

**WEST LINN CITY COUNCIL**  
**FINAL DECISION AND ORDER**  
**AP 15-01**

**IN THE MATTER OF AN APPEAL OF THE PLANNING COMMISSION'S  
DENIAL OF A CLASS II DESIGN REVIEW FOR A MULTI-USE  
DEVELOPMENT OF 180 MULTI-FAMILY DWELLING UNITS WITH  
COMMERCIAL SPACE AND A PROPERTY LINE ADJUSTMENT**

**I. Overview**

CON AM Properties, LLC (Appellant or Applicant), filed its application in July 2015, and it was deemed complete on July 20, 2015. The approval criteria for the applications are found in Community Development Code (CDC) Chapters 21, 34, 38, 41, 42, 44, 46, 48, 52, 54, 55, and 85. The hearings were conducted pursuant to the provisions of CDC Chapter 99.

The Planning Commission (Commission) held the initial evidentiary hearing on August 26, 2015. The hearing commenced with a staff report presented by John Boyd AICP, Planning Manager. Rob Morgan, CON AM Properties, LLC; Michael C. Robinson, Perkins Coie LLP; and Brent Ahrend, Mackenzie; presented for the Applicant. The initial hearing was continued to September 2, 2015, for additional evidence and public testimony. At its September 2 hearing the Commission left the written record open until September 9, 2015, at noon, and it continued the hearing to September 9, 2015, for rebuttal and deliberations. The Commission heard public testimony from approximately 50 individuals over the course of the first two meetings and accepted many written submissions.

The hearing was closed on September 9, 2015, and a motion was made by Commissioner Knight and seconded by Commissioner Walvatne to deny the applications and direct staff to prepare a Final Decision and Order adopting findings consistent with the Commission's decision that specifically addressed the issue of mixed use under CDC 21.050. The motion passed unanimously to deny the application for the Class II Design Review of the seven structure mixed use development consisting of multiple-family dwelling units and commercial units and the property line adjustment.

The Appellant, also the Applicant, filed an appeal of the Planning Commission's decision on September 30, 2015. The appeal hearing was held on November 16, 2015. The Appellant presented oral argument, followed by oral argument from the public, and it concluded with rebuttal by the Appellant. The appeal hearing was closed on November 16, 2015, and Councilor Frank made a motion to make a tentative decision to overturn the Planning Commission's decision to deny LLA-15-01, the lot line adjustment. Councilor Tan seconded the motion, and the motion passed unanimously; thereby approving the lot line adjustment. Councilor Frank then made a motion to make a tentative decision to uphold the Planning Commission's decision

to deny DR-15-11, which was the design review application. Councilor Perry seconded the motion, and the motion passed unanimously.

## **II. The Record**

The appeal hearing originally was scheduled for October 26. The Appellant, however, requested to extend the date of the hearing to accommodate its attorney's schedule (Michael Robinson). The City granted the request and the hearing was rescheduled to November 16, 2015. Prior to the hearing, the Appellant submitted additional written argument and rebuttal on November 9, 2015. Jeffrey Kleinman, attorney for Concerned Citizens of West Linn, objected orally to the inclusion of the Appellant's November 9, 2015, submission for the reasons stated in his November 10, 2015, letter to the Council.

At the November 16 hearing, Councilor Frank made a motion to include the Appellant's November 9, 2015, submission as part of the record, which was seconded by Councilor Tan; however, the motion did not carry and the November 9, 2015, submittal by the Appellant was excluded from the record. Mayor Axelrod noted that it was his understanding that the agreement to extend the hearing date to November 16, was granted solely for the schedule, and not to submit additional testimony to the on-the-record hearing. He noted also that the November 9, submittal may contain additional information which exceeded the scope of the original appeal. On the advice of the City Attorney, Dan Olsen, Appellant's November 9, 2015, submission was included in the record solely for purposes of preserving the issue of whether the exclusion of the submittal was proper if an appeal to the Land Use Board of Appeals is filed, but the submittal is excluded from consideration by the Council on the merits of the appeal. The Council clarified that the Appellant, represented by counsel for ConAm, could present any and all argument orally at the hearing and only the written statement was excluded.

The record was finalized at the November 16, 2015, appeal hearing. The record includes the entire file for AP-15-01, DR-15-11 and LLA-15-01, excluding the November 9, 2015, submittal by the Appellant.

## **III. Procedural Issues and Scope of Review**

The Appellant, through its attorney Michael Robinson, agreed that the scope of the hearing was limited to the issues on appeal. Mr. Robinson stated that the appeal statement, not any summarization of it, forms the basis of the appeal, and he made a standing objection to any argument that may arise that is beyond the scope of the Appellant's appeal application. Mr. Robinson also took exception to the Council's decision not to admit Appellant's November 9, 2015, letter into the record.

The Council reviews the Planning Commission's decision to determine if: 1) there is substantial evidence in the record to support the Planning Commission's decision, or 2) errors of law were committed. CDC 99.280(D).

#### IV. Findings of Fact

- 1) The Overview set forth above is true and correct.
- 2) The Appellant and Applicant is CON AM Properties, LLC.
- 3) The Council finds that it has received all information necessary to make a decision based on the Agenda Report; appeal application; the Applicant's oral argument; oral argument by the public; and the evidence in the whole record.

#### V. Findings

##### A. DR-15-11 – Design Review Application

The Council upholds the Planning Commission's denial of DR-15-11 because the development does not meet the prescribed conditions for mixed use in the Office Business Center Zone (OBC Zone). CDC 21.050 sets forth uses and developments permitted in the Office Business Center Zone under prescribed conditions. The Council finds that the prescribed conditions in CDC 21.050(2) are not met for two reasons: 1) residential parking garages are part of the multiple-family units, which are prohibited on the first floor in the OBC zone, and 2) the CDC requires commercial use on the entire first floor and part of the first floor contains residential parking garages.

##### 1) *Residential parking garages are part of the multiple-family units.*

The Council finds that the prescribed conditions in CDC 21.050(2) are not met because residential parking garages are part of the multiple-family units, which are prohibited on the first floor. First, the Council finds that the express language of CDC 21.050(2) allows "[m]ultiple-family units, as a mixed use in conjunction with commercial development, *only* above the first floor of the structure." (emphasis added). This is a clear and unambiguous requirement. The CDC defines "multiple family residential units" as "[a] *structure* containing three or more attached dwelling units in any vertical or horizontal arrangement." CDC 2.030 (emphasis added). The CDC does not state that multiple family units are "a structure containing three or more attached dwelling units in any vertical or horizontal arrangement, [excluding parking for the residential units that are in the structure]." To interpret the CDC to include words that are not in the definition would contradict the express language of the regulation.

Residential parking garages for the multiple-family units are located on the first floor of the multiple family residential unit structure. Parking in this instance is not a separate use; it is simply a component of the multiple-family units. Each one of the Applicant's seven multiple family residential unit structures violates the prescribed condition by including part of the multiple-family units on the first floor. The combined square footage of the first floor parking garages ranges from approximately 2,200 square feet, for the smallest building to 5,400 square feet for the largest multiple-family structure. This large area devoted to parking, and the sheer number of parking garages, combined with the closed garage doors, demonstrates that the residential parking garages are part of the multiple-family units and are not intended to serve the small (less than 300 square feet) commercial space allocated to each building.

The Council finds that the prescribed condition in CDC 21.050(2) is not met because multiple-family units are allowed “*only* above the first floor of the structure”; therefore, garages, as part of the multiple-family units, are *not* allowed on the first floor. (emphasis added). Further, the garages proposed by the Appellant are not “parking facilities,” which are a permitted use in the OBC Zone, because the garages are not separate freestanding garages or lots providing “parking services.”

The Council understands the Appellant’s reading of CDC 21.050(2) to be that parking on the first floor satisfies the condition that multiple-family units are “only above the first floor” because parking is not part of the multiple family units. However, the Council disagrees with this reading of the prescribed condition because it is inconsistent with the plain meaning and the intent of the text as explained above.

Second, the Council finds that requiring all components of the multiple-family units to be above the first floor of the structure is consistent with the purpose of the prescribed condition, which is to provide an opportunity for commercial development on the first floor of the structure. Moreover, prohibiting multiple-family units from being located on the first floor is consistent with the purpose of the OBC Zone, which is to “provide for groups of business and offices in centers” because it would allow a number of businesses to be located adjacent to one another on the first floor. It also provides opportunities for larger commercial spaces and a wider variety of commercial uses. If the Appellant’s interpretation of the prescribed condition is adopted, the result would essentially be a rezoning of the property to residential uses, which contradicts the purpose of the OBC zone.

The purpose statement for the OBC zone is not a separate criteria or approval standard, but it provides important context and a clear statement of intent that informs Council’s interpretation of the standards at issue. It might be that right now the market is not ideal for office and business centers, but the market will return and West Linn will need its limited OBC zoned lands to meet its longer term economic objectives.

Third, the Council finds the prescribed condition to be consistent with the Comprehensive Plan, which provides the underlying policy basis for the prescribed condition, as well as all of the City’s other land use regulations. Prohibiting multiple-family units on the first floor of the structure is consistent with Comprehensive Plan Goal 9, Economic Development, Goal 4, to “[m]ake the most efficient use of our existing commercial and industrial lands.” The prescribed condition makes efficient use of land in the OBC zone by ensuring that residential uses will not displace limited office and business spaces on the first floor. Preserving space on the first floor for offices and businesses provides convenient access for customers, which in turn should increase the economic viability of the businesses. There is no evidence in the record of any other approvals authorizing multi-family residential units or residential parking on the first floor of commercially zoned development in lieu of commercial uses on the first floor as is required in the OBC zone.

Appellant interprets the prescribed condition to mean that parking is allowed on the first floor of the structure because parking is not a residential use. However, the Appellant’s

interpretation of the prescribed condition leads to a lack of commercial space on the first floor that makes it difficult for the Appellant's interpretation to be consistent with the Comprehensive Plan. Appellant cites Goal 2, Land Use Planning, Goal 1, which mentions developing mixed use districts and increasing housing choices to support its interpretation. This one Comprehensive Plan goal cannot be considered in isolation. The very next goal states that "development of commercial and office facilities in West Linn that will increase employment opportunities, reduce dependence on services outside of the City, and promote energy-efficient travel and land use patterns" should be considered. Comprehensive Plan, Goal 2, Land Use Planning, Goal 2. The small commercial spaces that result from the Appellant's interpretation are unlikely to be very effective at increasing employment opportunities, reducing the dependence on services outside the City, or reducing travel.

The Council upholds the Planning Commission's denial of the application and finds that the application fails to meet the prescribed conditions in CDC 21.050(2) because multiple-family units are located on the first floor of the structure. The Council's determination is consistent with the plain meaning of the CDC, the purpose of the OBC zone to "provide for groups of business and offices in centers", and the underlying Comprehensive Plan policies that provide the basis for the prescribed conditions.

*2) The CDC requires commercial use on the entire first floor.*

The Council adopts the Planning Commission's findings regarding the scope of commercial use of the first floor. First, the Council finds that CDC 21.050(2) requires the entire first floor to be used for commercial purposes. CDC 21.050(2) allows "[m]ultiple-family units, as a mixed use in conjunction with commercial development, only above the first floor of the structure." This is an unambiguous requirement. Moreover, requiring the entire first floor to be retained for commercial use is consistent with the purpose of the OBC Zone, as stated above. Further, the Comprehensive Plan policies noted above demonstrate that the Council's conclusion regarding the language of the prescribed condition is consistent with the Comprehensive Plan.

The Council understands the Appellant's reading of CDC 21.050(2) to be that some commercial space on the first floor satisfies the condition that multiple-family units are "only above the first floor". However, the Council disagrees with this reading of the prescribed condition because it is inconsistent with the plain meaning of the text and it could lead to an absurd result. For example, under the Appellant's interpretation the installation of a vending machine on the first floor would meet the prescribed condition that there is some commercial use on the first floor, but such a limited commercial use would not serve the purpose of the OBC zone. Therefore, the Council finds that the CDC 21.050(2) requires the entire first floor to be comprised of commercial space. Council notes that having one small, single, isolated commercial space in each building does not comport with the purpose of the zone to "to provide groups of businesses and offices in centers."

The application proposes to build seven mixed use structures, each containing multiple-family dwellings above the first floor; the application only reserves a small portion, 300 square feet or less, of the first floor of each of the seven mixed used buildings for commercial uses. The remainder of the first floor consists of residential parking garages, which are not a commercial use. As noted above, the square footage of residential parking garage space completely dwarfs the single miniscule 300 square feet of commercial space provided for in each multi-family structure. The Council finds that the application does not meet the requirement that the entire first floor is reserved for commercial use because the overwhelming majority of the first floor consists of residential parking garages with only 300 square feet or less of commercial space.

The Council upholds the Planning Commission's denial of the application and finds that the application fails to meet the prescribed conditions in CDC 21.050(2) because the entire first floor is not used for commercial purposes. This is consistent with the plain meaning of the CDC, the purpose of the prescribed condition, and the underlying Comprehensive Plan policies that provide the basis for the prescribed condition.

The Council finds that either one of the reasons stated above is sufficient to deny this application for failure to meet the prescribed conditions in CDC 21.050(2).

#### **B. LLA-15-01 – Lot Line Adjustment**

The Council overturns the Planning Commission's denial of the lot line adjustment and finds that there is substantial evidence in the record to demonstrate that all of the criteria for approval of the lot line adjustment were satisfied by the Appellant's initial application for LLA-15-01 and applicable analysis in the August 26, 2015, Staff Report. The Appellant's narrative responding to CDC 85.210 is attached as Exhibit A and incorporated by this reference. The August 26, 2015, Staff Report, and all other exhibits, plans, or maps, submitted as part of LLA-15-01, are also incorporated by this reference. The Council adopts staff's and the Applicant's responses to CDC 85.210 as its findings approving the lot line adjustment.

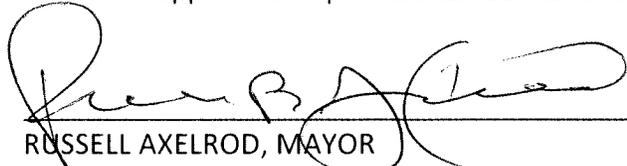
#### **VI. Order**

The Council concludes that AP-15-01 is upheld in part and overturned in part. The Council upholds the Planning Commission's denial of DR-15-11 based on the entire Record, Findings of Fact, and Findings above.

The Council overturns the Planning Commission's denial and approves LLA 15-01 based on the entire Record, Findings of Fact, the Findings above, and the following condition of approval from the August 26, 2015, Staff Report:

1. Property Line Adjustment. The final Property Line Adjustment Map shall be submitted to the City of West Linn for approval prior to recording. This map shall substantially conform to the property line adjustment as shown on Sheet P1.2.

Staff shall approve and process LLA 15-01 consistent with this Final Decision and Order.

  
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RUSSELL AXELROD, MAYOR  
WEST LINN CITY COUNCIL

November 23, 2015  
DATE

This decision may be appealed to the Land Use Board of Appeals in accordance with the applicable rules and statutes.

Mailed this 24<sup>th</sup> day of November, 2015.

Therefore, this decision becomes effective at 5 p.m., December 14, 2015.