

**WEST LINN CITY COUNCIL
FINAL DECISION NOTICE
AP-09-02 and CUP-09-01**

**IN THE MATTER OF THE PROPOSAL OF A NEW HOTEL WITH A
CONSOLIDATED HEARING FOR A CONDITIONAL USE PERMIT AND
FOR A CITY COUNCIL REVIEW OF A PLANNING COMMISSION'S
APPROVAL . THE COUNCIL'S REVIEW WAS OF A PLANNING
COMMISSION DECISION APPROVING A CLASS II DESIGN REVIEW,
WITH A WATER RESOURCES AREA PERMIT DUE TO BERNERT
CREEK AND WETLANDS ON SITE, AND WITH A CLASS II VARIANCE
FOR AMOUNT OF SQUARE FOOTAGE PROPOSED FOR
DEVELOPMENT IN WATER RESOURCES TRANSITION AREA, AT
2400-2450 WILLAMETTE FALLS DRIVE**

At their meeting of May 11, 2009, the West Linn City Council held a public hearing to consider the request by VKNW, Inc. to approve a new hotel at 2400-2450 Willamette Falls Drive. This involved a Conditional Use Permit and a City Council review of a Planning Commission decision. The Planning Commission decision had approved a Class II Design Review, a Water Resources Area permit due to the presence of wetlands and Bernert Creek on site, and a Class II Variance for the amount of square footage to be developed within the transition area (as the amount proposed exceeded the 5,000 square feet allowed under the hardship provisions of Community Development Code [CDC] 32.090). The Planning Commission file is DR-08-01/VAR-08-01/WAP-08-01. The approval criteria for Design Review are found in Chapter 55 of the CDC. The approval criteria for Water Resources Area permit are found in Chapter 32 of the CDC. The approval criteria for Variance are found in Chapter 75 of the CDC. The approval criteria for Conditional Use are found in Chapter 60 of the CDC. The hearing was conducted pursuant to the provisions of CDC Chapter 99. Specifically, this hearing was held as a consolidated hearing for the review of the Planning Commission decision and the Conditional Use Permit, under the provisions of CDC 99.070 Consolidations of Proceedings.

Mayor Galle opened the hearing. The hearing commenced with a staff report presented by Chris Kerr, Interim Planning Director. Presenting for the applicant were Brad Kaul of Steven P. Elkins Architects, Dale Gulliford, Jr. of Schott and Associates, and John Gordon of GVA Kidder Mathews. Karen Mohling of Tualatin Valley Fire and Rescue (TVFR) provided a presentation on behalf of TVFR. Mr. Kaul provided the applicant's rebuttal after the TVFR presentation. Speaking in support of the application were Elizabeth Kieres of Willamette Neighborhood Association, and Buffalo Zobel. Speaking in opposition were Gary Hitesman, Teri Cummings, and Karie Oakes. Alene Ludwig provided neutral testimony.

A motion was made and approved to continue the application to the hearing date of May 19, 2009, with a deadline for the submission of all written material at 5:00 PM on May 18, 2009.

On May 19 Mayor Galle opened the hearing. Mr. Kerr gave the staff presentation. The applicant's presentation was given by Mr. Kaul, Steve Elkins of Steven P. Elkins Architects, David Smith of Mead Smith P.C., Vic Patel of VKNW, Inc., and Katen Patel of VKNW, Inc. Testimony in favor was given by Alice Richmond, David Smith, and Chris Williams. Ms. Oakes and Roberta Schwarz gave testimony in opposition. There was no neutral testimony. The applicant's rebuttal was given by Mr. Kaul, Mr. Elkins, Mr. Smith, and Mr. Gulliford. Mayor Galle closed the hearing. A motion was made, seconded, and passed to continue the applications by allowing the applicant until June 1, 2009 to submit written rebuttal regarding the real estate study submitted at the May 11 hearing and to address specific questions posed by members of the City Council. The motion also provided that the Council would reconvene on June 8, 2009 to render a decision on the applications.

On June 8 the Council reconvened. Mayor Galle ruled that part of the applicant's June 1 rebuttal submittal constituted new information (specifically the last three lines of Table A). Mayor Galle reopened the hearing for citizens to comment on only these lines. Ms. Oakes and Mr. Hitesman testified regarding this information. Mr. Smith asked to strike the three lines from the record on behalf of the applicant. The Council voted to strike the three lines from the record thus no new evidence was before the City Council for consideration. The hearing was closed. A motion was made and seconded to approve CUP-09-02. The motion failed on a vote of 3-1. Motions were made, seconded, and passed to deny CUP-09-02 and to deny DR-08-01/VAR-08-01/WAP-08-01, with 10 additional findings attached to both decisions. The additional findings attached to both denial decisions are as follows:

Finding No. 1

The City Council had authority to call up DR-08-01/VAR-08-01/WAP-08-01 pursuant to authority within CDC 99.170 G.2. The CDC provides that two members of the Council have the right to order the review of a Planning Commission decision within fourteen days of the final decision. The final decision was issued on January 27, 2009 and the Council finds that the record contains two individual written requests for a review of the decisions submitted via e-mail by Councilor John Kovash and Mayor Patti Galle, present members of Council, and who were members at the time of the call up. The requests were received by the planning staff prior to the established deadline of February 10, 2009. Council finds that both requests were submitted in a timely manner thus CDC 99.170 G.2 was met and a review by Council was taken.

Finding No. 2

The Council finds that the written requests submitted by the two members of Council conform to the requirements for a call up of a Planning Commission decision as they are in writing and reference the application sought to be reviewed. The written requests are in the record at pages 6 and 7 of the binder given to Council for the March 3, 2009 hearing. The Council finds that the code does not require that grounds be submitted because the hearing will be de novo. Council finds that CDC 99.250 D. provides that an application for review "may state grounds" for the review, but it is not required. Council finds that the notices

contain sufficient details as required by CDC 99.250 to comply with the Code for proper application for a Council review, and the Code requirements are met.

Finding No. 3

Following the timely call up of DR-08-01/VAR-08-01/WAP-08-01 pursuant to authority within CDC 99.170 G.2, city planning staff prepared a notice of the review. The record for AP-09-02 contains the affidavit of notice and the mailing list used for the notice. The affidavit shows that the applicant was sent the notice of the initially scheduled call-up hearing legally. The applicant was sent a notice of the originally scheduled call-up hearing on February 10, 2009, at least 20 days ahead of the March 2, 2009 hearing. The Council finds that the notice, found in the record of AP-09-02, is adequate to conform to the requirements of CDC 99.260 that requires that review notices be given to all persons with standing. The contents of the notice conform to the requirements of CDC Chapter 99, including notice that the appeal will be de novo.

Finding No. 4

Prior to conducting the review hearing, it was determined by Council that in addition to the applications previously reviewed and approved by the Planning Commission, the application required a conditional use review to allow transient housing in the general commercial zone. The conditional use determination is needed before a review of DR-08-01/VAR-08-01/WAP-08-01 is completed. Due to the time constraints related to the 120 day time limits for review of DR-08-01/VAR-08-01/WAP-08-01, the Council determined that the conditional use application should be expedited. The applicant stated that it was not willing to allow for further delay beyond the time needed for it to prepare a conditional use application and for the city to prepare a revised hearing notice. Rather than send the conditional use application to the planning commission, the initial review body specified by the Code, the Council exercised its rights under CDC 99.070, consolidation of proceedings. The Council interpreted the Code to allow it to be the initial review body for the conditional use application allowing it to finalize the conditional use decision before taking final action on review of DR-08-01/VAR-08-01/WAP-08-01. Council finds that it is the only local review authority authorized by the Code to review a planning commission action under CDC 99.170. Council finds that it had original jurisdiction of the review of the planning commission decision, given the status of the applications at that time. The Council finds that when the need for a conditional use was determined, the language of CDC 99.070 allowed for consolidation of the proceedings with the Council the appropriate reviewer. Council finds, given the hierarchy established by CDC 99.070, that it was appropriate for it to conduct a consolidated review of the applications with a two step vote on the applications, with the conditional use vote occurring first.

Finding No. 5

Council finds there is no local right for an appeal of any decision made at the Council level as the appropriate appeal body is the Oregon Land Use Board of

Appeals. A conditional use decision made by the planning commission is subject to appeal to the City Council. Council finds that CDC 99.070 provides for consolidation of proceedings and identifies the City Council as the highest review authority in the hierarchy thus the Code anticipates that the City Council will be the initial reviewer of an application that is consolidated with another City Council review. Based upon this, the Council finds that applications that usually are reviewed by the planning commission with right of appeal to the City Council have no local appeal right when they are consolidated at the City Council review level. Council finds that the conditional use application decision made by the Council is subject to appeal to the Oregon Land Use Board of Appeals.

Finding No. 6

CDC 99.038 requires that an applicant contact and discuss an application with the affected neighborhood. CDC 99.038 1. states that the purpose of neighborhood contact is to identify potential issues or conflicts regarding a proposed application so they may be addressed prior to filing. Council finds that in this case all potential issues or concerns that could arise from the CUP application were sufficiently reviewed by the neighborhood in September, 2008 when the neighborhood reviewed DR-08-01/VAR-08-01/WAP-08-01. The review criteria for the CUP are essentially the same as those applied by the planning staff and planning commission in the review of the hotel under DR-08-01/VAR-08-01/WAP-08-01. During the hearing on May 11, 2009, Elizabeth Kieres, a representative of the Willamette Neighborhood Association, testified that the neighborhood reviewed and approved the concept of a hotel at this location at its meeting of September, 2008. The issues that the neighborhood raised, according to the neighborhood association representative, were addressed at the planning commission. Council finds that the conditional use application CUP- 09-01, to allow a hotel in the General Commercial zone, was not required to conform to CDC 99.038 1. because the Willamette Neighborhood Association had reviewed the hotel proposal earlier.

Finding No. 7

Regarding sites that are partially within the water resource area and transition area, such as the project site, CDC32.090(B) allows for reduction in the requirements of Chapter 32 to, “avoid the loss of all economically viable use of a vacant lot recorded with the County Assessor’s Office on or before the effective date of this ordinance that is partially inside the water resource area is permitted.” In order to obtain development approval under CDC 32.090(B)(1) applicants must demonstrate that “Without the proposed reduction, the applicant would be denied economically viable use of the subject property. To meet this criterion, the applicant must show that no other application could result in permission for an economically viable use of the subject property.” Council finds that the property has over 19,000 SF of developable land outside the transition area. As shown by the evidence in the record there are businesses in the immediately surrounding area that are economically viable but have less developed square footage than this application. Therefore Council finds that CDC 32.090(B) is not met.

Finding No. 8

CDC 75.060(1) says “Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, and result from lot size or shape, legally existing prior to the date of this ordinance, topography, or other circumstances over which the applicant has no control.” The Council finds that the applicant has not adequately explained why the shape of the site might be exceptional or extraordinary, and the shape of the site does not manifest itself to be exceptional or extraordinary. The percent of the site that is a water resource area is large, but the site is along a drainageway which is a common rather than an exceptional or extraordinary situation in West Linn. Parking requirements are a function of the applicant’s intended use of the site, not a circumstance that applies to the property. Therefore, the conclusion that “It would be impossible to develop the site viably” without the 16,440 sq ft variance asked for under CDC 75.060.1 does not follow. Indeed, it has been shown that it is common for viable businesses in West Linn to occupy 10,000 to 20,000 sq ft of land. The water resource area on the property is not an extraordinary circumstance due to the fact that the CDC allows for development opportunities for commercially zoned properties that include a water resource area. Therefore, there is no exceptional or extraordinary circumstance, and this criterion is not met.

Finding No. 9

CDC 75.060(2) states that a variance must be “necessary for the preservation of a property right of the applicant, which is substantially the same as a right possessed by owners of other property in the same zone or vicinity.” The Council finds that there is no violation of the applicant’s right to develop this property because, as demonstrated in the record, the applicant maintains the right to develop more than 19,000 square feet of the site without a variance; therefore, this criterion is not met.

Finding No. 10

The standards to be applied to conditional use approvals include CDC 60.070 A(2), which states that: “The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features”. The Council finds that the natural features of this site make it unsuitable for the proposed hotel use in the size and configuration proposed, and therefore finds that the requested conditional use does not meet the standards of this section of the CDC..

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.

Patti Galle
PATTI GALLE, MAYOR

Jan 9 2009
DATE

Mailed this 10th day of June, 2009.

Therefore, this decision becomes final at 5 p.m., July 15th, 2009.

Devrev/Finaldecisions/final decision AP-09-02 CUP-09-01