

October 3, 2016

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**VIA CERTIFIED MAIL NO. 7015 0640 0004 7296 8993**

Land Use Board of Appeals  
Attn: Kelly Burgess  
Department of State Lands Building  
775 Summer Street NE, Suite 330  
Salem, OR 97301-1283

**Re: *Upper Midhill Estates, LLC and Ryan Zygar v. City of West Linn*  
LUBA No. 2016-\_\_\_\_\_  
Notice of Intent to Appeal**

Dear Kelly:

Enclosed for filing on behalf of Upper Midhill Estates, LLC and Ryan Zygar are the original and two (2) copies of a Notice of Intent to Appeal, together with a check made payable to "Land Use Board of Appeals" in the amount of \$400.00 for the filing fee and deposit for costs.

Please process this filing. Thank you for your assistance.

Very truly yours,



Michael C. Robinson

MCR:rsr

Enclosures

cc: Persons listed or referenced in Paragraph III and V of Notice of Intent to Appeal  
(w/encls.) (via First Class U.S. Mail)

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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

UPPER MIDHILL ESTATES, LLC and  
RYAN ZYGAR,

*Petitioners,*

v.

CITY OF WEST LINN,

*Respondent.*

LUBA No. 2016 - \_\_\_\_\_

**NOTICE OF INTENT TO APPEAL**

**I.**

Notice is hereby given that petitioners Upper Midhill Estates, LLC and Ryan Zygar (together, "petitioners") intend to appeal the land use decision of respondent City of West Linn ("respondent") entitled "West Linn City Council Final Decision and Order AP-16-02 In the Matter of an Appeal of the Planning Commission Denial of a 34-Lot Subdivision and Water Resource Area Permit at 18000 Upper Midhill Drive," which became final on or about September 12, 2016. A copy of the decision is attached as **Exhibit 1**.

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II.

Petitioners are represented by Michael C. Robinson and Seth J. King of Perkins Coie LLP, 1120 NW Couch Street, 10th Floor, Portland, Oregon 97209, 503.727.2000.

III.

Respondent City of West Linn has as its mailing address and phone number: 22500 Salamo Road, West Linn, Oregon 97068, 503.657.0331. Respondent has as its legal counsel in this matter: Tim Ramis, City Attorney, Jordan Ramis PC, 2 Centerpointe Dr, 6<sup>th</sup> Floor, Lake Oswego, Oregon 97035, 503.598.7070 x173.

IV.

Petitioner Upper Midhill Estates, LLC is the applicant in this matter. The mailing address and phone number for applicant's legal counsel are set forth in paragraph II.

V.

Other persons mailed written notice of the land use decision by respondent, as shown on respondent's records, are listed, with their mailing addresses, in **Exhibit 2**.

1  
2 **NOTICE:**

3 Anyone designated in Paragraph V of this Notice who desires to  
4 participate as a party in the case before the Land Use Board of Appeals must  
5 file with the Board a Motion to Intervene in this proceeding as required by  
6 OAR 661-010-0050.  
7

8 DATED: October 3, 2016  
9

10 **PERKINS COIE LLP**

11 By: 

12 \_\_\_\_\_  
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20 *Upper Midhill Estates, LLC and Ryan Zygar*  
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**WEST LINN CITY COUNCIL  
FINAL DECISION AND ORDER  
AP-16-02**

**IN THE MATTER OF AN APPEAL OF THE PLANNING COMMISSION DENIAL OF  
A 34-LOT SUBDIVISION AND WATER RESOURCE AREA PERMIT  
AT 18000 UPPER MIDHILL DRIVE**

**I. Overview**

Upper Midhill LLC (Applicant) filed its application on October 21, 2015, and it was deemed complete on February 23, 2016. The approval criteria for the application are found in Community Development Code (CDC) Chapters 85, 32, and 14. The Planning Commission hearing on April 20, 2016, was conducted pursuant to the provisions of CDC Chapter 99.

After deliberations, a motion to approve the application failed to pass with a tie vote and the application was denied. A Planning Commission meeting on May 4, 2016, affirmed the April 20, 2016, decision as a denial of the application. On May 19, 2016, the applicant filed an appeal of the Planning Commission decision.

The City Council hearing on July 25, 2016, was conducted pursuant to the provisions of CDC Chapter 99. Public testimony was heard. The applicant's attorney, David Noren, requested that the May 4, 2016, letter from Andrew Tull, consultant for the applicant, be admitted into the record. The City Council allowed this with the provision that it would accept responses to the letter from persons with standing, including attorney Peggy Hennessy representing the Marylhurst Place Homeowner's Association, until August 10, 2016. The City Council also required that any written rebuttal by the applicant be submitted by August 12, 2016.

The City Council reconvened the hearing on August 15, 2016, with questions of staff and with full consideration of the July 25, 2016, to August 12, 2016, submittals in addition to the May 4, 2016, letter. City Council then closed the hearing and entered deliberations. Councilor Perry made a motion to deny the appeal; seconded by Councilor Martin. The motion passed 4 to 1, and the appeal was denied.

**II. The Record**

The record was finalized at the July 25, 2016, and August 15, 2016, hearings. The record includes the entire file from AP-16-02, SUB-15-03 and WAP-16-03.

## Findings of Fact

- 1) The Overview set forth above is true and correct.
- 2) The appellant/applicant is Upper Midhill LLC.
- 3) The City Council finds that it has received all information necessary to make a decision based on the Staff Report; public comments; and the evidence in the whole record, including any exhibits received at the hearings.

## III. Findings

### Appeal Issues by Upper Midhill LLC

Petitioner, Upper Midhill Estates LLC, is the applicant and appeared in the proceeding before the City Council through its representative Ryan Zygar; its consultant, Andrew Tull; and attorney David Noren. The applicant identified four grounds in its appeal:

1. The planning commission improperly construed the law when it determined that the application had not complied with CDC 85.200.B.5, regarding double frontage lots;
2. The planning commission improperly construed the law and made a decision not supported by the evidence when it found without discussion or analysis that the application had not complied with CDC 85.200 regarding the availability of adequate public facilities.
3. The planning commission committed procedural error when its decision failed to make adequate findings, as required by CDC 99.110.C, regarding whether or not the application meets the approval criterion of CDC 85.200.
4. The planning commission misconstrued the law, made a decision not supported by the evidence, and committed procedural error when its decision failed to address whether the standards of CDC 85.200 could be satisfied by conditions of approval.

These findings will address the issues on appeal as follows: A) compliance with CDC 85.200; and B) lack of compliance with CDC 85.200 and findings demonstrating there is sufficient evidence in the record to determine the criterion is not met and cannot be met by imposing conditions of approval.

#### A. DOUBLE FRONTAGE LOTS

The majority of the Council found that the application and staff report demonstrated that the application did not create double frontage lots; therefore, this criterion is met, and the appeal on this ground should be upheld.

CDC 85.200(B)(5) states:

*Double frontage lots and parcels. Double frontage lots and parcels have frontage on a street at the front and rear property lines. Double frontage lots and parcels shall be*

*avoided except where they are essential to provide separation of residential development from arterial streets or adjacent non-residential activities, or to overcome specific disadvantages of topography and orientation. A planting screen or impact mitigation easement at least 10 feet wide, and across which there shall be no right of access, may be required along the line of building sites abutting such a traffic artery or other incompatible use.*

The Council adopts the finding in the staff report, which concluded that there are no double frontage lots in West Linn. The Hillside Drive right of way that is being improved as part of this development was dedicated with the original Robinwood Plat. Hillside Drive is on the West Linn side of the Lake Oswego-West Linn border. After the Robinwood Plat, a development in Lake Oswego occurred towards the back of the lots abutting Hillside Drive, but that development did not improve Hillside Drive. Instead the Lake Oswego development constructed Woodhurst Place at the front of the lots for access, which created double frontage lots in Lake Oswego.

The applicant is proposing to improve Hillside Drive and utilize it as the access for a number of lots. The application does not create any double frontage lots because the right of way was previously dedicated. In addition, to the extent there are double frontage lots, those lots are not located in West Linn. The lots are located in Lake Oswego; therefore, the subdivision does not create double frontage lots in West Linn, and the criterion is met. Finally, it was noted that the applicant was required to use this right of way to construct the connection between Hillside Drive and Upper Midhill Drive. Therefore, the Planning Commission erred when it found that the application must be denied because it failed to meet 85.200(B)(5) and the appeal on this ground should be upheld.

#### B. LACK OF ADEQUATE PUBLIC FACILITIES

The Council finds the application does not meet CDC 85.200 because substantial evidence in the record that a reasonable person would rely upon indicates that the traffic generated by the proposed development would pose a safety hazard to pedestrians, bicyclists, and motorists using the local streets near the development, in particular, Upper Midhill Drive. The applicable code provisions are CDC 85.200, Approval Criteria and CDC 2.030, Specific Words and Terms, specifically "adequate public facilities," which provide:

##### **CDC 85.200 APPROVAL CRITERIA**

*No tentative subdivision or partition plan shall be approved unless adequate public facilities will be available to provide service to the partition or subdivision area prior to final plat approval and the Planning Commission or Planning Director, as applicable, finds that the following standards have been satisfied, or can be satisfied by condition of approval.*

A. Streets.

1. General. *The location, width and grade of streets shall be considered in their relation to existing and planned streets, to the generalized or reasonable layout of streets on adjacent undeveloped lots or parcels, to topographical conditions, to public convenience and safety, to accommodate various types of transportation (automobile, bus, pedestrian, bicycle), and to the proposed use of land to be served by the streets. The functional class of a street aids in defining the primary function and associated design standards for the facility. The hierarchy of the facilities within the network in regard to the type of traffic served (through or local trips), balance of function (providing access and/or capacity), and the level of use (generally measured in vehicles per day) are generally dictated by the functional class. The street system shall assure an adequate traffic or circulation system with intersection angles, grades, tangents, and curves appropriate for the traffic to be carried. Streets should provide for the continuation, or the appropriate projection, of existing principal streets in surrounding areas and should not impede or adversely affect development of adjoining lands or access thereto.*

**CDC 2.030 SPECIFIC WORDS AND TERMS**

*Adequate public facilities. Public facilities that must be adequate for an application for new construction, remodeling, or replacement of an existing structure to be approved are transportation, water, sewer, and storm sewer facilities. To be adequate, on-site and adjacent facilities must meet City standards, and off-site facilities must have sufficient capacity to (1) meet all existing demands, (2) satisfy the projected demands from projects with existing land use approvals, plus the additional demand created by the application, and (3) remain compliant with all applicable standards.*

*For purposes of evaluating discretionary permits in situations where the level-of-service or volume-to-capacity performance standard for an affected City or State roadway is currently failing or projected to fail to meet the standard, and an improvement project is not programmed, the approval criteria shall be that the development avoids further degradation of the affected transportation facility. Mitigation must be provided to bring the facility performance standard to existing conditions at the time of occupancy.*

The Applicant contends that because certain improvements are “programmed” through the City’s TSP, those improvements may be relied upon in determining if public facilities are adequate. We have considered this proposed interpretation and reject it. We interpret the standard to require concurrency at the time of occupancy of a proposed development project. While the definition at issue refers to improvements that are “not programmed”, a separate sentence requires that any mitigation needed to provide adequate public facilities must be in place at the time of occupancy. In deciding this case we interpret the Code to require that we apply a standard of concurrency. Any



necessary improvements to infrastructure must be assured to be in place at the time of occupancy.

The Council finds that there is substantial evidence in the record to find that the public facilities are inadequate because: 1) the assumptions in the applicant's traffic study are incorrect, resulting in a technical report that cannot be relied upon; 2) the evidence demonstrates that the Arbor Drive-Willamette Drive intersection is failing and unsafe; and 3) the evidence shows that Upper Midhill Drive cannot safely accommodate all modes of travel.

The Council recognizes that there is conflicting evidence on these points. We therefore explain the basis for our conclusion below. We have determined that we cannot rely on the report by the applicant's expert because of shortcomings in the report identified by other witnesses as described below. We found the testimony by non experts, which we have relied on, was credible and based on personal observation of the actual conditions in the area.

First, substantial evidence in the record indicates that the average daily trip calculation of 323 and estimates of the peak number of trips are grossly underestimated. PC-5 Public Comments Addendum – Part 2, 7 (Gregory Ball's April 18 email); Staff Report for the Planning Commission, 642 (April 20, 2016) (Friedrich Baumann's April 5 email). The CDC requires that the proposed development "satisfy the projected demands from projects with existing land use approvals, plus the additional demand created by the application." We find credible the testimony that the data was collected before completion of the new duplexes on Willamette Drive and the expansion of Mary's Woods, both of which will significantly impact traffic on Highway 43. PC-5 Public Comments Addendum – Part 2, 2 (Resolution of Robinwood Neighborhood Association); Staff Report for the Planning Commission, 626 (April 20, 2016) (David Goldenberg's April 6 email); Staff Report for the Planning Commission, 638 (April 20, 2016) (James and Patricia Crane's April 6 email).

In addition, the vehicle counts were collected during the summer when all the schools and Marylhurst University were on summer break, resulting in lower traffic counts overall, no school bus traffic, and no school drop-off traffic. PC-5 Public Comments Addendum – Part 2, 2 (Resolution of Robinwood Neighborhood Association). Even the applicant's attempt to seasonally adjust the counts cannot correct for the deficiency in the original data collection process.

The traffic calculations also fail to account for all of the heavy truck and construction traffic that will be impacting the safety of Upper Midhill Drive during the construction of the development. Staff Report for the Planning Commission, 627, 630 (April 20, 2016) (Scot and Lizelle Chandler's April 5 letter; Joanne Desky April 6 email). Therefore, the Council determines that the traffic study cannot be relied upon; the Council finds the numerous first-hand accounts of the citizens that live in the area and routinely

experience the traffic during the peak hours to be substantial evidence that it can reasonably rely on to find that the traffic calculations are inaccurate and the proposed mitigation by the applicant is unlikely to result in adequate transportation facilities.

Second, the Council finds that there is substantial evidence in the record to find that the intersection at Arbor Drive and Willamette Drive (“Arbor Drive intersection”) is currently unsafe and that the proposed mitigation measures will not adequately address this problem. The intersection is operating at a level of service of F, which constitutes a failed intersection under the existing conditions. Staff Report for the Planning Commission, 54 (April 20, 2016) (citing Kittelson and Associates, Figure 4). The Code requires that “[m]itigation must be provided to bring the facility performance standard to existing conditions at the time of occupancy;” however, the applicant only proposed a left turn lane addition, which will not adequately address the safety concerns at this failed intersection. Residents that utilize this intersection regularly expressed significant concerns about the amount of the traffic increase on Arbor Drive when the intersection is already unsafe. Chad Seber’s Oral Testimony, approx. 1hr.21min.20sec. (July 25, 2016); PS Sundar’s Oral Testimony, approx. 1hr.41min. (July 25, 2016).

The proposed mitigation fails to address the continued risk to travelers on Arbor Drive of joining traffic on Willamette Drive. Numerous citizens testified regarding the danger of the Arbor Drive intersection, and the Oregon Department of Transportation’s “Crash Summaries by Year by Collision Type” demonstrates that there have been a number of traffic incidents at this intersection, which supports the testimony. Peter Spir Memorandum, 22 (August 12, 2016) (Dorianne Palmer’s August 9 Email); Peter Spir Memorandum, 28 (Paul Halloran’s August 2, 2016 Letter); Scarlett Harris’ Oral Testimony, approx. 1hr.12min.40sec (July 25, 2016); Doug Palmer’s Oral Testimony, approx. 1hr.36min.30sec (April 20, 2016); Roger Cherry’s Oral Testimony, approx. 1hr.41min.25sec (April 20, 2016); Robert Stowell’s Oral Testimony, approx. 1hr.55min.30sec (April 20, 2016); Staff Report for the Planning Commission, 626 (April 20, 2016) (David Goldenberg’s April 6 email).

In addition, despite the fact that the intersection is identified in the adopted Transportation System Plan as a programmed project, the Council finds that the timing of that programmed project is problematic because there is no evidence that the programmed improvements and proposed mitigation will be constructed prior to occupancy to ensure that the Arbor Drive intersection is safe. In fact, there is much uncertainty regarding these improvements because that intersection is under the control of the Oregon Department of Transportation, and the City does not have control over the scope of the improvements or the timing of the work. The applicant argues that because the Arbor Drive intersection is a programmed intersection, it need not be improved for this development to be approved. The Council disagrees and finds that approving this application would increase the safety risks to an untenable degree for the citizens that already use these roads for an undetermined amount of time.

Further, the Council finds that there is not substantial evidence in the record to demonstrate that the left turn lane off of Willamette Falls will be sufficient to appropriately mitigate and prevent further degradation of the Arbor Drive intersection. The applicant has not shown that it is more likely than not that the proposed improvements at the Arbor Drive intersection will result in an adequate public facility that will be safe for West Linn citizens.

Third, the Council finds that the infrastructure between the development and the arterial connections is substandard; therefore, the proposed mitigation efforts will not provide safe and adequate public facilities. For example, Upper Midhill Drive is dangerous because it is very narrow, at some locations measuring only 16 feet wide, and it lacks pedestrian facilities. Staff Report for the Planning Commission, 633 (April 20, 2016) (James and Anne Moore's April 6 email); Staff Report for the Planning Commission, 634 (April 20, 2016) (Dorianne Palmer's April 6 email). Staff Report for the Planning Commission, 645 (April 20, 2016) (Michael and Veronica Finigan's April 5 email); Staff Report for the Planning Commission, 648 (April 20, 2016) (Stephen Morrison's April 5 email); Scarlett Harris' Oral Testimony, approx. 1hr.12min.40sec (July 25, 2016); PS Sundar's Oral Testimony, approx. 1hr.41min. (July 25, 2016); Chris Harris' Oral Testimony, approx. 1hr.54min. (July 25, 2016); Peter Lang's Oral Testimony, approx. 1hr.26min.45sec (April 20, 2016) (showing pictures of school bus on Upper Midhill road). The narrow roads and the visibility issues due to the vegetation, parked cars, and other obstacles make Upper Midhill Drive very dangerous for children and motorists. Lori Watts' Oral Testimony, approx. 1hr.36min.30sec (April 20, 2016); Peter Spir Memorandum, 14 (August 12, 2016) (Scarlett Harris' August 10 email). The applicant included sidewalks in some locations, and offered to provide sidewalks in other locations to provide more safe pedestrian paths; however, the applicant also acknowledged that some sidewalks it would be willing to construct may not be viable because right of way acquisition may be required. Widening of the Upper Midhill Drive and the installation of sidewalks would be necessary to make this area safe for pedestrians, bicyclists, and motorists alike. Steve McClellan's March 31 email.

In conclusion, for all of the reasons put forth above, and the substantial evidence in the entire record, the Council finds that this application must be denied because the applicant has not demonstrated that there are adequate transportation facilities.

#### **IV. Order**

The Council upholds the appeal on the double frontage issue, but otherwise denies the appeal (AP-16-02) and affirms the Planning Commission's decision to deny SUB-15-03 and WAP-16-03 based on the entire record, Findings of Fact, and Findings above. Therefore, the application is denied. In addition, the Council finds that the procedural errors alleged in the appeal were remedied by the appeal hearing and this Final Decision and Order.

  
RUSSELL AXELROD, MAYOR  
WEST LINN CITY COUNCIL

9/12/16  
DATE

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

Mailed this 13<sup>TH</sup> day of SEPTEMBER, 2016.

Therefore, this decision becomes effective at 5 p.m., OCTOBER 4, 2016.

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1  
2 **CERTIFICATE OF FILING AND SERVICE**

3 I hereby certify that on October 3, 2016, I filed the original and two (2)  
4 copies of this **NOTICE OF INTENT TO APPEAL** with the Land Use Board of  
5 Appeals via United States Postal Service, certified mail, return receipt  
6 requested, at the following address: Land Use Board of Appeals, Department  
7 of State Lands Building, 775 Summer Street NE, Suite 330, Salem, Oregon  
8 97301-1283.  
9

10 I further certify that on October 3, 2016, I served a true and correct copy  
11 of this **NOTICE OF INTENT TO APPEAL** on all persons listed or referenced in  
12 paragraphs III and V of this Notice pursuant to OAR 661-010-0015(2) by United  
13 States Postal Service, first-class mail, at the addresses listed or referenced in  
14 paragraphs III and V of this Notice.  
15  
16

17 DATED: October 3, 2016

18 **PERKINS COIE LLP**

19  
20 By 

Michael C. Robinson, OSB 910909  
Seth J. King, OSB 071384

21  
22 *Attorneys for Petitioners*  
23 *Upper Midhill Estates, LLC and Ryan Zygar*  
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