to the public right of way on Hood Street are not considered part of the disturbed area for purposes of CDC 32.090(A).
- H. Evidence submitted by the applicant shows that the total disturbed area, including storm water drainage facilities, is 4,998 square feet. An independent analysis by the City’s Engineering Department confirmed this number. Under either calculation, the total disturbed area is less than 5,000 square feet, and no contrary evidence has been received. Therefore, the applicant has satisfactorily addressed this issue as remanded by LUBA and criterion CDC 32.090(A) is met.
- I. Because the City has conditioned the project on re-vegetation of temporarily disturbed areas pursuant to CDC 32.050(K) and 32.080, any areas temporarily disturbed during construction do not count towards calculation of disturbed area for purposes of CDC 32.090(A). However, because the applicant is close to the maximum amount of disturbed area, the conditions of approval shall be modified to ensure that the final project does not exceed 5,000 square feet of disturbed area and that re-vegetation plans are implemented for the entire remainder of the site up to the edge of the permanently disturbed area.

Issue No. 2 – Rear Yard Setback

- J. CDC 2.060 defines “building height” as “the vertical distance above a reference datum measured to the highest point of a flat roof ... or to the highest gable of a pitched or hipped roof.” The reference datum is measured as follows:
  - 1. For relatively flat sites where there is less than a 10 foot difference in grade between the front and rear of the house, the height of the house shall be measured from grade five feet out from the exterior wall at the front of the house; or
  - 2. For steeper lots where there is more than a ten-foot difference in grade between the front and rear of the house, the height of the house is measured from grade at a point five feet out from the exterior wall on the lowest side (front or rear) of the house. One then measures vertically to the peak or ridgeline of the roof to determine the height.

Although these provisions refer to the “house,” the City uses these standards to measure the height of any structure. The CDC contains no alternative language for measuring the height of structures that are not “houses.”

- K. CDC 2.060 defines a “building” as “any structure used or intended for supporting or sheltering any use or occupancy.”
- L. CDC 2.060 defines a “structure” as “something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below.” The language “30 inches above grade and not over any basement or story below” applies to all structures, not just structures that are “platforms, walks and driveways.”
- M. The project site is within the Office Business Commercial zoning district, which requires a 25-foot rear yard setback under CDC Section 21.070(A)(4)(c). The setback applies to “structures” which, according to CDC 2.060, are only those improvements that are more than 30 inches above grade. For this site, the rear lot line is the west property line adjacent to the public library.
- N. The revised site plan for the project includes a surface parking lot to the rear of the building. This lot has two retaining walls, the first on the uphill (south) side and adjacent to the library (west) side. This wall is interior to the proposed parking area, because the parking area is at a lower finished grade than the surrounding terrain. The second retaining wall is on the drainage way (north) side and library (west) side. It reaches its maximum height at the northwest corner of the parking area and tapers to the south and east back to grade. This wall is exterior to the proposed parking area, because the parking area is at a higher finished grade than the surrounding terrain, which slopes steeply to the north, down into the drainage way.
- O. As compared to the site plan reviewed by the Council on March 17, 2008, the applicant’s revised plan keeps the retaining wall on the uphill side of the parking area the same, but modifies the downhill retaining wall by changing the turnaround area for one car. The resulting downhill retaining wall is 2 ½ feet, or 30 inches, above existing grade at its highest point, which is the northwest corner of the parking lot. Also, the downhill retaining wall is not connected to the building itself, being separated by a small area that is “at grade,” thus not requiring a retaining wall.
- P. The parking area and downhill retaining wall adjacent to the drainage way are a separate structure from the main building. The parking area by itself is the equivalent of a paved driveway to a residential structure, which, even though it may be physically connected to the concrete floor of a garage, is not part of the “structure” for determination of height and setback issues. A paved area and a commercial building are such fundamentally different types of “structures” that they cannot be considered to be one continuous structure. The downhill retaining wall is not physically connected to the building and therefore is not part of the same structure as the building.
- Q. By itself, neither the parking area nor the retaining wall adjacent to the drainage way has a height exceeding 30 inches, and therefore neither are structures subject to CDC 21.070(A)(4)(c). Pursuant to clause (1) of the definition of building height in CDC 2.060, the base grade of both these improvements is measured five feet in front (east) of the parking lot, since the difference between the lowest point and the highest point of the

parking lot and downhill retaining wall does not exceed 10 feet. This base datum is 117 feet.

- R. The parking area has a slight slope for drainage from its southeast corner down to its northwest corner. The highest point of the parking surface does not exceed the base datum of 117 feet by more than a few inches; hence the parking area is not a structure. Similarly, because the downhill retaining wall extends vertically downward from the parking area, it is located entirely below the base datum of 117 feet and therefore has no height. Any safety guard railing on the top of a retaining wall does not apply to calculation of its height for purposes of determining whether or not the wall is a structure; therefore, the wall is not a structure and is exempt from the rear yard setback of CDC 21.070(A)(4)(c). The Council imposes additional conditions of approval requiring that the final project not have retaining wall heights in excess of those shown on the tentative plans, and that the downhill retaining wall not be physically connected to the building. With these conditions of approval, the applicant has satisfactorily addressed this issue as remanded by LUBA and criterion CDC 21.070(A)(4)(c) is met.
- S. Alternatively, the downhill retaining wall adjacent to the drainage way is an “accessory” structure and is allowed pursuant to CDC 34.060 because the wall is more than three feet from the rear (west) property line, is located more than 60 feet from the front (east) property line, does not exceed fifteen feet in height, and is less than 500 square feet in size.

#### Other Findings

- T. The applicant’s revised site plan reduces the size of the outdoor parking lot, and therefore raises the question of whether the proposed parking area is still in compliance with the CDC. The CDC does not have a clear measurable criterion for determining whether the applicant’s proposed parking area is adequate; however, CDC 46.150(A)(9) provides that “access drives from the street to off-street parking shall be designed and constructed to facilitate the flow of traffic and provide maximum safety for pedestrian and vehicular traffic on the site.”
- U. A figure associated with CDC 46.150(F) shows alternative parking lot layouts with design standards. The standard width for a two-way access driveway with perpendicular parking stalls along both sides is 23 feet. The applicant’s proposed access driveway meets this standard under the building, but tapers to a lower width adjacent to the last perpendicular space to minimize the height of the retaining wall adjacent to the drainage way. However, the figure in the CDC speaks to required driveway aisle width when perpendicular parking stalls exist on both sides, and these two parking spaces are located on only one side. Therefore, the figure does not apply to this situation.
- V. The applicant’s revised site plan indicates that the two outdoor spaces will be designated for only “compact” vehicles. The two spaces are the farthest from the entrance and exit to Hood Street; therefore, vehicle maneuvering in the outdoor parking lot will not interfere with traffic flow in the parking lot, nor will it pose risks to pedestrians on Hood Street or elsewhere on the site. Further, the eastern parking space has space behind it that exceeds the standard width for an access driveway with perpendicular stalls on either side, and the western parking space has been made wider than required and has been

provided with extra turning and back-up space to the west that compensates for having less than 23 feet directly behind it. Thus, the Council concludes that the reduced size of the outdoor parking lot in the applicant's revised site plan does not change the City's prior conclusion that the project complies with the applicable approval criteria. Specifically, the requirements of CDC 46.150(A)(9) continue to be met.

W. All other revisions to the project proposed by the applicant subsequent to the LUBA remand are minor in nature and do not affect the City's determination that all applicable approval criteria are met.

In conclusion, the Council finds that the project, as modified according to the applicant's revised site plan (a copy of which is attached to this Final Decision Notice), and subject to the conditions of approval below, is in compliance with CDC 32.090(A), meets all applicable rear yard setbacks, and otherwise is in compliance with all applicable approval criteria.

The Council adopts the following conditions of approval for the project:

1. Prior to commencement of site work, the applicant shall prepare a landscape plan, to be approved by the Planning Director for the natural drainage way area and any areas of the site to be disturbed during construction, but not permanently developed. The applicant shall implement the landscape plan to the satisfaction of the Planning Director prior to occupancy. The landscape plan shall cover the entire site except for the actual building and parking area footprints, and the landscape plan shall not allow a "buffer" zone between the vegetation and the building.
2. Prior to occupancy, the applicant shall record a conservation easement over the entire site, except for the 4,998 SF of area proposed to be disturbed.
3. Prior to commencement of site work, the applicant shall place six-foot high chain link fencing along the perimeter of the area to be developed and the area to be disturbed by construction activity, with the precise location to be reviewed and approved by the City Arborist and the City Engineer. After removal of the fence, the applicant shall place appropriate riparian zone markers at 50 foot intervals, at locations to be approved by the City Engineer, prior to occupancy.
4. If final on-site and Hood Street widening impervious area exceeds 5,000 square feet, surface water treatment and detention will both be required. If less than 5,000 square feet, only treatment is required. No concrete structures may be placed in the drainage way or transition zone.
5. The applicant shall incorporate appropriate on-site solid waste and recycling facilities into the building design to the satisfaction of the City Engineer.
6. HVAC units shall be located and designed to demonstrate compliance with West Linn's CDC and Municipal Code noise standards.
7. The applicant shall replace the existing two-inch galvanized water line from the intersection of Hood Street and Burns Street to the property's private water service connection. The size of the replacement ductile iron line shall be determined by what is necessary to satisfy the fire protection standards of the Tualatin Valley Fire and Rescue District.

8. Prior to occupancy the applicant shall assess street frontage illumination. If found deficient, applicant must install street lights having the City's design approval to bring illumination to City standards.
9. In coordination with the re-vegetation plan required, the applicant shall prepare a landscape plan, to be reviewed and approved by the Planning Director with input from the City Librarian, designed to screen parking areas and retaining walls on the site from the view of the library. After approval, the applicant shall implement the plan prior to final occupancy, and shall provide a guarantee to ensure survival of the landscaping for at least three years after final occupancy.
10. The final building plan shall show all rooftop equipment fully screened from view from the library grounds.
11. The proposed retaining wall heights in the applicant's final building plans, and as constructed, may not increase in height above what is shown on the approved site plan. The wall heights may be less than those shown on the approved site plan, but in no case shall any portion of the northern retaining wall that is located within the 25 foot rear setback exceed 30 inches in height. The northern retaining wall may not be physically connected to the building.
12. Prior to the commencement of any site work, a revised stormwater management plan shall be approved by the City Engineer.

This decision will become effective 21 days from the date of mailing of this notice as identified below. Those parties with standing (i.e., those individuals who submitted letters into the record, or provided oral or written testimony during the course of the hearing, or signed in on the attendance sheet at the hearing, or who have contacted City Planning staff and made their identities known to staff) may appeal this decision to the Oregon Land Use Board of Appeals.

  
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 NORMAN B. KING, MAYOR

1-5-2009  
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 DATE

This decision was mailed on JANUARY 7, 2009

Therefore, this decision becomes final at 5:00 p.m., JANUARY 28, 2009.