City of West Linn

Memorandum

Date: May 3, 2017

To: West Linn Planning Commission

From: Jennifer Arnold, Associate Planner

Subject: Public Testimony for West Linn Planning Commission Public Hearing-Continued DR-17-01

On April 19, 2017 the Planning Commission held a public hearing for DR-17-01, 2 story commercial building at 0 Willamette Falls Drive (adjacent to 1754). Before closing the record, a continuance was requested and granted as follows:

From April 19, 2017 to April 26, 2017 at 5pm (first 7 day period) the record was held open for new testimony and evidence. This recognized rights for opponents to respond and the applicant to rebut.

From April 27, 2017 to May 3, 2017 (second 7 day period) is open for the public to rebut testimony submitted during the first 7 day period. No new evidence will be accepted during this time.

May 4, 2017 to May 10, 2017 is open for the applicant's final rebuttal of testimony submitted. No new evidence will be accepted during this time.

Attached you will find the public testimony submitted during the second 7 day period (April 27, 2017 to May 3, 2017).

May 1, 2017

Planning Commission
City of West Linn
22500 Salamo Road
West Linn, OR 97068

Re: DR-17-01

My Response To: April 26th Letter from Trent & Jenny Doman to Planning

I want to emphasize I am not against development of the property in question. I want the Domans to be able to move their office to West Linn where they live and are active in the community. I would welcome them as business neighbors and colleagues. I was in a similar situation to them 8 years ago when I moved my practice to Willamette. Not a day passes that I don't take pride in ownership of my office and its surroundings. It had been a dream of mine for many years – so I understand their feelings and why this is important to them. I also want to protect what is already here and believe this is not an "all or nothing" proposition.

As I've communicated previously, my opposition to this project is based on the overwhelming size and scale of the proposed structure relative to the surrounding buildings, impact to parking and the fate of the trees. I am holding out hope for a smaller structure (that isn't necessarily identical to the surrounding bungalows – but would still be of the 1880-1915 period). This would be a compromise that would address size/scale, parking and the trees (it is likely that at least 2 of the 3 could be saved). It's what the Domans wanted in the first place and I believe the smaller size would more than adequately accommodate their size operation (3 people according to their letter) and would be allowed under applicable code provisions.

A few specific comments to their letter:
Paragraph #7: I was unaware that the City of West Linn was offering Tree Conservation Easements. If I received a notice about this, I don't recall it. I am not sure that changes any of the facts we are now faced with.

Paragraph #8: If I said that I had met the Domans 3 years ago at the April 12th Willamette Neighborhood Association meeting, I was incorrect. It was on May 25, 2016, the timeframe indicated by Trent. This interaction was when I first learned of their desire for a smaller scale design.

My Response To: April 26th Letter from Michael Robinson (Perkins Coie) to Planning

Their point #1, page 1 (Planning should presumptively defer to the HRB's approval of the application):
I think it's important to note that the notice sent out to the public in advance of the March 21st HRB meeting stated that HRB would be considering only Chapters 19, 58 and 99 and that "a recommendation of approval or disapproval of the request by the HRB will be based solely upon these criteria. At the hearing, it is important that comments relate specifically to the applicable criteria listed." In other words, they wouldn't be looking at or considering anything related to Chapter 55. Because HRB wasn't looking at the full scope of the impact, I don't know how the Planning Department can be expected to simply "rubber stamp" HRB's recommendation.

Their point #4, pages 4-5 (tree location):
Fir tree: According to Harold Salo of Andy Paris & Associates, .9 feet (approximately 11 inches) of the fir tree extends onto my property as measured at the basal flare of the tree trunk (not +/- 6 inches).

Middle cedar tree: According to Salo, .3 feet (approximately 3-4 inches) of this tree extends onto my property at the basal flare of the tree trunk (not +/- 2 inches at the 'root' as noted in Robinson's letter).

Back cedar tree: Measured at the basal flare, this tree is not on my property. However, approximately 10 feet up and beyond, the trunk appears to straddle the property line.

Their point #5, page 5-6 (development of an alternate structure):
They point out an alternate design could not "match" the non-conforming adjacent buildings and that "the Planning Commission should deny contentions that Applicant should develop the Property with a one-story bungalow to conform to the adjacent properties." I would argue an alternate design would not need to exactly match and need not be limited to 1 story as long as it was from the 1880-1915 period and had a size and scale that was more congruent to surrounding buildings.

I am hoping the current design will be denied by Planning and that there will be an opportunity to compromise on a more suitable design.

Thank you for your consideration,

Steve Sutherland
Adjacent Property Owner (1742 Willamette Falls Drive)

Hathaway Koback Connors LLP

520 SW Yamhill St.
Suite 235
Portland, OR 97204

E. Michael Connors
503-205-8400 main
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mikeconnors@hkcllp.com

May 3, 2017

VIA EMAIL

Planning Commission
c/o Jennifer Arnold, Planner
City of West Linn
22500 Salamo Road
West Linn, OR 97068

Re: File No. DR-17-01
Class II Design Review – New Two-Story Office Building
My Client: Sutherland Properties, LLC
Rebuttal Submission

Dear Commissioners:

As you know, this firm represents Sutherland Properties, LLC and Steve Sutherland ("Sutherland"), who own and operates a business on the property located at 1742 Willamette Falls Drive, West Linn, OR, adjacent to the property for the above-referenced Class II Design Review Application to approve an approximate 6,000 square foot, two-story office building (the "Application"). Pursuant to the post-hearing procedures established at the April 19, 2017 hearing, we are submitting these additional written comments and attached documents as rebuttal to the applicant's supplemental submission, in particular the letter from the applicant's attorney, Michael C. Robinson, Perkins Coie, dated April 26, 2017. The headings in this rebuttal correspond to the headings in Mr. Robinson's letter.

1. **The Planning Commission cannot defer to the Historic Review Board ("HRB") recommendation because the HRB could not and did not consider the CDC Chapter 55 Design Review compliance issues raised in this proceeding.**

The applicant urges the Planning Commission to ignore the CDC Chapter 55 design review issues Mr. Sutherland and other parties are raising and defer to the HRB recommendation, but it conveniently omits a glaring flaw with this approach. The HRB could not, and did not, consider compliance with CDC Chapter 55 because it was beyond HRB's scope of review. Since the compatibility and tree removal issues raised in this proceeding are based on the CDC Chapter 55 design review approval standards, the HRB was not aware of and did not address these issues. Therefore, there is nothing to defer to because the HRB never considered these issues as part of its review.

The HRB's review of the Application was limited to determining compliance with CDC Chapter 58 and did not consider CDC Chapter 55. CDC 99.060(D), which addresses the review authority of the HRB, provides that "[t]he Historic Review Board shall review an application for compliance with Chapters 25 and 58 CDC, as applicable." (Emphasis added). That is why the City's public notice for the HRB hearing specifically noted that the HRB's review and recommendation is limited to compliance with CDC Chapter 58 and instructed the public to restrict their testimony to these code criteria:

> "Criteria applicable to the request are found in CDC Chapters 19, 58, and 99. A recommendation of approval or disapproval of the request by the HRB will be based solely upon these criteria. At the hearing, it is important that comments relate specifically to the applicable criteria listed." [1] *See* HRB Public Hearing Notice, attached as Exhibit A.

The HRB and the City staff also emphasized at the HRB hearing that public testimony must be limited to these approval criteria. Since the HRB does not have the authority to determine compliance with CDC Chapter 55 and the City instructed the public to limit their testimony to the CDC Chapter 58 criteria, the HRB was not aware of nor did it address the CDC Chapter 55 issues being raised in this proceeding.

The Planning Commission is the decision-making body with the sole responsibility and authority to determine compliance with the design review criteria set forth in CDC Chapter 55. CDC 99.060(B)(2)(h). The most significant issues raised by Sutherland, lack of compatibility with the size, scale and design of the adjacent buildings and the removal of the significant trees, are based predominately on the design review criteria in CDC 55.100(B). Therefore, the Planning Commission is the only decision-making body thus far in this Application process that can actually review these issues.

2. CDC Chapter 58 does not supersede or conflict with the design review standards in Chapter 55.

The applicant's assertion that the City can ignore the CDC Chapter 55 requirements because CDC Chapter 58 purportedly controls over or supersedes Chapter 55 is based on two false premises. First, the applicant erroneously assumes that CDC Chapter 58 and Chapter 55 conflict with one another without explaining why that is the case. Second, the applicant's claim that the City can ignore CDC Chapter 55 notwithstanding the fact that the proposed development is subject to design review is inconsistent with the City code and Oregon law.

As we explained in our April 26, 2017 letter, CDC Chapter 55 is not inconsistent with CDC Chapter 58. The applicant's suggestion that CDC 58.090(C)(1) requires 100 percent lot coverage and zero-foot setbacks is wrong and inconsistent with the plain language of this code provision. CDC 58.090(C)(1)(d) does not require a minimum or specific size building, it merely provides that "up to 100 percent of lot may be developed depending upon ability to mitigate impacts upon abutting residential and other uses." (Emphasis added). The highlighted language

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[1] CDC Chapter 19 is the General Commercial zone chapter and CDC chapter 99 addresses the quasi-judicial decision-making process.

demonstrates that the 100 percent lot coverage is the maximum, not the minimum coverage, the "may" language demonstrates that it is permissive and not mandatory, and the size of the building is specifically limited to a size that can effectively mitigate impacts on the adjacent properties. Similarly, the side and rear setbacks are not required to be zero feet and are expressly contingent upon mitigating impacts to the adjacent properties. CDC 58.090(C)(1)(a)-(c). Therefore, requiring the applicant to comply with CDC 55.100(B) and develop the property with a building that is more compatible with the size of the adjacent buildings and at least attempt to save some of the significant trees located on the properties does not violate CDC 58.090(C)(1).

Even if there were conflicts between the CDC Chapter 55 and 58 code provisions, the City cannot simply ignore or override CDC Chapter 55 even if it concludes that CDC Chapter 58 is more specific. The State statute and case cited by the applicant's attorney to support its claim do not even apply to this situation - they apply to the interpretation of State statutes, not the application of conflicting local code provisions. When a local government is faced with interpreting potentially conflicting provisions of its zoning regulations, the local government must interpret the two provisions to harmonize and give effect to each of the code provisions. *Waker Assoc., Inc. v. Clackamas County*, 111 Or App 189, 826 P2d 20 (1992) (court upheld remand to require the county to reinterpret or reapply the potentially conflicting planning goals in a way that demonstrates that due consideration has been given to all of them); *Concerned Homeowners Against the Fairways v. City of Creswell*, 52 Or LUBA 620 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (LUBA rejected local government interpretation that did not attempt to harmonize and give effect to all of the applicable code provisions); *Fechtig v. City of Albany*, 31 Or LUBA 410, 413–414 (1996), *aff'd*, 150 Or App 10 (1997) (affirming a local government's interpretation when the local government harmonized seemingly conflicting provisions by giving meaning to all parts of the ordinance); *Foster v. City of Astoria*, 16 Or LUBA 879, 882–883 (1988) (local government was required to harmonize and apply two variance standards, instead of applying just one of them). CDC Chapter 55 and Chapter 58 must be read together and can be harmonized as we explained.

If the City Council intended CDC Chapter 58 to supersede or override Chapter 55, it would have expressly provided so in the CDC. The City Council could have exempted proposed development in the Willamette Falls Drive Commercial District from design review under CDC Chapter 55 altogether. The City Council could have expressly stated in CDC Chapter 58 that these requirements supersede conflicting standards in other sections of the CDC, just as the City Council did for the Historic District Overlay standards in CDC Chapter 25.[2] The fact that the City Council included this language in Chapter 25, but not Chapter 58, is strong evidence that the City Council did not intend Chapter 58 to override or supersede other applicable CDC provisions.

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[2] As we explained in our April 26, 2017 letter, CDC 25.020(B) expressly provides that the Historic District Overlay standards in CDC Chapter 25 "shall supersede any conflicting standards or criteria elsewhere in the CDC."

3. **The applicant's variance requests were not justified based on alternative designs that incorporate exceptional 1880-1915 architectural designs.**

The applicant's attorney claims that the variance requests are justified under CDC 58.100(B) based on alternative designs that incorporate exceptional 1880-1915 architectural designs, but that claim is inconsistent with the applicant's own statements in the Application. The applicant is requesting a variance for the metal awnings on the grounds that they are a "more durable roofing material." Application, Chapter 58 criteria, p.7. The applicant is requesting a variance for less than 80% windows on the frontage "due to structural limitations." Application, Chapter 58 criteria, p.4. The applicant is requesting a variance for the entry door recess because it is "consistent with the adjacent neighboring buildings." Application, Chapter 58 Criteria, p.7. None of these justifications for these variances have anything to do with 1880-1915 architectural designs.

Additionally, the applicant's claim that it does not need a variance for the entry door is wrong. The applicant claims it no longer needs a variance to CDC 58.090(C)(13) because the entry doors will be setback 5 feet from the south *property line*. Staff Report, p.26. However, CDC 58.090(C)(13) requires that the "doors shall be recessed three to five feet back from the *building line*." (Emphasis added). Measuring from the building line, as opposed to the property line, the proposed development does not comply with CDC 58.090(C)(13) and requires a variance.

4. **The applicant cannot unilaterally remove the significant trees now that it has been verified by both the applicant and Sutherland's surveyor that a portion of the significant tree trunks are located on the Sutherland property.**

Throughout this process, the applicant's justification for removing the significant trees has repeatedly changed as each justification has been proven wrong. At the October 16, 2016 neighborhood meeting, the applicant stated that it would not commit to preserving any of the three large trees because none of these trees qualified as a significant tree. *See* Willamette Neighborhood Association Meeting Minutes, attached as Exhibit B. When the City arborist determined that these trees were indeed significant trees, the applicant then falsely claimed that "[t]he adjacent property owners on both sides of this property have shared their concerns" about these trees and "[t]hey have expressed their support for the removal of these trees in order to ensure a safe environment..." Revised Application, dated February 15, 2017, p.4. When Mr. Sutherland corrected this misrepresentation and clarified that the opposite was true, the applicant claimed at the April 19 hearing that it surveyed the property and it was absolutely certain that all three trees were entirely on the applicant's property. Now that both the applicant and Sutherland's surveyor confirmed that a significant portion of at least two of these trees is on the Sutherland property,[3] the applicant has changed its position yet again.

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[3] Rather than acknowledge in its latest April 26, 2017 submission that the applicant had the property staked by its surveyor and discovered that the trees are in fact located partially on Mr. Sutherland's property line, the applicant was largely silent on this issue. The applicant submitted the photos of the survey stakes without any explanation or clarification, and it had its attorney raise a new argument that "even if" the trees were located on Mr. Sutherland's property they can still remove the trees without Mr. Sutherland's consent.

The applicant now argues that the Planning Commission should ignore the "majority rule" of courts regarding the ownership of trees and its own City attorney's legal advice that the applicant cannot unilaterally remove trees that straddle the property boundary, and force Mr. Sutherland to resolve this issue privately with the applicant after the Application is approved. The applicant, however, has no intention of resolving this issue if the Application is approved. It has already made it clear that it intends to remove those trees regardless of Mr. Sutherland's wishes, the law regarding ownership of trees or the requirements of CDC 55.100(B)(2). The only way to ensure that this issue is "resolved privately among PNW and Mr. Sutherland" is to deny the Application and force the applicant to negotiate this issue openly and honestly with Mr. Sutherland. As Mr. Sutherland testified, he is not opposed to any development of this property and is willing to be reasonable. But the applicant has to be reasonable as well and it clearly won't be reasonable on this issue unless it is forced to do so.

The applicant raised several flawed arguments to support its new contention that it can remove these significant trees notwithstanding their location on Mr. Sutherland's property. First, the applicant claims that the tree preservation requirements in CDC 55.100(B) do not apply to these trees because the property is not Type I or II lands. This position is inconsistent with the plain language of CDC 55.100(B)(2). CDC 55.100(B)(2) provides that "all trees and clusters of trees ("cluster" is defined as three or more trees with overlapping driplines; however, native oaks need not have an overlapping dripline) that are considered significant by the City Arborist, either individually or in consultation with certified arborists or similarly qualified professionals * * * shall be protected pursuant to the criteria of subsections (B)(2)(a) through (f) of this section." CDC 55.100(B)(2)(b) specifically requires "Non-residential and residential projects on non-Type I and II lands shall set aside up to 20 percent of the protected areas for significant trees and tree clusters, plus any heritage trees." Therefore, the tree preservation requirements in CDC 55.100(B)(2) clearly apply to these three significant trees.

Second, the applicant argues that the tree preservation requirements in CDC 55.100(B)(2) conflict with and are superseded by CDC 58.090(C) because it is more specific than the general requirements in CDC 55.100(B)(2). As previously explained, CDC 58.090(C) does not require the removal of these trees and does not conflict with CDC 55.100(B)(2). Even if there was a conflict, CDC 55.100(B)(2) is clearly the more specific code provision regarding the preservation or removal of significant trees. CDC Chapter 58 does not even address heritage or significant trees. The applicant's suggestion that CDC Chapter 58 allows property owners to cut down heritage and significant trees in the Willamette Falls Commercial District without any limitation, regardless of CDC 55.100(B)(2), is inconsistent with the plain language of the City's code.

Finally, the applicant erroneously claims that even though the trees are partially on Mr. Sutherland's property it can still unilaterally remove them. As the applicant's attorney admits, and the City attorney confirmed at the April 19 hearing, the vast majority of courts have held that a tree whose trunk straddles the property line is owned jointly by both affected property owners. *Young v. Ledford*, 37 So3d 832 (2009); *Alvarez v. Katz*, 124 A3d 839 (2015); *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wash App 81 (2007); *Rhodig v. Keck*, 421 P2d 729 (1966). The applicant does not cite any authority to the contrary. In this case, the property line goes through the trunk of at least two of the trees and therefore these trees are jointly owned with Mr.

Sutherland.[4] *See* Andy Paris & Associates Tree Location Survey, dated April 26, 2017, and Exhibits. The City cannot authorize the applicant to remove trees that are jointly owned by the adjacent property owner.

In fact, the City code specifically requires the written consent of the property owners subject to the proposed development. CDC 99.030(A)(1)(b) provides that an application may only be initiated by: "The owner of the property that is the subject of the application or the owner's duly authorized representative." CDC 55.070(A) provides that "The design review application shall be initiated by the property owner or the owner's agent, or condemnor." Since the applicant's proposal to remove the significant trees involves Mr. Sutherland's property, these CDC provisions require his written consent before an application can even be processed.

5. **CDC 55.100(B)(6) requires that the building be "compatible" in size and design with the adjacent buildings, not an exact match or a one-story bungalow.**

The applicant's claim that it cannot design the proposed building consistent with the requirements set forth in CDC 55.100(B)(6) is a strawman argument based on false premises. First, we have never argued that the proposed building must "match" the adjacent buildings or must be a "one-story bungalow". Mr. Robinson's April 26, 2017 Letter, pp.5-6. CDC 55.100(B)(6) requires that the building be "compatible" in size, scale and design with the adjacent buildings, not an exact match. *See* CDC 55.100(B)(6)(a) & (b). While there is no dispute that the proposed building is not compatible with the adjacent structures based on its size and design, it does not mean that only a one-story bungalow could qualify. There are numerous sizes and designs options between the proposed building and a one-story bungalow that could potentially be compatible, but the applicant appears to be taking an all-or-nothing approach. CDC 55.100(B)(6) requires far more of the applicant than proposing an incompatible building in terms of size and design, and summarily claiming that it is the only option available.

Second, the applicant presumes that the adjacent buildings are non-conforming structures without ever explaining why they claim that to be the case. CDC Chapter 58 does not prohibit bungalows or impose a minimum size requirement. The applicant's mere claim that the structures are non-conforming, without any explanation as to how and why, is not sufficient to establish it as a non-conforming structure.

Third, the applicant's suggestion that CDC 55.100(B)(6) does not require consideration of compatibility with adjacent structures that are non-conforming has no support in the City's code. CDC 55.100(B)(6) and Chapter 55 in general do not provide an exception to the design review

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[4] The applicant's attorney erroneously suggests that only the tree roots are on Mr. Sutherland's property. Mr. Sutherland and his surveyor clearly state that a portion of the basal flare or trunk are located on Mr. Sutherland's property. Additionally, the survey photos make it obvious that the property line goes through the trunk of the trees. Finally, the applicant admits that at least one of the tree trunks is partially on Mr. Sutherland's property: "In the present case, at least two of the tree trunks do not extend onto Mr. Sutherland's property." Mr. Robinson's April 26, 2017 Letter, p.5.

standards if an adjacent structure is non-conforming. Neither do CDC Chapter 58 or 66 include any language supporting this concept.

Finally, the applicant attempts to give the misimpression that the adjacent bungalow structures are outliers that are incompatible with the surrounding structures. As Ken Kaufmann demonstrated in his April 26, 2017 letter and photographs, the vast majority of the structures on the north block of Willamette Falls Drive between 12th and 14th Street are similar in scale and architectural style to the adjacent structures. It would be the proposed building that would stick out like a sore thumb in this area if the City were to approve it, not the two adjacent structures.

6. **The applicant bears the burden of proving compliance with all of the approval criteria and cannot force a specific proposal on the City.**

The applicant is correct that the Application is subject to the approval criteria in effect when the Application was submitted, but it is the applicant who is arguing that it should not be required to comply with all of the approval criteria. CDC Chapter 55, and CDC 55.100(B) specifically, were clearly in effect when the Application was filed. And yet the applicant is taking the position that it is not required to comply with the CDC Chapter 55 approval criteria or even attempt to modify the design to comply with these requirements.

The applicant bears the burden of demonstrating compliance with all of the applicable approval standards and criteria. *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973); *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994). If the proposed development does not comply with certain approval criteria, it cannot simply disregard those criteria and ask the City to supersede or override these requirements based on other code sections that say nothing about superseding the design review criteria. CDC Chapter 58 does not compel the specific development proposed by the applicant and it certainly does not permit the applicant to ignore the design review criteria in CDC Chapter 55. The applicant has not even made an honest effort to address these issues and would not even grant the Planning Commission a brief extension to the 120-day deadline to allow sufficient time for the parties to confirm the location of the property boundary. It appears that the real reason the applicant is claiming that it cannot modify the proposal or save any of the significant trees is that it does not want to slow down the process or make any changes at this point in the process.

While Mr. Sutherland is sympathetic to the applicant's situation, it is the applicant's own creation. As Commissioner King noted at the April 19 hearing, the applicant should have reached out to Mr. Sutherland early in the process since he will clearly be the most impacted neighbor and shares the trees the applicant wants to cut down. But the applicant choose not to do so. As noted in the record, Mr. Sutherland attended the neighborhood meeting and HRB hearing and raised concerns, but the applicant elected to proceed with the proposal as is. Now that Mr. Sutherland demonstrated that the proposed development does not satisfy the design review criteria and the significant trees are located partially on his property, which he had to do at considerable expense, the applicant cannot argue that it is too late to address Mr. Sutherland's concerns or consider modifications to the proposal that would comply with all of the approval criteria and save at least some of the significant trees.

As Mr. Sutherland has repeatedly stated throughout this process, he is not opposed to development on the adjacent property and is willing to be reasonable and work with the applicant regarding a modified proposal. He continues to stand by those sentiments. But unless and until the applicant obtains Mr. Sutherland's consent to cut those significant trees it shares with the applicant and modifies the proposal to make it more compatible with the adjacent structures, the Planning Commission has no choice but to deny the Application.

Conclusion

As we demonstrated throughout this process, the Application does not comply with the applicable approval criteria in several respects. The proposed building does not comply with CDC 55.100(B)(6) because it is not compatible with the size, scale and design of the adjacent structures. The applicant's proposal to remove all three significant trees does not comply with CDC 55.100(B)(6) and is not allowed since Mr. Sutherland also has an ownership interest in those trees. The applicant failed to justify the variance requests consistent with CDC 58.100. Therefore, the Planning Commission should deny the Application and require the applicant to work with the adjacent property owners and propose a revised design that preserves some or all of the significant trees and satisfies these approval criteria.

Very truly yours,

HATHAWAY KOBACK CONNORS LLP

E. Michael Connors

EMC/pl
Enclosures

cc: Sutherland Properties, LLC

CITY OF WEST LINN
HISTORIC REVIEW BOARD
PUBLIC HEARING NOTICE
FILE NO. DR-17-01

The West Linn Historic Review Board (HRB) is scheduled to hold a public hearing on **Tuesday, March 21, 2017, at 7:00 p.m.** in the Council Chambers at City Hall, 22500 Salamo Road, West Linn, to consider an application for Class II Design Review to construct a new two-story, Commercial building at 0 Willamette Falls Drive (adjacent to 1754 Willamette Falls Drive). The purpose of the public hearing is to make a recommendation to the West Linn Planning Commission on the application's compliance with the Willamette Falls Drive Commercial Design District approval criteria.

Criteria applicable to the request are found in CDC Chapters 19, 58, and 99. A recommendation of approval or disapproval of the request by the HRB will be based solely upon these criteria. At the hearing, it is important that comments relate specifically to the applicable criteria listed.

You have been notified of this proposal because County records indicate that you own property within 500 feet of the affected site on Clackamas County Assessor's Map 31E02BA, Tax Lot 1902, or as otherwise required by Chapter 99 of the CDC.

The complete application in the above noted file is available for inspection at no cost at City Hall or via the web site at http://westlinnoregon.gov/planning/adjacent-1754-willamette-falls-drive-historic-review-and-class-ii-design-review-new-two. Copies can also be obtained for a minimal charge per page. At least 10 days prior to the hearing, a copy of the staff report will be available for inspection. For further information, please contact Associate Planner Jennifer Arnold at jarnold@westlinnoregon.gov or 503-722-5512. Alternately, visit City Hall, 22500 Salamo Road, West Linn, OR 97068.

The hearing will be conducted in accordance with the rules of Section 99.170 of the CDC. Anyone wishing to present written testimony on this proposed action may do so in writing prior to, or at the public hearing. Oral testimony may be presented at the public hearing. At the public hearing, the HRB will receive a staff presentation, and invite both oral and written testimony. The HRB may continue the public hearing to another meeting to obtain additional information, leave the record open for additional evidence, arguments, or testimony, or close the public hearing and take action on the application as provided by state law. **It is important to provide all evidence, both oral and written, to the HRB. Generally, the City Council will not be able to accept additional evidence if there is an appeal of this application.** Failure to raise an issue in person or by letter at some point prior to the close of the hearing, or failure to provide sufficient specificity to afford the decision maker an opportunity to respond to the issue, precludes an appeal to the Land Use Board of Appeals (LUBA) based on that issue.

Exhibit A

Willamette Neighborhood Association draft minutes for 10/12/16

Gail Holmes brought the meeting to order at 7:05.

Corrections to minutes of 9/14//16. $20,000. Was for flower beds, walkways, not holiday lighting. Bob moved that the minutes be adopted with changes/clarifications, Debbie seconded, motion passed unanimously.

Elizabeth informed us that we have $5022 78 in our account.

Main Street asked us for $1,000. For solar lighting on 17 (2 strings per tree) small trees and then using what is left over to help pay for some of the wreaths. They are exactly sure how much the lighting will cost, but they are quoting us $900. The 50 wreaths are being made by one of our businesses at a cost of $24.per wreath. Bob made the motion and Mary seconded. It passed unanimously.

There were no nominations for WNA officers.

For the next 2 presentations Mayor Axelrod left the room, John Carr and Beth Smolens did not:

1). SG Architecture= Pacific Northwest Properties, 14th St. and Willamette Falls Dr. They are looking build a 6,000 sq. ft 2 story office building. It is in the Historic district. The property is 5,000 sq. ft. They will have zero set back in the front, 5' to the east and west, 10 ft. in the rear. There are 3 large trees on property, "none of which are significant". They will not commit to saving any of them. They would like to align with the other bungalows on each side. They would like to put a porch on the front to bring it to the sidewalk. They would like a variance that would exempt them from putting up the canopy. Parking is not required nor provided. They can't go underground. They will generate 8-16 parked cars. Shannon stated that Main Street would fight them on several of their requests since it does not fit into the long range plans of Main Street, which is "a shopping community". Perhaps commercial on the first floor and office on the second (developer won't go for that). They are not trying to attract retail for the bottom floor. Retail is not viable. An accounting firm is to go in on the bottom floor. Traffic engineer said that they would only generate 6 trips per day (why 8-16 parking spaces but only 6 trips?) City not requiring traffic study. They had a Sept. pre-ap. Their next step in the Historic Review Board, chapters 55 and 58, the Planning Commission (month after Historic Review Board), early spring start to build. Jennifer Arnold is the City Planner involved.

2). General Store- Ann Chay. She would like to turn the General Store (historic) into a cider brewery. It would have hard cider, snacks, and a bakery (to go compliment the cider), continue the BBQ theme. The cider would only be sold on site. It is zoned general commercial. They would like to refurbish the coy pond, retarp the green house. They would like to open March 1st. They would be open from noon to 10:00 p .m, or perhaps 4-10:00p.m. She will have some events· open mike night, other breweries/cideries, lecturers, music, etc. The city seems to take issue with the making of cider in a General Commercial Zone. Just down the street McMenamins brews and sells beer. WNA does not see the difference. Shannon made a motion for a letter of support of the cider brewery to be written to the city. John Wyatt seconded. Motion passed unanimously. The city should make amends for Ann keeping the building in original form. Historic treasure. They have an OLCC license for their Woodburn business so she doesn't foresee an issue for the West Linn business. They would then need get their TTB license. After getting TTB it would then take about 3 month OLCC for West Linn. Motion passed unanimously.

Main Street = 1). The theme for Halloween is the Flintstones. Shops will give out candy from 3-6pm.

2). 24" fresh wreaths for each business (50 in all). Each business is to decorate it, it is a contest. The wreaths will be judged Dec. 8th. On Dec 10th the carriage rides start. There will be Pop-Up Xmas shops in Lavender Bleu. It will be a Craft/Art Bazaar. They will open mid- November, there will be 10-11 booths. Each booth space will cost $50. A day. They will be open on weekends from 10-6.

We had 4 candidates introduce themselves to WNA. John Carr, Beth Smolens, Gail Holmes, and Russ Axelrod.

Exhibit B

PERKINSCOIE

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May 3, 2017

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VIA EMAIL

Mr. Gary Walvatne, Chair
West Linn Planning Commission
West Linn City Hall
22500 Salamo Road
West Linn, OR 97068

Re: Class II Design Review Application
City File No. DR-17-01
Applicant's Second Open Record Period Submittal

Dear Chair Walvatne and Members of the Planning Commission:

This office represents PNW Properties, LLC ("PNW"), the developer of the proposed two-story commercial building on Willamette Falls Drive ("Project") identified as City File No. DR-17-01 ("Application"). This letter and its attachments constitute PNW's second open record period submittal, and it is being timely submitted to City staff before May 3, 2017, at 5:00pm. We have asked staff to place a copy of these materials into the record for this matter. Please consider these materials before making a final decision on the Application.

Consistent with the terms of the open record period established by the Planning Commission, PNW's letter is limited to rebutting testimony received during the first open record period.[1] Specifically, PNW responds as follows:

[1] PNW has attached two exhibits, which may constitute new evidence. Notwithstanding the staff memo outlining the terms of the open record periods, PNW believes this new evidence may be submitted at this time because PNW understood the Planning Commission to allow new evidence in the second open record period, provided that it is rebuttal in nature. As explained below, PNW's two exhibits are rebuttal in nature.

1. Response to Ken Kaufmann Letter.

A. Style and Scale of Buildings.

Although Mr. Kaufmann contends that the Project is not of a similar style or scale to surrounding buildings, the Planning Commission should deny this contention for two reasons. First, his contention is misleading. For example, all of the buildings depicted in his Exhibits A-2 to A-7 are nonconforming to the current West Linn Community Development Code ("CDC"). PNW cannot design its Project to conform with buildings that themselves do not conform to the CDC. Further, Mr. Kaufmann's photographs actually support the conclusion that the City has approved new development in the Willamette Falls Drive ("WFD") Commercial Design District that is taller than surrounding development. *See* Kaufmann Exhibit A-8 (depicting new development that is one story taller than adjacent nonconforming development).[2] Mr. Kaufmann's contention is also misleading because it includes a rendering that depicts the Project 35% larger than it would appear in real life. *See* Exhibit 2.

Second, Mr. Kaufmann has not supplied the Planning Commission with a legal basis to deny the Application. That is, he has not identified a standard that the Application violates by not conforming to nearby non-conforming development.

For these reasons, the Planning Commission should deny Mr. Kaufmann's contention on this issue.

B. Access, Parking and Vehicle Impacts.

Although Mr. Kaufmann contends that the Project will have adverse impacts on the WFD Commercial Design District as a whole because the subject property ("Property") lacks off-street parking and rear or side-street vehicle access, the Planning Commission should deny this contention because the only CDC provisions cited by Mr. Kaufmann in support of his contention are not applicable criteria or are not relevant to the Application. First, contrary to Mr. Kaufmann's contention, the purpose statement for the WFD Commercial Design District, set forth in CDC 58.010, does not require that new development provide on-site parking and rear or side-street vehicle access. The Planning Commission should reach this conclusion for two reasons.

[2] Notably, the Project is only proposed to be one-half story taller than the adjacent bungalows.

First, CDC 58.010 is not directly applicable to the Application. Most land use regulation purpose statements are phrased as a general expression of the goals and objectives the local government hopes to achieve by enacting the regulation(s). In these circumstances, the purpose statement does not play a direct role in reviewing permit applications and does not operate as a mandatory approval criterion. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312, 323 (2003).

There are two exceptions to this general rule. First, the text of the purpose statement itself may elevate the purpose statement beyond simply being descriptive or aspirational in nature. *See Freeland v. City of Bend*, 45 Or LUBA 125 (2003) (where purpose statement expressly required that decision-makers "consider" certain impacts, the decision must address issues the parties raise as to those impacts). Second, the approval criteria for the particular application may expressly require compliance with the purpose statement or may incorporate the purpose statement as a mandatory approval criterion. *See Crowley v. City of Bandon*, 43 Or LUBA 79 (2002) (zoning district purpose statement is a separate mandatory approval criterion when the listed approval criteria require that development must promote "the purpose of the zone"). *See also Rowan v. Clackamas County*, 19 Or LUBA 163 (1990) (where zoning code expressly required that conditional uses not conflict with the purpose statement of the applicable zoning district, the county was required to make a finding regarding this issue).

CDC 58.010 establishes the purposes of the WFD Commercial Design District and reads as follows:

> "A. Implement the goals and policies of the economic element of the Comprehensive Plan relating to the rehabilitation and revitalization of the Willamette Commercial District.
>
> "B. Enhance the historic and aesthetic quality of the Commercial District.
>
> "C. Increase the attractiveness of the commercial areas to tourists, customers, tenants, business owners, and City residents.

"D. Reinforce the commitment to existing commercial buildings of the 1880-1915 period and complement the adjacent residential historic district.

"E. Encourage a sense of historic identity for the Willamette area and West Linn as a whole."

Although Mr. Kaufmann contend that CDC 58.010 is a mandatory approval criterion applicable to the Application, Mr. Kaufmann is mistaken. As the quoted text provides, CDC 58.010 is a generally-worded purpose statement that identifies the goals and objectives the City intends for the WFD Commercial Design District to achieve. Unlike the purpose statement in *Freeland*, CDC 58.010 itself does not require that the City take a specific action or even consider the objectives the provision sets forth. Further, unlike the purpose statements at issue in *Crowley* and *Rowan*, no mandatory approval criterion in the CDC requires compliance with CDC 58.010 in order to approve the Application. In fact, Mr. Kaufmann's contention improperly inserts language that is not otherwise present into the CDC in contravention of ORS 174.010.

Second, even if the City applies CDC 58.010 in this case, there is no basis to grant Mr. Kaufmann's contention that approval of the Application is inconsistent with the purpose and intent of the WFD Commercial Design District. The City Council has legislatively determined that new development in this area of the WFD Commercial Design District is not required to provide any on-site parking. CDC 46.140. Additionally, the City Council does not expressly require that new development in this location have rear, side, or any vehicular access. Mr. Kaufmann's proposed interpretation of CDC 58.010 ignores these aspects of the CDC and collaterally attacks the City Council's previous legislative actions.

Therefore, the City Council should deny Mr. Kaufmann's contention .

Second, although Mr. Kaufmann contends that the Project is not consistent with the specific approval criteria in CDC 25.070.B, these criteria are not applicable to the Application. CDC 25.070 is entitled "Additional Standards Applicable to Historic Districts" and, as the title suggests, establishes additional standards that apply to properties within a historic district. CDC 25.070. The Property is not located in a

historic district. *See* City of West Linn Historic Resource Map attached as Exhibit 2. Therefore, the provisions of CDC 25.070 are not applicable to the Application.

Third, although Mr. Kaufmann contends that the Application lacks an adequate analysis of vehicle-related impacts to adjacent properties and the neighborhood, Mr. Kaufmann is mistaken for two reasons. First, in his argument, Mr. Kaufmann erroneously relies upon CDC 55.100.I.1, which requires an applicant to complete off-site improvements to the public street system to ensure that there are adequate public facilities available to serve the Property before occupancy of the Project. Mr. Kaufmann's argument is not concerned about the need for off-site improvements; rather, he is concerned about the potential need for on-site improvements that he believes should be completed on the Property. Therefore, CDC 55.100.I.1 does not support his contention. Second, the record is replete with evidence that there are adequate public street facilities to serve the Project, including the findings of PNW's transportation engineer in the Traffic Impact Analysis and the concurrence of the City's transportation consultant. The Planning Commission should deny Mr. Kaufmann's contention on this issue.

C. Variances.

For three reasons, the Planning Commission should deny Mr. Kaufmann's contention that the Application could qualify for variances pursuant to CDC 58.100 if PNW redesigned the Project in the style of the neighboring bungalows. First, the figure in the CDC that immediately follows the text of CDC 58.100 indicates that variances are more nuanced than Mr. Kaufmann suggests. This figure features a Western false front building with labels directed at specific attributes of the building, the implication being both that a Western false front building meets the relevant historical era and that variances are to be limited to specific building elements, not to an entire building style.

Second, although some bungalows were developed in the region during the relevant era (1880-1915), they were utilized as single-family residences, not as commercial buildings. They would not have been appropriate in a business district such as the WFD Commercial Design District. Additionally, the record reflects that neither of the adjacent bungalows were built between 1880 and 1915.

Third, it is not the neighbors' nor the Planning Commission's role to redesign the Project. Rather, the Planning Commission must simply decide on the Application as presented.

2. Response to Mike Connors Letter.

A. Mr. Connors has not demonstrated that his client has a property right in the two trees that encroach a matter of inches onto his client's property.

Contrary to Mr. Connors' contention, there is substantial agreement among four different surveys as to the location of the trees relative to the property line. The first of these surveys was completed when the original lot (addressed as 1754 Willamette Falls Drive) was subdivided. The City approved this subdivision. PNW commissioned the second and third surveys—one for design and planning approval and the second (submitted during the first open record period) at the request of the Planning Commission. Both of PNW's surveys identify the tree locations and sizes, and the second of these addressed the tree caliper near the ground and identified some minor encroachment onto the Sutherland property by a matter of inches by two of the three trees. These results are substantially consistent with the survey commissioned by Mr. Connors' client.

However, the minor encroachment of two trees (one of which is not even significant, according to the City Surveyor) does not grant Mr. Connors' client authority to veto the Project. For that matter, Mr. Connors has not even established that the intrusion of a portion of a tree on a neighbor's property grants that neighbor any rights in or to the tree under Oregon law. The cases cited in Mr. Connors' initial letter are all from other states, and he does not identify any additional cases on this issue in this letter. Although Mr. Connors favorably cites the example offered by the City Attorney at the public hearing in support of his client's position, that example does not resolve anything for this case. It simply stands for the proposition that if a landowner has a right in a tree, the owner may have a right to damages if its neighbor damages the tree. However, this example does not answer the threshold question whether the landowner has a right in the tree at all or how that determination would even be made. In short, Mr. Connors has not established that his client has a legal right in any trees that may encroach on his client's property.

B. Mr. Connors misconstrues the relationship between CDC Chapters 55 and 58.

For three reasons, the Planning Commission should deny Mr. Connors' contention about the relationship between CDC Chapters 55 and 58.

First, Mr. Connors' contention creates conflict where none may exist at all. At an initial level, the City must attempt to construe CDC Chapters 55 and 58 in a way that gives effect to both chapters. ORS 174.010. The City can do so by determining that compliance with the dimensional standards of CDC Chapter 58 constitutes a legislative determination of compliance with the "compatibility" and "transition" standards of CDC 55.100.B.6 within the geographic area of the WFD Commercial Design District. This is not a determination that CDC Chapter 58 controls over CDC Chapter 55; rather, it is a determination that the provisions can be harmonized and that compliance with one necessarily ensures compliance with the other.

To the extent Mr. Connors gives effect to both provisions, he does so in an erroneous manner by arguing that the only way to ensure compliance with CDC Chapters 55 and 58 is to take into account the bulk and massing of adjacent development which, in this case, is nonconforming, at least as to CDC Chapter 58. Thus, Mr. Connors effectively argues for PNW to violate CDC Chapter 58 under the guise of complying with CDC Chapter 55. The Planning Commission should deny this construction of these provisions.

Second, to the extent there is a conflict between CDC Chapters 55 and 58, Mr. Connors does not refute PNW's contention that, under general principles of statutory construction and ORS 174.010, a specific provision controls over a general provision that regulates the same subject area. In this case, CDC Chapter 58 is the more specific in terms of standards and geographic location and thus would control over the more general provisions of CDC Chapter 55, which apply City-wide.

Third, although Mr. Connors correctly notes that CDC Chapter 25 expressly provides that it supersedes any conflicting standards elsewhere in the CDC while there is no such statement addressing CDC Chapter 58, this point is not dispositive. In fact, the same is true as to CDC Chapter 55: There is no statement in the CDC that CDC Chapter 55 controls over conflicting provisions of CDC Chapter 58. Thus, under Mr. Connors'

theory, because there is no such statement, the Planning Commission cannot conclude that CDC Chapter 55 controls over CDC Chapter 58.

For these reasons, the Planning Commission should deny the contentions in Mr. Connors' letter.

3. Response to Steve Sutherland Letter.

Mr. Sutherland contends that he has an ownership interest in at least two of the trees, and he does not grant permission or support for removal of the trees to allow development consistent with the proposed design of the Project. The Planning Commission should deny this contention for two reasons. First, for the reasons explained above in response to Mr. Connors' letter, Mr. Sutherland has not established that he has an ownership interest in the trees under Oregon law. Instead, this is an open question. Second, and more importantly for the relevant proceeding, the Planning Commission is not required to determine who owns the trees (or if Mr. Sutherland approves of their removal) as a prerequisite to approving the Application because the question of property rights in the trees is outside of the Planning Commission's jurisdiction. It is a private matter that will be resolved outside of this process, and as needed, in a judicial forum.[3]

4. Response to Gail Holmes Letter.

Ms. Holmes erroneously contends that the Application is subject to compliance with Statewide Planning Goal ("Goal") 5. Neither Goal 5 nor any of the other Goals directly apply to the Application because the City's comprehensive plan and CDC are acknowledged to comply with the Goals, and thus, the plan and CDC apply directly. ORS 197.175(2)(d). Therefore, the Planning Commission should deny Ms. Holmes' contention.

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[3] Even if the Planning Commission had jurisdiction over this question, it would be limited to a single tree because the tree closest to the street is not significant or heritage according to the City Arborist and thus is not subject to any City regulation, and the third tree (farthest from the street) is entirely located on the Property and thus not subject to a claim of ownership by Mr. Sutherland. That leaves only the middle tree where the City has regulatory authority and there is any dispute about rights in the tree.

5. Additional Responses.

Contrary to opponents' contentions, the Project is not required to provide any off-street parking spaces because it is located between 10th and 16th Streets in the WFD Commercial Design District. As a result, the Property is exempt from off-street parking requirements. CDC 46.140. More importantly, the Planning Commission should note the reason why off-street parking standards do not apply in this location is "[t]o facilitate the design requirements of Chapter 58 CDC." *Id.* As a result, there is no basis to deny the Project on the basis that it does not provide off-street parking .

6. Conclusion.

For these reasons, and the additional reasons set forth in the record, the Planning Commission should find that the Application satisfies all relevant and applicable approval standards. Accordingly, the Planning Commission should approve the Application.

Thank you for your consideration of this testimony. PNW reserves the right to submit additional argument and evidence in this proceeding in accordance with ORS 197.763 and the open record periods established by the Planning Commission.

Very truly yours,

Michael C. Robinson

MCR:rsr

Enclosures

cc: Mr. John Boyd (via email) (w/encls.)
Ms. Jennifer Arnold (via email) (w/encls.)
Mr. Dan Olsen (via email) (w/encls.)
Ms. Megan Thornton (via email) (w/encls.)
Mr. Scot Sutton (via email) (w/encls.)
Mr. Kevin Godwin (via email) (w/encls.)
Mr. Trent Doman (via email) (w/encls.)
Ms. Jenny Doman (via email) (w/encls.)
Mr. Seth King (via email) (w/encls.)

Exhibit A-9

Proposed new commercial office space to be located. next.to.1754 Willamette Falls Drive (DR 17-01, City of West Linn)

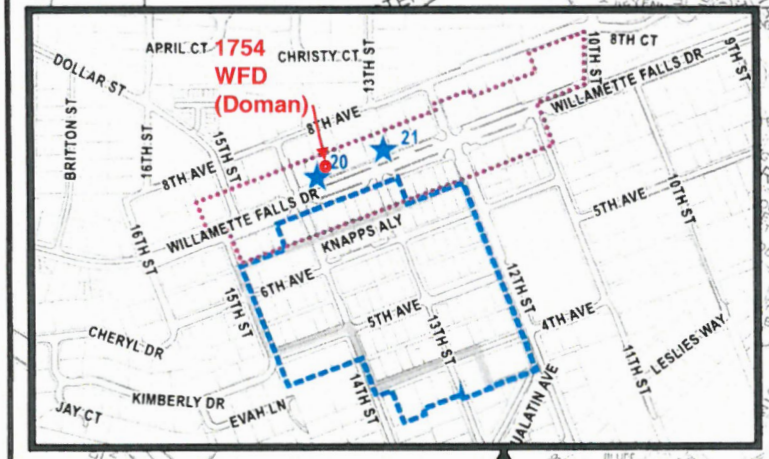
Submitted to Jennifer Arnold, Associate Planner (jarnold@westlinnoregon.gov).

EXHIBIT 1

CITY OF WEST LINN

Historic Resource Map

UPDATED JULY 2015



Overlay Zones

- Willamette Historic District
- Willamette Falls Drive Commercial Design District

Other

- Willamette Historic District National Register
- Taxlots & Streets
- Outside West Linn City Limits

Historic Landmarks:

1. 4600 Alder Street
2. 1448 Buck Street
3. 1562 Buck Street
4. 1646 Buck Street
5. 1690 Buck Street
6. 1715 Buck Street
7. 5495 Grove Street
8. 5350 River Street
9. 5575 River Street
10. 4708 Riverview Avenue
11. 4742 Riverview Avenue
12. 5797 Robert Moore Street
13. 20375 Willamette Drive
14. 20685 Willamette Drive
15. 20725 Willamette Drive
16. 22825 Willamette Drive
17. 22820 Willamette Drive*
18. 22840 Willamette Drive
19. 21420 Willamette Drive
20. 1742 Willamette Falls Drive
21. 1832 Willamette Falls Drive
22. 4835 Willamette Falls Drive
23. 4845 Willamette Falls Drive
24. 4865 Willamette Falls Drive
25. 4891 Willamette Falls Drive

*Ordinance 1614 cited address 22830 Willamette Falls Drive. Corrected address is provided for clarity.

WEST LINN GIS / HISTORIC / WILLAMETTEHISTORICDISTRICT_HISTORICRESOURCEMAP_201507.MXD | KAHA | 7-23-2015

EXHIBIT 2