

## DEVELOPMENT REVIEW APPLICATION

**For Office Use Only**

STAFF CONTACT <i>Jennifer Arnold</i>	PROJECT NO(S). <i>AP-18-01</i>	
NON-REFUNDABLE FEE(S) <i>\$400.00</i>	REFUNDABLE DEPOSIT(S)	TOTAL <i>\$400.00</i>

**Type of Review (Please check all that apply):**

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Annexation (ANX)<br><input checked="" type="checkbox"/> Appeal and Review (AP) *<br><input type="checkbox"/> Conditional Use (CUP)<br><input type="checkbox"/> Design Review (DR)<br><input type="checkbox"/> Easement Vacation<br><input type="checkbox"/> Extraterritorial Ext. of Utilities<br><input type="checkbox"/> Final Plat or Plan (FP)<br><input type="checkbox"/> Flood Management Area<br><input type="checkbox"/> Hillside Protection & Erosion Control | <input type="checkbox"/> Historic Review<br><input type="checkbox"/> Legislative Plan or Change<br><input type="checkbox"/> Lot Line Adjustment (LLA) */**<br><input type="checkbox"/> Minor Partition (MIP) (Preliminary Plat or Plan)<br><input type="checkbox"/> Non-Conforming Lots, Uses & Structures<br><input type="checkbox"/> Planned Unit Development (PUD)<br><input type="checkbox"/> Pre-Application Conference (PA) */**<br><input type="checkbox"/> Street Vacation | <input type="checkbox"/> Subdivision (SUB)<br><input type="checkbox"/> Temporary Uses *<br><input type="checkbox"/> Time Extension *<br><input type="checkbox"/> Variance (VAR)<br><input type="checkbox"/> Water Resource Area Protection/Single Lot (WAP)<br><input type="checkbox"/> Water Resource Area Protection/Wetland (WAP)<br><input type="checkbox"/> Willamette & Tualatin River Greenway (WRG)<br><input type="checkbox"/> Zone Change |
|---|--|---|

Home Occupation, Pre-Application, Sidewalk Use, Sign Review Permit, and Temporary Sign Permit applications require different or additional application forms, available on the City website or at City Hall.

<b>Site Location/Address:</b> <b>4096 Cornwall Street, West Linn OR 97068</b> <b>SUB-17-04</b>	Assessor's Map No.: <b>21E36BA</b> Tax Lot(s): <b>6300</b> Total Land Area: <b>2.18 acres</b>
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**Brief Description of Proposal:** **APPLICANT APPEALING PLANNING COMMISSIONS 1-22-18 DENIAL OF ELD 6-LOT SUBDIVISION SUB-17-04**

<b>Applicant Name:</b> <b>ICON CONSTRUCTION AND DEVELOPMENT, LLC</b> <small>(please print)</small> <b>Address:</b> <b>1980 WILLAMETTE FALLS DR. #200</b> <b>City State Zip:</b> <b>WEST LINN, OR 97068</b>	Phone: <b>503-657-0406</b> Email: <b>darren@iconconstruction.net</b>
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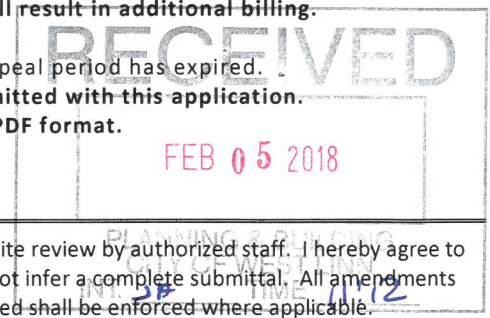
<b>Owner Name (required):</b> <b>ICON CONSTRUCTION AND DEVELOPMENT, LLC</b> <small>(please print)</small> <b>Address:</b> <b>1980 WILLAMETTE FALLS DR. #200</b> <b>City State Zip:</b> <b>WEST LINN, OR 97068</b>	Phone: <b>503-657-0406</b> Email: <b>darren@iconconstruction.net</b>
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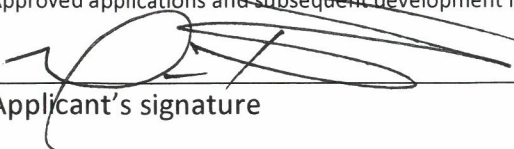
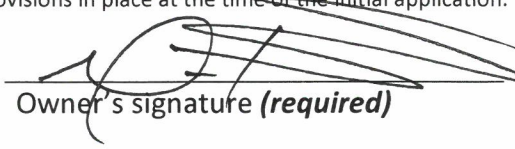
<b>Consultant Name:</b> <b>MICHAEL ROBINSON</b> <small>(please print)</small> <b>Address:</b> <b>1211 SW 5<sup>th</sup> Ave #1900</b> <b>City State Zip:</b> <b>Portland, OR 97204</b>	Phone: <b>503-796-3756</b> Email: <b>mrobinson@schwabe.com</b>
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1. All application fees are non-refundable (excluding deposit). **Any overruns to deposit will result in additional billing.**
2. The owner/applicant or their representative should be present at all public hearings.
3. A denial or approval may be reversed on appeal. No permit will be in effect until the appeal period has expired.
4. **Three (3) complete hard-copy sets (single sided) of application materials must be submitted with this application.**  
**One (1) complete set of digital application materials must also be submitted on CD in PDF format.**  
**If large sets of plans are required in application please submit only two sets.**

\* No CD required / \*\* Only one hard-copy set needed

The undersigned property owner(s) hereby authorizes the filing of this application, and authorizes on site review by authorized staff. I hereby agree to comply with all code requirements applicable to my application. Acceptance of this application does not infer a complete submittal. All amendments to the Community Development Code and to other regulations adopted after the application is approved shall be enforced where applicable. Approved applications and subsequent development is not vested under the provisions in place at the time of the initial application.



 Applicant's signature	<b>1-23-18</b> Date	 Owner's signature (required)	<b>1-23-18</b> Date
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February 5, 2018

**Michael C. Robinson**  
Admitted in Oregon  
T: 503-796-3756  
C: 503-407-2578  
mrobinson@schwabe.com

**VIA PERSONAL DELIVERY**

Ms. Jennifer Arnold  
Associate Planner  
City of West Linn Planning Department  
22500 Salamo Rd.  
West Linn, Oregon 97068

RE: Appeal of City of West Linn File No. SUB-17-04; Planning Commission Final Decision Denying an Expedited Land Division Application for A Six-Lot Subdivision Located at 4096 Cornwall Street

Dear Ms. Arnold:

This office represents Icon Construction and Development, LLC (the "Applicant"). This letter constitutes the Applicant's timely appeal of the West Linn Planning Commission's (the "Planning Commission") final decision and order mailed on January 22, 2018 pursuant to ORS 197.375(1). The remainder of this letter addresses the requirements of ORS 197.375(1) and explains why the Planning Commission's decision should be reversed and the Referee appointed to review the appeal should approve the Application pursuant to ORS 197.375(4)(b).

**1. Status of Application.**

The Applicant submitted the Application on November 8, 2017. The City deemed the Application complete on November 27, 2017. The City gave notice of an opportunity to comment on the Application on November 28, 2017, pursuant to ORS 197.365(3). The comment period closed on December 13, 2017.

The Planning Commission considered the Application without a public hearing on December 20, 2017 and January 10 and January 17, 2018. The City mailed notice of the Final Decision on January 22, 2018. The Appeal period ends on February 5, 2018. ORS 197.365(1)(a).

**2. Requirements of ORS 197.375(1).**

This section establishes the requirements for the filing of an appeal of an Expedited Land Division by a local government.

a. This appeal is timely filed with the City of West Linn (the "City") within fourteen days of the date of mailing of the notice of decision. The City mailed the notice of decision on January 22, 2018. This appeal is filed prior to February 5, 2018, before 5:00 p.m. ORS 197.365(1)(a).

- b. The appeal is accompanied by a \$300 deposit for costs. ORS 197.365(1)(a)
- c. The appeal is filed by the Applicant. ORS 197.365(1)(b)(A).
- d. The appeal is solely based on ORS 197.365(1)(c).

**3. Basis for Appeal Under ORS 197.375(1)(c).**

ORS 197.375(1)(c) provides four reasons for an appeal of an Expedited Land Division decision. This section explains why the Planning Commission's decision on the Application pursuant to ORS 197.375(1)(c)(A)-(D) must be reversed and the Application approved.

**a. Page 1 of Final Decision: The City Deemed the Application Complete Pursuant to ORS 197.365(1)(b).**

The Planning Commission found that "the findings should reflect the information in the record was not technically sufficient to reach the Applicant's burden of proof to demonstrate compliance with ORS 197.360(1)(a)(B), ORS 197.360(1)(a)(E), ORS 197.360(4) and CDC 85.200 regarding the adequacy of transportation of stormwater facilities."

**Response:** The Referee must reject this finding because the decision reflects that the Planning Department found the Application complete on November 27, 2017, pursuant to ORS 197.365(1)(b). Therefore, the Planning Commission's finding is erroneous and contrary to the requirements of ORS 197.365(1)(b).

Further, the Referee must reverse the Planning Commission's decision on this point because, as explained below, the requirements of ORS 197.360(1)(a)(B), 197.360(1)(a)(E), 197.360(4) and West Linn Community Development Code ("CDC") 85.200 are satisfied by substantial evidence in the whole record demonstrating that the Application met the substantive provisions of the applicable land use regulations as required by ORS 197.375(1)(c)(A) and 197.375(4)(a) ("The Referee shall apply the substantive requirements of the local government's land use regulations in ORS 197.360.")

As explained below, the Application demonstrated why it satisfied minimum street or other right-of-way connectivity standards established by acknowledged land use regulations pursuant to ORS 197.360(1)(a)(D). The Application demonstrated by substantial evidence why the land division would result in creation of enough lots to allow building residential units at 80% or more of the maximum net density established by the zoning district, pursuant to ORS 197.360(1)(a)(E)(i). The Staff Report at page 25 also explains why this standard is met. The Application also demonstrated how the land division complies with each of the provisions of ORS 197.360(1).

Finally, this Appeal explains why the Application satisfied the relevant standards in CDC 85.200.

**b. Page 2 of Final Decision, “1. Density Calculation”: The Application Satisfies ORS 197.360(1)(a)(E).**

The Planning Commission found that the Application did not satisfy ORS 197.360(1)(a)(E) because it failed to, as required by ORS 197.360(4), demonstrate how it would create enough lots to allow building residential units at 80% or more of the maximum net density permitted by the zoning district.

**Response:** The Planning Commission erred by finding that the Application failed to satisfy ORS 197.360(3).

The property is located in the R-10, “Single-Family Residential Detached”, zoning district. This district requires a minimum lot size of 10,000 square feet per lot. The Application at page 4 contains a chart entitled “Density Calculation” which described the total allowed density. The chart shows that six dwelling units, or lots, are allowed on the 2.17-acre subdivision site. The chart adequately explains, as required by ORS 197.360(1)(a)(E)(i), how the Application creates enough lots to allow building residential units at 80% or more of the maximum net density permitted by the R-10 zoning district. The Staff Report at page 25 also explains how the minimum density requirement is met.

The appeal below describes how ORS 197.360(3)(c) is satisfied. The Application at page 2 explained that it proposed to create residential lots consistent with the requirements of the R-10 zoning district and that the proposed six lots would be consistent with the R-10 zoning district’s maximum density, thus exceeding the 80% requirement.

The Planning Commission Staff Report at page 6 found that “the only use proposed on site is single-family detached residential units. All other standards above are also met or exceeded by each lot.” Thus, substantial evidence before the Planning Commission, including the Staff Report, found that the requirements of R-10 zoning district were satisfied. The Referee can find that ORS 197.360(3)(a) and (b) are satisfied by substantial evidence in the whole record.

The Referee must reject the Planning Commission’s conclusions that the Application failed to adequately explain how the density was calculated for the subdivision area. The Planning Commission erred by concluding that the chart at page 4 of the Application did not “adequately explain” how six homes meets the 80% density requirement.

For these reasons, the Referee must find that the Planning Commission erred in concluding that ORS 197.360(4), 197.360(1)(a)(E) and 197.360(3) were not satisfied.

**c. Page 2 of Final Decision, A “Particular Concern” About the Portion of the Subdivision.**

The Planning Commission noted, without making a finding, that it had a “particular concern” about the portion of the site not dedicated to the creation of lots or parcels. The Planning

Commission failed to relate this concern to a relevant approval criterion in the acknowledged land use regulations and it is, therefore, not a basis for a denial of the Expedited Land Division.

For this reason, the Referee must reject this finding.

**d. Page 3 of Final Decision, "Transportation System Adequacy".**

The Planning Commission found that the Application failed to comply with CDC 85.200, which requires that "adequate public facilities will be available". The Planning Commission decision lacks specificity in explaining exactly how the Application failed to satisfy CDC 85.200 and failed to explain how the Application did not meet the burden of demonstrating compliance with the standard. The Planning Commission found that this was not the case because of "errors" but failed to explain the "errors" with adequate specificity to inform the Applicant. The Planning Commission Final Decision does not cite to an applicable land use regulation or Statewide Planning Goal requiring minimum street or other right-of-way connectivity. ORS 197.360(1)(a)(D).

**Response:** The Referee must find that the Application at page 4 explains the proposed subdivision layout. The land division proposed to connect the site to existing Landis Street but not connect Landis Street to Cornwall Street. The Application at page 4 explained that the future street connection was consistent with the acknowledged West Linn Transportation System Plan ("TSP") and satisfied applicable West Linn local street standards.

The Planning Commission's findings are inadequate and ignore substantial evidence in the whole record. First, the Planning Commission decision fails to address CDC 85.200, "Approval Criteria", in full. The relevant passage provides in whole: "No tentative subdivision or partition plan shall be approved unless adequate public facilities will be available to provide services 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 conditional approval." The relevant standard applies to the "subdivision area". To the extent the Planning Commission addresses cut-through traffic, that issue is beyond the "subdivision area" and is irrelevant to the approval standard.

Second, the Planning Commission decision ignores substantial evidence in the whole record regarding this issue. If cut-through traffic were relevant to an approval standard, the Planning Commission fails to cite to such a standard and, in any event, substantial evidence in the whole record demonstrates that no cut-through traffic is possible because Landis Street will not connect to Cornwall Street. The Application at page 5 demonstrates that adequate transportation facilities will be available to serve the subdivision area; i.e. the 6-lot subdivision.

Third, the Planning Commission Final Decision incorrectly denies the Application based on "fire access". The November 17, 2017 letter from the Tualatin Valley Fire and Rescue District states that "TVFR will endorse this proposal (the subdivision)". Thus, substantial evidence in the whole record demonstrates that the Tualatin Valley Fire and Rescue District, which provides fire and emergency services to the subdivision area, found that the proposal was adequate for its

purposes. Additionally, the Planning Commission's reliance on Oregon Fire Code ("OFC") 503.2.1 is improper because the OFC is not an acknowledged land use regulation; therefore, it may not be a basis for the Planning Commission's Final Decision.

The Staff Report required that lots 5 and 6 take access from the proposed alley. Staff Report Condition of Approval 7 prohibits gating of the alley. The Application proposes a gate at the end of the alley adjacent to Cornwall Street, which prohibits cut-through traffic but, as the staff report notes, allows a future connection between Landis Street and Cornwall Street. See Applicant's December 12, 2017 letter.

The Planning Commission also found that the Application failed to satisfy CDC 85.200(A)(15)(f) which "requires" a minimum alley width of 14 feet. The Planning Commission decision is incorrect. CDC 85.200(A)(15)(f) provides that "alleys *should* be a minimum of 14 feet wide as to width, paved with no curves." (Emphasis added). The section is a guideline and not a mandatory approval standard as to width. The Application is nevertheless able to comply with this section providing for a 14-foot wide paved alley. The Referee may impose a Condition of Approval requiring a 14-foot wide paved alley. ORS 197.365(4)(a) and (b). For the above reasons, the Referee can find that the Planning Commission erred in concluding that the relevant sections of CDC 85.200(A) are not satisfied. Substantial evidence in the whole record, including the Application and the Staff Report, demonstrate that the relevant standards are satisfied.

The Planning Commission Decision found that a gated alley is not permitted, relying on CDC 85.200(A)(20) and Condition of Approval 7 prohibiting a gate, pursuant to ODC 48.030(I).

The Referee can find that the land division can be approved without a gated alley. The issues identified by the Planning Commission at page 4 of the Final Decision arising from a non-gated alley do not support a denial of the Application. Cut-through traffic is not prohibited to by the applicable land use regulations. Fire access is sufficient. The condition of Cornwall Street is not a basis for denial of the Application because of the small number of new daily vehicle trips (See Application at page 8 and Staff Report at page 7). Additionally, page 7 of the Staff Report found that the addition of 5 new single-family dwellings will not generate sufficient new vehicle trips to require a traffic study pursuant to CDC 48.025.D.1. The Planning Commission Final Decision does not cite to a relevant approval standard for these issues nor is the final decision supported by substantial evidence. Additionally, the Referee may consider information not presented to the local government. ORS 197.365(3). The Applicant requests that it be allowed to provide substantial evidence on the issue of traffic impacts.

Alternatively, ORS 197.365(4)(a) requires the Referee to seek means by which the Application can satisfy the Applicable requirements. The Referee can impose a condition of approval allowing a *temporary gate* at the alley connection with Cornwall Street and provide for conditions under which the gate will be removed, including the creation and termination of a reserve strip owned by the City as allowed by CDC 85.200(A)(6).

Finally, the Planning Commission noted that the Application failed to identify how “traffic safety” issues will be resolved. The Planning Commission final decision cites no relevant approval standard for traffic safety issues.

For the above reasons, the Referee must reject these findings. For these reasons, the Referee must find that the Planning Commission erred in finding the applicable land use regulations not satisfied.

**e. Pages 4 and 5 of the Final Decision, “Storm Water”.**

The Planning Commission found that CDC 85.170(F), “Storm” was not satisfied. The Planning Commission did so because it found “that the information provided was not sufficient to conduct an adequate review”.

**Response:** The Referee can find that the record contains a drainage analysis dated September 29, 2017 prepared by Bruce D. Goldson, P.E. The drainage analysis addresses the storm water system for the proposed 6-lot subdivision. The report concludes at page 9 that there is “excess capacity” in the detention system to receive the subdivision’s storm water.

Additionally, the Planning Commission decision on this issue is erroneous for the following reasons. First, the storm water drainage report is substantial evidence demonstrating that the relevant standards for storm water are satisfied. Second, the rain gardens are permitted uses on the individual lots and are not part of the public storm water system. There is no applicable approval criterion requiring the storm water drainage report to analyze the function of the rain gardens. Further, Staff Report Finding 75 and Condition of Approval 9 require the storm water management report to be reviewed and approved by the City Engineer prior to the issuance of a public improvement permit. This is permissible because substantial evidence in the whole record demonstrates the standard is capable of being satisfied and the condition of approval is simply a ministerial approval ensuring that the standard will be satisfied prior to issuance of public improvement permits. Where substantial evidence demonstrates that relevant approval criteria can be satisfied, it is appropriate to impose a condition of approval. *Meyer v. City of Portland*, 67 Or App 274, 678P 2<sup>nd</sup> 741, rev den Or (1984); *Harra v. City of West Linn* \_\_\_\_\_ Or LUBA \_\_\_\_\_ (LUBA No. 2017-074, January 23, 2018), Slip op 23 and 24 (holding that where a city finds that a standard can be satisfied, the city may impose a condition of approval to the city to select a particular solution to identified problems).

Additionally, the Planning Commission decision cited CDC 85.200.J.1 which applies to wetland and natural drainage ways. The Planning Commission decision is without findings on how this standard is applicable and, if applicable, how it is not satisfied. The Referee can find that the Application proposed no impact on wetlands and natural drainage ways not otherwise allowed by the relevant City Storm Drainage Master Plan.

For these reasons, the Referee must reject the Planning Commission’s findings on storm water.

**f. The Planning Commission's Decision Must Be Reversed**

Based on the above, the Referee must find that ORS 197.365(1)(c)(A) is violated by the Planning Commission Final Decision because the decision violated substantive decisions of the land use regulations in failing to reach the correct conclusion that substantial evidence in the whole record demonstrated that applicable land use regulations were satisfied.

**g. The Planning Commission Decision Violates ORS 197.365(1)(c)(D)**

ORS 197.365(1)(c)(D) provides a basis for an appeal if the parties' substantive rights have been substantially prejudiced by an error in the procedure by the local government."

**Response:** The Referee can find that the Planning Commission erred in its procedure by considering evidence not related to the Application before it and approval criteria unrelated to the Application. The record contains argument and evidence related to a prior Application, which does not reflect the current Application. By relying on that prior evidence and argument, and not distinguishing between argument and evidence related to the current Application and the prior Application, the Planning Commission violated the Applicant's substantial rights to a full and fair hearing and the opportunity to make its case. The Planning Commission relied on evidence not related to the current Application and thus not properly addressing the approval criteria for the proposed land division. The Applicant was entitled to a decision relying only on substantial evidence related to the current Application.

**4. Conclusion**

For the reasons contained in this Appeal, the Referee can find that the Applicant has met the requirements for an appeal of the Planning Commission's Final Decision, that the Planning Commission erred by violating substantive provisions of the City's applicable land use regulations and committed procedural error that substantially prejudiced the Applicant's rights to a full and fair hearing and the opportunity to make its case.

The Referee must reverse the Planning Commission's decision and approve the Application for this reason. ORS 197.365(4)(a) requires the Referee to apply the substantive requirements of the local government's land use regulations. Because this Application qualifies as an Expedited Land Division, ORS 197.365(4)(a) requires the Referee to identify means by which the Application can satisfy the applicable requirements.

The Applicant requests a public hearing on the appeal under ORS 197.365(3).



Ms. Jennifer Arnold  
February 5, 2018  
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The Applicant respectfully requests the Referee make a written decision approving the Application with relevant conditions of approval designed to ensure that the Application satisfies the land use regulations, pursuant to ORS 197.365(4)(b).

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Robinson", with a long horizontal stroke extending to the right.

Michael C. Robinson

MCR:gv

CC: Mr. Mark Handris (via email)  
Mr. Darren Gusdorf (via email)  
Mr. Rick Givens (via email)  
Ms. Megan Thornton (via email)

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