

CITY OF WEST LINN  
PLANNING COMMISSION

Minutes of June 17, 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:

Chris Kerr, Acting Planning Director; Tom Soppe, Associate Planner; 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 7:01 p.m.

APPROVAL OF MINUTES

**Jones moved** to approve the Minutes of May 20, 2009 with one modification requested by Steel. **Wood seconded** the motion and it **passed** 4:0. Lytle, Martin and Horsey abstained.

PUBLIC COMMENTS (None)

PUBLIC HEARING

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

**CDC-09-01** CDC amendments to Chapter 25 Historic District

Chair Babbitt opened the hearing and explained the staff had asked that it be continued so the neighborhood association and the historic review board had more time to review the draft code before the Planning Commission heard the matter.

**Jones moved** to continue CDC-09-01 to August 5, 2009, 7:00 p.m. **Wood seconded** the motion and it **passed** 7:0

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**PUD-09-01/SUB 09-01/ WAP-09-02, 6-Lot PUD, Subdivision and Water Resources Area Permit at 19650 Suncrest Drive**

Chair Babbitt opened the public hearing, explained the applicable criteria and procedure, and announced the time limits for testimony. He asked the Commissioners to declare any conflict of interest. Lytle had served as secretary of the Hidden Springs Neighborhood Association. He recused himself to avoid any appearance of bias. The other Commissioners each declared they had made a site visit.

When the Chair asked if anyone challenged the authority of the Planning Commission or the ability of any individual Commissioner to hear the matter, Lynn Fox, PO Box 236, Marylhurst, Oregon, 97036, offered the Commission a list of businesses the applicant owned. She asked each Commissioner to declare it if he/she or any relative worked in those businesses. Jones,

Wood, Steel and Babbitt each declared they did not. The Planning Commission did not accept the list after Jones argued that was inappropriate and would set a harmful precedent, and Wood, Steel and Babbitt agreed.

#### *Staff Report*

Tom Soppe, Associate Planner, presented the staff report. (See Planning & Development Department Staff Report dated June 20, 2009). He said the code allowed the development to be a PUD because more than 25% of the site was Type 1 and 2 lands. He calculated that if the entire R-10 zoned site were unconstrained, it could accommodate up to 16 lots. If allowable site density were transferred from the constrained portions of the site to its developable area, there could be as many as 12 lots. However, the applicant proposed to create 6 lots and to protect almost one-third of the site in an open space tract. He presented an aerial photograph to show how proposed lot sizes compared well with existing surrounding lot sizes and that there was contiguous City-owned open space. He discussed the site plan and the vicinity map. Four lots (3, 4, 5 and 6) were to share the internal driveway. That ensured driveways were appropriately spaced along Suncrest Drive, a collector street. An analysis of abutting property showed there was no need for the proposed driveway to be a full, connected, street. TVF&R had approved the hammerhead configuration. In order to provide an aesthetically pleasing streetscape, the houses on the three lots along Suncrest Drive were to be oriented to face that street.

Soppe advised that PUDs were supposed to offer a benefit to the community in return for being allowed to transfer density. The conditions of approval required the applicant to place a conservation easement over open space Tract B to protect a significant riparian corridor from development; improve it by removing certain invasive species; and provide an easement for a future trail connection through it. Those aspects would benefit the community. The homeowners association would own the underlying land of Tracts A and B. Tract A contained the stormwater treatment facility. The proposal met the code requirement to protect 20% of significant tree area. There was to be 1:1 mitigation for removed trees.

Soppe reported that the applicant had agreed to revised Condition 11, to remove the worst of the invasive species, as follows:

**Prior to recording of the subdivision plat the applicant shall remove all Himalayan Blackberry, garlic mustard, and English ivy on the ground within proposed tract B.**

Soppe reported that the applicant had originally not proposed to plant trees in the front swale. But the code required it, so they had agreed to the following new condition:

**Street trees shall be planted between the sidewalk and the street. The City Arborist shall approve the proposed tree species.**

Soppe then listed and summarized the submittals received into the record and correspondence between the staff and Commissioner Horsey. The staff had just received a letter from the applicant's attorney confirming that the applicant agreed with the staff-proposed conditions of approval. In that letter, the attorney had advised that to require the applicant to dedicate Tract B to the City was an exaction that did not meet the legal nexus and proportionality test.

During the questioning period, the Commissioners wanted to know why the staff did not recommend requiring the applicant to convey Tract B to the City, so the City could control it and the public could use it like a neighborhood park. Soppe explained that it was a large part of the

site (63%). To take so much land from the applicant for a six-lot development would not meet the legal nexus and proportionality test for exactions. But the public would be able to use the trail easement through it in the future after the trail was built. Monahan advised the purpose of conservation easement was to protect land and such an easement did not allow active recreation. The trail easement would be the only part of Tract B that the public could use.

The Commissioners wanted to know why a conservation easement was proposed if Chapter 32 protected resource land. The staff explained the easement protected all of Tract B - even some parts of it that were not protected by Chapter 32. It would be recorded and permanently protect the tract even if the code were changed in the future. The Commissioners wanted to know what justified the trail easement exaction. The staff observed it was a small, 20-foot wide swath and the land under the easement would still be owned by the six homeowners. The trail was on the City's adopted Master Trail Plan, so there was no need to justify it via the proportionality test (just as the City did not have to justify requiring dedication of right-of-way along street frontage). Martin was concerned that the City had not been consistent. They had paid one developer for parkland the developer figured out of his subdivision parcel; and they had purchased an easement for a trail along the river at Burnside Park. The staff related the City had many PUDs with private land in conservation easements. They pointed out where the future trail segment would connect to a larger future trail system. Other property owners along that route would also be required to provide trail easements when they developed their property. Residential lots would not extend into the conservation easement - it would be common area owned by the homeowners association and recorded on the plat. Tract A (the stormwater facility) would also be recorded on the plat and owned by the homeowners association, but maintained by the City. The owners could not sell it or do anything else with it. Steel observed if the City owned the open space tract they might maintain it more responsibility than six private owners. Jones recalled that the City owned, but did not do a good job of maintaining, many open space parcels. City ownership was no guarantee the tract would be maintained. A complaint that the space was not being maintained would generate enforcement action. Soppe pointed out a condition of approval called for the applicant to sign a stormwater maintenance agreement with the City so the City could maintain it. But ownership of Tract A would remain private. He said the staff did not propose a condition to maintain Tract B due to its size and the proportionality issue. He clarified that without any constraints, the code would allow the applicant's R-10 zoned, 165,000 sq. ft. parcel to be divided into 16, 10,000 sq. ft. lots and with the constraints they could be allowed to have up to 12 lots.

Monahan advised the Commissioners to judge each application by comparing it to applicable criteria. They could not decide it based on the contention that the applicant had violated tree-cutting restrictions in the past on another property. If they wanted extra assurance that the applicant would maintain the conservation easement area, they should ensure the record showed its existence; the approval required the edge of the conservation area to be marked; and the staff ensured that protective measures were taken during construction. He clarified that a conservation easement was perpetual and had a clear purpose to require the property to be maintained in its natural state.

#### *Applicant*

Kirsten Van Loo, Emerio Design LLC, 6900 SW 105<sup>th</sup> Ave., Beaverton, Oregon 97008, testified on behalf of the applicant. She said the project met all applicable development standards. She cautioned that planting street trees in a swale could cause problems, but the applicant would comply with the condition requiring trees to be planted there. She said the public benefit would be that the proposed project would protect the pristine vegetated land that filtered water that

went into Fern Creek; update public water facilities in Suncrest Drive; and provide an easement for a future public trail. She stressed the conservation easement was to protect flora and fauna and not for public recreation purposes and the PUD would allow the applicant to build six, single-family, residential houses. She clarified that she had made the same presentation at each of two pre-submittal neighborhood meetings with the Hidden Springs and Marylhurst Neighborhood Associations. She said she had made it clear that the applicant did not contemplate giving open space to the City. She advised that what some other consultant may have said about another land use application was not part of the record.

Van Loo pointed out the three lots facing the R-7.5 lots across the street would be of comparable size and dimension to those across the street. The applicant's development would not go into the drainage area as far as the Ridgebrook subdivision did. She said 2.5 years ago the property to the south had been partitioned to create a second lot with a very small conservation easement on it that was not set aside in a separate tract. But the applicant put their conservation easement in a separate tract that could never be developed without further land use approval. She said using a smaller, private, driveway for access resulted in less pavement and runoff than a dead end street, which would require so much land that the project would not be economically feasible. Four lots taking access from a private drive was allowed by the code and the Fire Marshal and helped minimize access points on Suncrest. She addressed public benefits and stressed the applicant proposed six lots instead of the maximum density of 12 lots and put a conservation easement over all of Tract B even though part of it was not associated with the Fern Creek corridor. They were upsizing the public water lines in front of project. They would remove the specified invasive species from the open space.

During the questioning period, Van Loo referred to the Preliminary Street & Utility Plan (Sheet 3 of 7). She was asked about the safety of the stormwater detention facility. She pointed it out, described its dimensions and how it worked, and explained it would be fenced, gated and locked to prevent children from falling in. She explained the applicant would work with the City and the County to name the unnamed street in the final plat. Horsey was concerned about the privacy and sunlight of neighbors north of Lot 6. Van Loo confirmed the sideyard setback there was 7.5 feet. She said there were typically no exterior lights on a side yard and the abutting lots were already heavily vegetated. She noted that residents of the three abutting Ridgebrook Park Estates lots had not commented on the application. She referred to the aerial photograph and pointed out the Ridgebrook house that would potentially be most impacted by Lot 6. It was oriented so the back of its garage was closest to the joint property line and its rear yard faced east, not toward the Lot 6. She clarified for Horsey that the front setbacks on Lots 4 and 5 were 20 feet, measured from the edge of the shared access easement.

The Commissioners asked about parking. Van Loo said there would be more than adequate parking. Guests and delivery service could park in the driveways of the houses or on one side of Suncrest Drive, where parking was allowed. The applicant would dedicate ten more feet of right-of-way on Suncrest and make improvements that would likely widen the asphalt a couple of feet. Private, interior, Street "B" was also wide enough to allow parking on one side and two cars to move slowly past each other. She clarified that the stormwater facility was to be landscaped and so low that drivers entering the development would not see it. She clarified that there was no need to provide a way for residents to access the conservation easement area and the applicant did not propose to do so because the purpose of such an easement was to protect the resource, not to offer a place for recreation. The applicant would mark the boundaries with signage telling people not to go into it. When asked, she said it was the applicant's choice not to dedicate that land to the City and he would not likely do it any time in the future.



Martin was concerned about safety on Suncrest even if it were widened a couple of feet. He recalled it was a major traffic street. He and a police officer had each opted not to park on Suncrest when they visited the site. Van Loo reported that it was almost 40 feet wide, curb-to-curb, and seemed to function as on street parking for other residents along Suncrest. Babbitt announced a ten-minute recess and thereafter reconvened the hearing.

*Proponents*

Alice Richmond, 3939 Parker Rd., stressed the six new homes would generate needed City revenue. If the staff and fire officials agreed to it she could too. She agreed the public should not use a conservation easement and the homeowners association could own it. She said her own experience was that City ownership did not guarantee the City would maintain a stormwater facility; and that the fence around the facility on her property kept kids from using it.

*Neither for nor Against*

Daria Knowles, 1810 Carriage Way, questioned why a trail should cross a conservation easement if no public access was allowed. The staff explained the trail easement would facilitate one link of a future connected public trail system and they confirmed the homeowners association would own the land under the easement. Knowles questioned requiring the applicant to plant trees in the swale if they might be a potential hazard and cause a financial burden on the homeowners. Babbitt observed that the code required street trees.

Tom Neff, 671 Marylhurst Circle, reported that the concern in his written testimony about findings regarding street trees had been addressed. He said the City would at least have an opportunity to take better care of the conservation easement if they owned the land. He wanted to see fencing separating the backyards of Lots 4, 5 and 6 from the easement area. He pointed out the August 26th minutes of the Marylhurst Neighborhood Association reported that Van Loo had explained the developer intended to dedicate the land to the City, but would wait until the houses were sold to offset capital gains taxes. Neff stressed that if the developer intended to dedicate the land, they should be required to do so immediately.

Karie Oakes, 1125 Marylhurst Dr., representing the Marylhurst Neighborhood Association testified that each of two applicant representatives had told the Association the applicant would dedicate the water resource area to the City: Ben Altman at the pre-annexation meeting; and Van Loo at the pre-application conference. Oakes said she had also attended the Hidden Springs Neighborhood Association meeting and heard Altman state that the owner intended to dedicate it. She had the CDs if anyone wanted them. She said she felt "defrauded." She said the applicant's submitted version of the summary of the July 17, 2008 Pre-Application conference meeting on pages 145-147 of the staff report was different than the version on pages 189-191. The applicant's version did not report that owner Mark Handris attended the meeting; omitted a paragraph related to a discussion of the dedication and setbacks; and omitted another paragraph related to the discussion of trees to be removed.

Oakes said her Association questioned whether the development provided a public benefit. The code already required the applicant to protect the water resource area and improve the facilities in the street. The land could be developed in a manner that would protect the resource without a PUD. She said the Association wanted to see a plan for the trail and a geotechnical report that confirmed that it was possible to put it on the steep slopes next to the creek. She asked for clarification of a statement in the applicant's narrative that indicated they wanted to modify side

yards. She could not find more details about that in the documents. She asked the Planning Commission to continue the hearing to allow time for the Association to discuss it at their meeting the following Tuesday.

During the questioning period, Oakes clarified that the Association position was that dedicating Tract B to the City was best because the City would be the most responsible owner, and if the area was not being maintained the neighborhood would know who to talk to get that done right away. The staff confirmed that if the City owned the tract the Parks Department would be responsible for maintaining it; however, it was true that sometimes maintenance did not happen. Whoever owned it, a complaint to code enforcement would generate a demand that the owner maintain it. Oakes said the Association believed if the homeowners association owned the tract that would place too large a burden of responsibility on them. Home ownership would change over the years making it hard to track who was responsible for ensuring that CC&Rs were complied with. Horsey wanted to know if volunteers who helped remove invasive species from City property could remove invasive species from a conservation easement over private property without trespassing. Monahan advised they would need the owner's permission to do that.

The staff clarified that the official record of the July 17, 2008 pre-application conference was the summary on pages 189-191. That was what the City had sent to both the applicant and the neighborhood association and put on the City website. Jones observed the summary indicated that the City preferred that the applicant dedicate the resource tract. Kerr confirmed that the City preferred such land to be dedicated, and that the staff always tried to achieve that. He said they initially intended to require dedication of Tract B in this case, but subsequently found that the scale of such an exaction from a six-lot development would not meet the legal nexus and proportionality test. After they found the City could not require the dedication, their next step was to ask if the applicant would dedicate the tract. The applicant declined to do that. They now recommended requiring the applicant to provide the trail easement and clean up invasive species. Kerr clarified that the staff decision was not based on the preapplication summary submitted by the applicant, but on staff notes. He confirmed that the City sometimes purchased open space if it was high enough on the acquisition priority list and if funds were available. But there were many privately owned conservation easements in the City.

Horsey observed the Commissioners needed to discuss the general issue of meeting summary discrepancies in the future. Martin suggested the controversy over different versions of the meeting summary might be "much ado about nothing" because the applicants' version of the summary included a sentence that indicated the applicant was to place markers at the boundaries of Tract B that identified it as "owned by the City of West Linn."

### *Opponents*

Brandy Sarget, 19667 Sun Circle, submitted written testimony. She argued that the record did not show the application met the applicable criteria for a PUD that required it to be as good or better than the resulting, traditional, lot-by-lot subdivision; or that it preserved existing landscaped character and amenities. She indicated it would adversely impact pristine green space ecosystem that was the home of wildlife like the northern flying squirrel. It would impact the character of the overall community (i.e., beyond the R-7 development across the street). She wanted the Commissioners to recognize that Carriage Way was at the threshold from more developed areas to the north to less developed areas to the south. She questioned the argument that the PUD offered public benefits. She said that all owners of land that abutted green space were responsible for taking care of the land and removing blackberries. The

Planning Commission should compare the supposed benefits against the detriments of building six, tightly spaced, houses; increasing stormwater runoff; and building into a pristine area. They should deny the application.

Mike Gokey, 2085 Ridgebrook Dr., recalled the developer had stated he was going to dedicate the open space to the City. He asked the Planning Commission to listen to the recording of the pre-application meeting to hear that. He cautioned that if the homeowners owned the trail they were legally responsible and would be open to lawsuits. He questioned whether a trail could be built within 100 feet of a stream. He referred to the stormwater treatment facility design and worried that dirt and vegetation would be washed into the stream in a 100-year storm. He asked why the City was settling for the trail easement and not intent on getting the two-plus acres of land it could get from the applicant. He said it was the developer's responsibility to pull invasive species and West Linn code should require that. He said the applicant had not made a good faith effort to talk to the residents of the three houses along the property line about tree removal.

Matthew Knowles, 1810 Carriage Way, presented graphics and slides to show how the proposed development would affect his privacy and views and to show trees and vegetation he wanted saved. He asked that the internal drive be shifted slightly inward so buffering trees could be planted between his property and the development. He asked the Planning Commission to save a large fruit tree on the southwest corner and protect a laurel hedge along the property line during construction. He asked the Planning Commission to require treated windows on project homes to mitigate privacy issues and ensure those residents did not see into his home and he did not see into theirs. He said his requests were not unreasonable and the results would meet the code intent to provide appropriate transitions.

Lynn Fox, PO Box 236, Marylhurst, Oregon, 97036, representing the Hidden Springs Neighborhood Association, reported that the packet the staff had sent the Association for the current meeting did not contain information related to this land use case. She stressed that in his written testimony, Gary Hitesman had expressed concern that the open space area was not being dedicated to the City; explained there were problems with conservation easements; and offered to recommend better language to protect the land. She asked the record be kept open so the Association could submit a Willamette Falls TV DVD that recorded the applicant telling the City Council during Step 2 of the annexation process that the open space would be dedicated to the City. She said the letter from the Association that reported that they had passed a resolution on March 17<sup>th</sup> not to support the application should have been highlighted in the "public comments" section of the staff report. She related the Association felt SFA Design Group had "betrayed" them. She said the Association was concerned about the applicant's history as a steward of public assets. She worried the applicant likely considered the fine they got for cutting trees on Osterman Road a cost of doing business. If the City were serious about protecting trees the fine should be higher. She submitted to the record a list of over 50 businesses in West Linn owned by the applicant. She said the description of the annexation request in the voters' pamphlet did not tell voters what it would cost them to develop the site as a PUD.

During the questioning period, Fox clarified that the Association would provide a copy of the February 11<sup>th</sup>, Step 2, hearing for the record. She clarified that Hitesman had written about his concern that the terms of the conservation easement were not clear, and he wanted to ensure it was perpetual, and would not expire. She agreed that the City should prefer dedication to an easement because that was permanent, and the rights and obligations of the parties were clear. She opined that the development's residents would be required to care for a disproportionate

amount of open space relative to the amount of open space other homeowners associations were required to care for. If lack of maintenance became a problem, West Linn taxpayers would eventually have to maintain the open space. She cautioned not to assume the project homeowners association would be active. She related that only three of the 20-plus homeowners associations in the Hidden Springs Neighborhood were active and the rest were not meeting their responsibilities to the City to maintain common area.

Babbitt clarified that the information packet related to the current land use case would have been mailed to the Association prior to the first hearing date, not just before the continued hearing. Fox clarified that it was important to consider the applicant's pre-annexation statements about dedication because they had promised that to the City Council and the Association and voters had voted for it because they anticipated that public benefit. She recalled that Comprehensive Plan, Goal 5, Policy 26 was to dedicate property for a trail where practicable. She asked who decided what was "practicable?" Babbitt observed the trail was in a master plan that had been considered and adopted by the City.

Michael Robinson, Perkins Coie, 1120 NW Couch St., 10th Fl., Portland, Oregon, 97209-4128, said the applicant preferred to offer rebuttal at the next hearing. He confirmed the applicant would agree to extend the 120-day rule period to July 29, 2009,

**Jones moved** to continue PUD-09-01/SUB 09-01/ WAP-09-02 to July 29, 2009 at 7 :00 p.m. **Martin seconded** the motion and it **passed** 6:0. Chair Babbitt clarified that the public record would be open to both oral and written testimony at that hearing.

#### ITEMS OF INTEREST FROM STAFF

Kerr asked the Commissioners to email any comments related to the CDC Re-Write to Spir.

#### ITEMS OF INTEREST FROM THE PLANNING COMMISSION

#### **Work Session on Willamette Historic District CDC Re-write**

This discussion was held over to the next Planning Commission meeting.

#### ADJOURNMENT

There being no other business, Chair Babbitt adjourned the Planning Commission meeting at 10:45 p.m.

#### **APPROVED:**



**Michael Babbitt, Chair**



**Date**