BEFORE THE EXPEDITED LAND DIVISION REFEREE
FOR THE CITY OF WEST LINN, OREGON

Regarding an appeal by Icon Construction and	)	**F I N A L O R D E R**
Development of the Planning Commission	)	**File No. AP – 18-01**
decision denying a six-lot subdivision at 4096	)	**(4096 Cornwall**
Cornwall Street in the City of West Linn, Oregon	)	**Subdivision Appeal)**

A. SUMMARY

1. On November 8, 2017, Icon Construction and Development (the "applicant") filed an application to divide a roughly 2.18-acre parcel into six lots as an expedited land division pursuant to ORS 197.360-197.380. The parcel is located at 4096 Cornwall Street, West Linn, Oregon; also known as tax lot 6300, assessor's map #21E36BA (the "site"). The site is located in the Sunset neighborhood on the south end of Cornwall Street and the east end of Landis Street. The site and surrounding properties are zoned R-10 (Residential, 10,000 square foot minimum lot size). The site is currently developed with an existing residence and accessory structures in the northeast corner.

a. The applicant proposed to extend Landis Street through the site, from its existing terminus at the west boundary of the site and terminating at the north boundary to allow for further extension when the abutting property redevelops. The applicant also proposed a public alley between the northern portion of the Landis Street extension and Cornwall Street, abutting the east boundary of the site. Proposed lots 1 through 4 will take access directly off Landis Street and proposed lots 5 and 6 will take access via the alley. The applicant proposed to install a temporary emergency gate at the east end of the alley to prohibit public vehicular access to Cornwall Street from the site. The gate would allow pedestrian, bicycle, and emergency vehicle access to Cornwall Street.

b. The applicant proposed to remove the existing residence and build a new single-family detached dwelling on each of the proposed lots.

c. The applicant proposed to collect and treat stormwater runoff from all impervious surfaces on the site. Runoff from proposed Lot 1 and the on-site roadways will be directed to the existing stormwater facility within the Tanner's Stonegate development east of the site for treatment and detention. Stormwater runoff from proposed Lots 2 through 6 is proposed to discharge to individual rain gardens for treatment and detention. Excess stormwater from these lots will discharge to Cornwall Creek located offsite to the southeast. Grading will be required for the public street and stormwater improvements.

d. Additional basic facts about the site and surroundings and applicable approval standards are provided in the City of West Linn Staff Report for the Planning Commission dated December 20, 2017 (the "Staff Report") incorporated herein by reference, except to the extent modified by or inconsistent herewith.

2. The application (SUB-17-04) was deemed complete on November 27, 2017. On November 28, 2017 the City issued notice of the application and opportunity to comment pursuant to ORS 197.365(3). The comment period closed on December 13, 2017. The City of West Linn Planning Commission (the "Planning Commission") considered the application without a public hearing on December 20, 2017. The Planning Commission denied the application based on the following findings:

a. Although the City accepted the application as complete on November 27, 2017, the application was not technically complete, because it was insufficient to meet the applicant's burden of proof regarding the adequacy of transportation and stormwater facilities;

b. The applicant failed to demonstrate that the proposed subdivision will create enough lots to meet at least 80-percent of the maximum net density permitted by the R-10 zoning;

c. The applicant failed to demonstrate that the proposed development complies with the minimum street or other right-of-way connectivity requirements of ORS 917.360(1)(a)(D) and the proposed transportation facilities do not meet Section 85.200 of the West Linn Community Development Code (the "CDC"), specifically regarding cut-through traffic, fire access, and the City's prohibition of gated public streets;

d. The applicant failed to demonstrate that the proposed stormwater facilities comply with CDC 85.170.F, CDC 85.200(1), and CDC 32; specifically that there is insufficient evidence demonstrating that the proposed rain gardens constructed on clay soil will not affect the discharge to Cornwall Creek.

3. On February 5, 2018, attorney Michael Robinson filed a written appeal of the Planning Commission's decision on behalf of the applicant.

4. On February 6, 2018 the City appointed Joe Turner to serve as referee for the appeal pursuant to ORS 197.375. (the "referee"). On February 8, 2018 the referee issued a Notice Of Appeal establishing a three-week schedule for the submittal of written comments in response to the appeal. The referee ordered that initial written comments be submitted by February 15, 2018. The referee ordered that written comments in response to the initial comments be submitted by February 22, 2018. The referee ordered that the applicant's final argument be submitted by March 1, 2018. Michael Robinson, the applicant's attorney, submitted letters on February 15 and 22, and March 1, 2018. The City did not receive any other comments in response to the Notice Of Appeal.

5. Based on the findings provided or incorporated herein, the referee concludes that:

a. The Planning Commission had no authority to reconsider the Director's completeness determination;

b. The proposed development will create enough lots to meet at least 80-percent of the maximum net density permitted by the R-10 zoning, ORS 197.360(1)(a)(E)(1);

c. The application does not comply with the street connectivity requirements of ORS 197.360(1)(a)(D), ORS 197.360(3), and CDC 85.200:

i. Concerns regarding cut-through traffic are not relevant to the applicable approval criteria for this application;

ii. The subdivision can be designed to preclude cut-through traffic;

iii. The applicant can widen the alley to meet City standards; and

iv. The Oregon Fire Code is not an applicable approval criterion for this application;

d. The applicant failed to demonstrate compliance with CDC 85.170.F; specifically, that the proposed rain gardens "[c]omply with the standards for the improvement of public and private drainage systems located in the West Linn Public Works Design Standards." CDC 92.010(E)(2).

6. Therefore the appeal must be denied and the Planning Commission's decision denying the application should be affirmed.

B. DISCUSSION

1. ORS 197.375 authorizes the City to appoint a referee to hear appeals of expedited land division decisions. Pursuant to ORS 197.375(1)(c), an appeal of an administrative decision on an expedited land division may be based solely on allegations:

(A) Of violation of the substantive provisions of the applicable land use regulations;

(B) Of unconstitutionality of the decision;

(C) That the application is not eligible for review under ORS 197.360 to 197.380 and should be reviewed as a land use decision or limited land use decision; or

(D) That the parties' substantive rights have been substantially prejudiced by an error in procedure by the local government.

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2. ORS 197.375(4) provides:

(a) The referee shall apply the substantive requirements of the local government's land use regulations and ORS 197.360. If the referee determines that the application does not qualify as an expedited land division as described in ORS 197.360, the referee shall remand the application for consideration as a land use decision or limited land use decision. In all other cases, the referee shall seek to identify means by which the application can satisfy the applicable requirements.

(b) The referee may not reduce the density of the land division application. The referee shall make a written decision approving or denying the application or approving it with conditions designed to ensure that the application satisfies the land use regulations, within 42 days of the filing of an appeal. The referee may not remand the application to the local government for any reason other than as set forth in this subsection.

3. The referee finds that the Planning Commission has no authority to find that the application was not technically complete

a. The Director accepted the application as complete pursuant to ORS 197.365(1)(b) and CDC 85.060. However the Planning Commission determined that the application was not technically complete, because, "[t]he information in the record was not technically sufficient to meet the applicant's burden of proof to demonstrate compliance with [specified approval criteria]." p. 1 of the Planning Commission's Final Decision and Order.

b. The Planning Commission and the referee have no authority to review the Director's completeness determination or to deny the application for failure to comply with the submittal requirements. As LUBA stated:

> An applicant's failure to include information that a local ordinance requires to be submitted as part of a land use permit application does not necessarily constitute a basis for remand. That failure must result in an evidentiary shortcoming that prevents a required demonstration of compliance with one or more mandatory applicable approval criteria. *Frewing v. City of Tigard*, LUBA No. 2003-194 citing *McConnell v. City of West Linn*, 17 Or LUBA 502 (1989).

c. The Planning Commission's decision appears to be consistent with LUBA's ruling. The Planning Commission's determination that the application was incomplete was included in Section I "Overview" of its Final Decision and Order rather than the Section III "Findings." The Section III "Findings" address how the information the Planning Commission determined was missing prevents it from finding compliance with the applicable approval criteria. However, to the extent the Planning Commission's decision is based on a determination that the application was incomplete, it is incorrect.

4. The referee finds that the proposed land division complies with ORS 197.360(1)(a)(E)(1). This section requires the proposed land division, "Create[] enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site."

a. CDC 02.030 provides the following relevant definitions:

> Acres, gross. All of the land area owned by the applicant under consideration. See "Tract."
>
> Acres, net. The total gross acres less the public right-of-way and other acreage deductions, as applicable.

b. The site is zoned R-10, which requires a minimum lot size of 10,000 square feet. The 2.17-acre site contains 94,808 square feet of "gross" area. The proposed street rights of way consume 19,068 square feet, leaving 75,740 square feet of "net" area. Therefore the maximum net density of the site is 7.6 lots.[1] 80-percent of the maximum net density is 6 lots.[2] The applicant proposed to develop the site with six lots, which is sufficient to comply with ORS 197.360(1)(a)(E)(1).

c. The applicant calculated the maximum net density of the site as six units. (See p. 4 of the application narrative and the February 21, 2018 Memorandum from Rick Givens). The applicant notes that the net area of the site includes 20,587 square feet of Type I and II (steeply sloped) lands.[3] The applicant's analysis assumes that these Type I and II lands may only be developed at 50-percent of the allowed density. Therefore the applicant determined that the 75,740 square feet of net area on the site can be divided into a maximum six lots, based on the following analysis:

i. (20,587 square feet of Type I and II lands/10,000 square feet/unit)*50%= 1.03 units.

ii. (55,153 square feet of Type III and IV lands/10,000 square feet/unit)*100% = 5.51 units.

iii. 1.03 units on Type I and II lands + 5.51 units on Type III and IV lands = 6 units maximum.

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[1] 75,740 square feet/10,000 square feet per lot = 7.6 lots.

[2] 7.6 lots x 0.8 = 6.1 lots.

[3] CDC 02.030 defines Type I, II, III, and IV lands as follows, in relevant part:

> Type I – land with more than 35-percent slope.
> Type II – land with slopes between 25 and 35-percent.
> Type III – land with slopes between 10 and 25-percent.
> Type IV – land with slopes of 10-percent or less.

d. Unfortunately the applicant failed to provide any support for its determination that Type I and II lands may only be developed at 50-percent of the allowed density.

i. CDC 24.130 does provide that Type I and II lands may only be developed at 50-percent of the allowed density. However this section only applies to Planned Unit Developments ("PUD's"). The applicant did not propose to develop the site as a PUD. Therefore this section is inapplicable.

ii. CDC 55.100.B(2)(d) allows adjustment in net density to preserve trees, providing, "The developable net area excludes all Type I and II lands and up to 20 percent of the remainder of the site for the purpose of protection of stands or clusters of trees as defined in subsection (B)(2) of this section." However the applicant did not exclude areas of Type I and II lands from its density calculations; the calculation merely reduced the density in these areas by 50-percent. In addition, there is no evidence that the proposed reduction in net density is "[f]or the purpose of protection of stands or clusters of trees as defined in subsection (B)(2) of this section." Therefore the referee cannot find that the proposed 50-percent density reduction on Type I and II lands is consistent with CDC 55.100.B(2)(d).

iii. The applicant failed to identify any other code provision that reduces the development density on Type I and II lands by 50-percent.

iv. However, as discussed above, the application does propose to divide the site into enough lots to meet 80-percent o the maximum net density permitted by the R-10 zone.

e. The referee finds that the application does not comply with ORS 197.360(3), cited by the Planning Commission in its discussion of density. As discussed below, the proposed land division does not comply with the comprehensive plan and land use regulations regarding drainage, ORS 197.360(3)(c).

f. This section of the Planning Commission's decision includes a finding that, "[t]he proposed transportation facilities do not meet the requirements of CDC 85.200…" The referee finds that this issue is not relevant to the density calculations. The requirements of CDC 85.200 are addressed below.

g. The Planning Commission's decision notes a "particular concern" regarding "[t]he portion of the site not dedicated to the creation of lots or parcels." The only portion of the site that is not dedicated to the creation of lots or parcels are the proposed street and alley rights-of-way. The Planning Commission failed to provide any explanation of its "particular concern" about these areas. In addition, as noted by the applicant, the Planning Commission failed to relate this "particular concern" to an applicable land use regulation. The referee finds that the on-site street and alley will comply with all applicable comprehensive plan provisions and land use regulations, based on the findings below.

5. The Planning Commission concluded that the application does not comply with the street connectivity requirements of ORS 197.360(1)(a)(D), ORS 197.360(3), and CDC 85.200. Specifically the Planning Commission determined that the application failed to adequately address: cut-through traffic, fire access, and the impermissibility of a gated public street. In addition, the Planning Commission cites to unidentified "errors" in the evidence submitted by the applicant. p. 4 of the Planning Commission's Final Decision and Order.

a. The Planning Commission expressed concerns regarding cut through traffic; the proposed alley or accessway will provide a new vehicular connection between the proposed Landis Street extension and existing Cornwall Street, which appears to provide a more direct route for some residents on the existing section of Landis Street west of the site.

i. There are no standards in the Code that define or regulate "cut-through" traffic. The definition of "local street" in CDC 02.030 provides that such streets are "[n]ot intended to accommodate through traffic." However the term "through traffic" is not defined. CDC 48.025.C requires this type of street connection "In order to promote efficient vehicular and pedestrian circulation throughout the City…" The referee cannot find any applicable approval criteria in the CDC or state law that would authorize denial of this application due to concerns about potential cut-through traffic. Therefore the referee reverses that portion of the Planning Commission's decision denying this application based on concerns with potential cut-through traffic.

ii. The referee finds that the subdivision can be designed to preclude cut-through traffic on the alley or accessway between the Landis Street extension and Cornwall Street.

(A) The applicant proposed to dedicate a reserve strip between the alley and Cornwall Street as allowed by CDC 85.200.A(6). The applicant proposed to install a temporary emergency access gate within the reserve strip to allow emergency access between Cornwall Street and the alley, but preclude all other vehicles from using the Alley.

(B) The referee finds that the proposed temporary emergency access gate can be approved. CDC 48.030.I prohibits gated accessways to residential development, other than a single-family home. CDC 85.200.A(20) prohibits gated streets in all residential areas on both public and private streets. CDC 02.030 defines "street" as "A public or private way that is created to provide ingress or egress for persons to one or more lots, parcels, areas or tracts of land…" CDC 02.030 defines "private street' as "An accessway which is under private ownership." The Code does not define the term "accessway." Therefore the referee refers to the dictionary definition as required by CDC 02.030.D. Dictionary.com[4] defines "accessway" as, "a path, route, etc.,

[4] CDC 02.030.D cites to "Webster's Third New International Dictionary of the English Language, Unabridged." However Webster's does not provide a definition of the term "accessway."

that provides access to a specific destination or property, as to a public beach or state park." accessway. (n.d.). In Dictionary.com online, Retrieved March 6, 2018, from *http://www.dictionary.com/browse/accessway?s=t.*

(C) The referee finds that the reserve strip where the applicant proposed a temporary gate is not an "accessway" or a "street" as those terms are defined by the Code and/or used in CDC 48.030.I and 85.200.A(20). The reserve strip will preclude vehicular access between the alley and Cornwall Street. Therefore it will not "provide access" or "provide ingress or egress" to any lots. The "accessway"/alley serving proposed lots 5 and 6 will be located west of the gate and function as a dead-end road/access. Because the section of alley east of the gate, subject to a City owned reserve strip, is not an accessway or street, the prohibitions on gated accessways to residential development in CDC 48.030.I and 85.200.A(20) do not apply. The City can remove the reserve strip and gate in the future when Landis Street is extended and provides alternative access to the surrounding street network. The applicant can reserve and easement over the reserve strip to allow emergency vehicles and pedestrians to cross the reserve strip.

(D) The Planning Commission expressed concerns that the proposed emergency access gate could delay emergency access to the site. However Tualatin Valley Fire District ("TVFR") did not express any concerns with the proposed emergency access gate and "endorsed" the proposed development, subject to certain conditions. See the November 17, 2017 TVFR letter. TVFR expressly allows emergency access gates. *See* paragraph #15 of the November 17, 2017 TVFR letter. Similar emergency access gates are provided throughout the region. The proposed emergency access gate is unlikely to cause significant delays. The gate is only required for secondary access to the site, in the event that Landis Street is inaccessible.

iii. The referee finds that the proposed alley does not comply with CDC 85.200.A(15)(a), which prohibits alleys abutting undeveloped lots or parcels that are not part of the project proposal. As proposed by the applicant, the 25-foot wide alley easement abuts the north boundary of the site. See the December 11, 2017 letter from Rick Givens. The applicant can remedy this by:

(A) Shifting the alley south to provide a strip of private land outside the easement between the alley and the abutting undeveloped property; or

(B) Changing the alley to a shared private driveway/accessway located within an easement on Lots 5 and 6. This would eliminate the need for a reserve strip dedicated to the City. The applicant could locate the temporary emergency access gate on Lot 6, at the east end of the shared accessway. Proposed Lots 5 and 6 could both take access from Landis Street. In the alternative, the applicant could locate the temporary emergency access gate on the boundary between proposed Lots 5 and 6. Either design would comply with CDC 48.030.I and 85.200.A(20), because the "accessway" serving these lots would not be gated; the lots would have direct, un-gated, access to Landis or Cornwall Street.

iv. As the Planning Commission noted, the proposed 12-foot paved surface proposed by the applicant is inconsistent with CDC 85.200.A(15)(f), which provides, "Alleys should be a minimum of 14 feet wide, paved with no curbs." It is unclear whether the term "should" is a mandatory or permissive standard. CDC 02.010.A provides, "The word "shall" is mandatory, the word "may" is permissive." The Code does not address the term "should." However there is no need to resolve that issue in this proceeding. The applicant agreed to construct the alley with a minimum 14-foot paved width. See p. 3 of the applicant's March 1, 2018 submittal.

v. Conditions of approval are warranted requiring the applicant modify the final plat consistent with these findings if this application is approved.

b. The unidentified "errors" noted by the Planning Commission at p. 4 of the Final Decision and Order are not sufficient to support denial of this application.

c. The Planning Commission concluded that "[t]here is not sufficient evidence to determine that the minimum street or ROW connectivity requirements of ORS 197.360(1)(a)(D) are met." However the Planning Commission failed to indicate how these connectivity requirements not met. The applicant proposed to extend Landis Street through the site, from its existing terminus at the west boundary of the site to the north boundary of the site to allow for further extension and connection with other streets when the adjacent property redevelops, as required by CDC 85.200.A(1) & (8) and CDC 85.200.B. As noted in the Staff Report, the topography of the site preclude the extension of streets to the east or south. The application complies with the block size and connectivity standards of CDC 48.025.C and 85.200.B to the extent feasible.

d. The referee finds that adequate emergency access can be provided to serve the proposed development, based on the expert testimony of TVFR. See the November 17, 2017 TVFR letter. There is no substantial evidence to the contrary.

i. The Oregon Fire Code ("OFC") is not an acknowledged land use regulation. Therefore it provides no basis for approval or denial of this application. Although the proposed 12-foot paved width does not meet the requirements of OFC 503-2.1, OFC 503-1.1 authorizes the "Fire Code Official" to modify the requirements of OFC 503-2 under certain circumstances. TVFR allows 12-foot wide access roads serving up to three dwellings. See paragraph #5 of the November 17, 2017 TVFR letter. In addition, the 25-foot wide alley or private access easement is sufficient to accommodate a 20-foot wide driving surface consistent with OFC 503-2 if required by TVFR.

6. The referee finds that the applicant failed to demonstrate compliance with the stormwater requirements of CDC 85.170.F.

a. CDC 85.170.F provides, "A storm detention and treatment plan and narrative compliant with CDC 92.010(E) must be submitted for storm drainage and flood control including profiles of proposed drainageways with reference to the most recently adopted Storm Drainage Master Plan."

b. CDC 92.010(E) provides, in relevant part:

> Storm detention and treatment. For Type I, II and III lands (refer to definitions in Chapter 02 CDC), a registered civil engineer must prepare a storm detention and treatment plan, at a scale sufficient to evaluate all aspects of the proposal, and a statement that demonstrates:
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> 1. The location and extent to which grading will take place indicating general contour lines, slope ratios, slope stabilization proposals, and location and height of retaining walls, if proposed.
> 2. All proposed storm detention and treatment facilities comply with the standards for the improvement of public and private drainage systems located in the West Linn Public Works Design Standards.
> 3. There will be no adverse off-site impacts, including impacts from increased intensity of runoff downstream or constrictions causing ponding upstream.
> 4. There is sufficient factual data to support the conclusions of the plan.
> 5. Per CDC 99.035, the Planning Director may require the information in subsections (E)(1), (2), (3) and (4) of this section for Type IV lands if the information is needed to properly evaluate the proposed site plan.

c. The majority of the site contains Type I and II lands. *See* the "Willow Ridge Trees & Slope Analysis Plan" (the "Slope Analysis Plan"). Therefore CDC 92.010.E requires a storm detention and treatment plan prepared by a registered civil engineer.

d. The applicant provided the required plan and narrative. See the September 29, 2017 Drainage Analysis. The Drainage Analysis included the following:

i. The applicant proposed to collect stormwater runoff from Lot 1, the Landis Street extension, and the proposed alley and direct it to the existing stormwater facility serving the Tanner's Stonegate development west of the site. As discussed in the Drainage Analysis and Staff Report, this existing facility was designed to treat, detain, and discharge runoff from this site consistent with City standards.

ii. The applicant proposed to provide individual rain gardens in the rear yards of proposed Lots 2 through 6 to treat, and detain stormwater runoff from roof and foundation drains of homes on these lots. The applicant proposed to collect excess runoff rom the rain gardens and release it to the offsite wetland and stream east of the site.

e. The applicant's Drainage Analysis included a study demonstrating that the existing Tanner's Stonegate stormwater facility can, with certain modifications,

accommodate runoff from Lot 1 and the roadways on this site. The Drainage Analysis did not include any analysis of the propose rain gardens.

i. The applicant argued that "[r]ain 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." p. 6 of the applicant's February 5, 2018 letter. However CDC 92.010(E)(2) requires that "All proposed storm detention and treatment facilities comply with the standards for the improvement of public and private drainage systems located in the West Linn Public Works Design Standards." The proposed rain gardens are "private drainage systems." Although the rain gardens are located on the individual lots, they are all connected by a single Therefore the applicant must demonstrate that the rain gardens "[c]omply with the standards for the improvement of public and private drainage systems located in the West Linn Public Works Design Standards."

f. There is no evidence that the propose rain gardens can comply with the West Linn Public Works Design Standards Drainage Analysis (the "Design Standards").

i. The Design Standards do not address rain gardens. Therefore the referee relies on the standards of the City of Portland Stormwater Management Manual (the "Stormwater Manual"), as required by Section 2.0010 of the Design Standards.[5]

ii. Section 2.3.4.5, p. 2-60, of the Stormwater Manual provides, "Site Suitability: Rain gardens are suitable for sites that have well-draining soils (>2 inches/hour) and have an overall slope of 10 percent or less." Section 2.3.4.5, p. 2-61, provides, "Rain gardens must not be installed at locations on the site where slope is greater than 10%."

iii. Based on the applicant's Slope Analysis Plan, all of proposed Lots 2 and 3 and the majority of proposed Lots 4, 5, and 6 contain slopes of 15-percent or more. The flatter, 0-15-percent slope, areas on these lots are primarily located within the front yard areas of these lots. Rain gardens are prohibited on slopes greater than 10-percent. There is no evidence that it is feasible to locate the rain gardens slopes of 10-percent or less. Therefore the referee finds that the applicant failed to demonstrate that the proposed storm detention and treatment facilities comply with the standards for the improvement of public and private drainage systems located in the West Linn Public Works Design Standards. CDC 92.010(E)(2).

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[5] Section 2.0010 provides, "For situations not specifically addressed in these standards, the current edition of the City of Portland Stormwater Management Manual may be used as guidance. Each case will be reviewed for approval by the City Engineer." *See also*, Section 2.0013.B(1) ("All Water Quality Facilities shall meet the design requirements of the current City of Portland, Stormwater Management Manual, as amended and adopted by the City of West Linn and the requirements of Subsection 2.0050, Water Quality Facilities of this manual"), 2.0041.B ("Detention and/or treatment Methods contained in the City of Portland Stormwater Manual, as modified by the City of West Linn, may be used in mitigation as approved by the City Engineer"), and 2.0053.A ("Methods contained in the City of Portland Stormwater Manual, as modified by the City of West Linn, may be used in mitigation as approved by the City Engineer").

7. The referee finds that the application can comply with CDC 85.200.J(1). This section provides, "Wetlands and natural drainageways shall be protected as required by Chapter 32 CDC, Water Resource Area Protection…." The proposed stormwater outfall is the only impact proposed within the Water Resource Area (the "WRA"). CDC 32 expressly allows stormwater outfalls in WRAs. *See* CDC Table 32-1. Discharging treated stormwater into the stream is permitted by Section 2.0010(3) of the Design Standards.

8. ORS 197.375(1)(a) requires that any appeal of an expedited land division decision be accompanied by a $300 deposit for costs. The appeal narrative states that the appeal includes a $300 deposit. However the accompanying City form indicates that City charged a $400 non-refundable appeal fee. The referee finds that the $400 appeal fee imposed in this case should be considered a "deposit" consistent with ORS 197.375(1)(a).

9. ORS 197.375(6) provides:

> Notwithstanding any other provision of law, the referee shall order the local government to refund the deposit for costs to an appellant who materially improves his or her position from the decision of the local government. The referee shall assess the cost of the appeal in excess of the deposit for costs, up to a maximum of $500, including the deposit paid under subsection (1) of this section, against an appellant who does not materially improve his or her position from the decision of the local government. The local government shall pay the portion of the costs of the appeal not assessed against the appellant. The costs of the appeal include the compensation paid the referee and costs incurred by the local government, but not the costs of other parties.

The referee finds that the applicant did not "materially improve [its] position from the decision of the local government" in this case. The referee concluded that the Planning Commission erred in finding that the application did not comply with certain code provisions. However the referee affirmed the City's overall decision denying the application. Therefore, the referee must assess the costs of the appeal against the applicant, up to $500. The costs of the appeal in this case exceed $500 The referee understands that the applicant paid an initial deposit of $400. Therefore the referee orders the applicant to pay an additional $100 to the City of West Linn.

C. CONCLUSION

Based on the above findings, the referee concludes that the applicant failed to demonstrate that the proposed land division complies with ORS 197.360(3)(c); specifically that the land division complies City of West Linn's comprehensive plan and land use regulations designed to regulate drainage facilities: CDC 85.170.F and 92.010(E). Therefore the appeal should be denied and the application the Planning Commission decision denying the application should be affirmed.

D. DECISION

In recognition of the findings and conclusions contained herein, the referee hereby denies the appeal and upholds the City's decision denying SUB-17-04.

DATED this 14th day of March 2018

Joe Turner, Esq., AICP
City of West Linn
Expedited Land Division Referee

APPEAL RIGHTS

Any party to the appeal proceeding may seek judicial review of the referee's decision by filing a petition in the Court of Appeals within 21 days following the date the City delivered or mailed this Final Order. ORS 197.375(8). The Land Use Board of Appeals does not have jurisdiction to consider any aspect of this decision. ORS 197.375(7).