

March 1, 2018

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

**VIA EMAIL**

Mr. Joe Turner  
City of West Linn Expedited Land Division Referee  
c/o Shauna Shroyer, Administrative Assistant  
22500 Salamo Road  
West Linn, Oregon 97068

RE: City of West Linn File No. AP-108-1/SUB-17-04 (4096 Cornwall Street Subdivision); Appellant's Final Written Argument Submitted Prior to the End of the Final Open Record Period on March 1, 2018 at 5:00 PM

Dear Joe:

This office represents Icon Construction & Development ("Icon"), the Appellant. This letter is the Appellant's timely submittal prior to the close of the final open record period on Thursday, March 1, 2018 at 5:00 PM. This letter does not contain new evidence.

**1. Introduction.**

ORS 197.375 governs the proceeding on appeal of an Expedited Land Decision by a local government. The statute intends for the Referee to apply the local government's land use regulations and provides ways for the Referee to approve the application.

ORS 197.375(3) provides: "The Referee shall provide the local government an opportunity to explain its decision, but is not limited to reviewing the local government decision and may consider information not presented to the local government."

The Applicant has provided additional information ("argument" and "evidence", as those terms are defined in ORS 197.763(9)) that demonstrates why the local government's denial of the Expedited Land Division application is flawed and must be reversed due to ORS 197.375.

Additionally, ORS 197.375(4)(a) provides "...in all other cases...the Referee shall seek to identify means by which the application can satisfy the applicable requirements". The Appellant's submittals to the Referee demonstrates why the application satisfies applicable requirements for in the West Linn Community Development Code ("the CDC").

Mr. Joe Turner  
City of West Linn  
March 1, 2018  
Page 2

Additionally, ORS 197.375(4)(b) provides: “The Referee may not reduce the density of the land division application.” In this case, the proposed six-lot subdivision may not be reduced further.

Finally, ORS 197.375(4)(b) provides “The Referee shall make a written decision approving or denying the application or approving it with conditions designed to ensure the application satisfies the land use regulations...” The Referee may impose conditions of approval that address reasons the West Linn Planning Commission denied the Expedited Land Division application.

Taken together, the above provisions show a preference for approval of an Expedited Land Division application with its proposed density. As explained in the Appellant’s two prior submittals and in this final written argument, the Referee can find that the Planning Commission erred in the application of the substantive provisions of the CDC and failed to rely on substantial evidence in making its decision pursuant to ORS 197.375(1)(c)(A) and (D).

**2. The Planning Commission’s Decision Denying the Land Division Application is Flawed Because it Fails to Properly Apply Applicable Substantive Provisions of the CDC and the Planning Commission’s Decision is Not Supported by the Substantial Evidence.**

**A. Issues Not Related to Substantive Provisions of the CDC.**

a. The Planning Commission raised the issue of whether the City properly deemed the application complete pursuant to ORS 197.365(1)(b). The Referee can find that the City followed applicable statutory and CDC provisions regarding the completeness determination, and, in any event, completeness is not relevant to a substantive provision of the CDC regarding approval of the Expedited Land Division application.

b. The Planning Commission’s decision noted a “particular concern” about the land outside of the proposed lots or parcels without relating that concern to a substantive provision of the CDC.

c. The Planning Commission found that the Expedited Land Division application did not satisfy CDC 85.200. However, the relevant part of that standard provides that it applies to the “subdivision area”, which means the area proposed to be subdivided, not off-site streets. Therefore, the Referee can find that 85.200 is not applicable to this application in this respect.

d. The Planning Commission found that the application failed to provide for fire access. However, the Planning Commission failed to relate that issue to a substantive provision of the CDC and the Oregon Fire Code (the “OFC”) is not a land use regulation and, therefore, not a basis for the decision. Moreover, as explained before, the Tualatin Valley Fire and Rescue District determined that it was satisfied with the proposed subdivision and its ability to provide fire and emergency services to the subdivision area.

e. The Planning Commission also found that the Expedited Land Division application failed to satisfy CDC 85.200(A)(15)(f) requiring a minimum alleyway width of fourteen feet. However, the standard provides that alleys “should” be a minimum of fourteen feet wide. The Referee can either find that this not a mandatory approval standard, or can impose a condition of approval requiring that the alley be fourteen feet wide.

f. The Planning Commission found that CDC 85.200(A)(20) and Condition of Approval 7 prohibit a gate, pursuant to CDC 48.030(I). The Appellant has proposed that the Referee impose a condition of approval requiring an reserve strip owned by the City between the alley and Cornwall Street as allowed by CDC 85.200(A)(6) and impose a requirement for a temporary gate associated with the reserve strip. When the City determines to connect the alley with Cornwall Street, the City, as the owner of the reserve strip, can remove both the reserve strip from the title to the property and the temporary gate.

g. The Planning Commission found that the application failed to address cut-through traffic. No substantive provision of the CDC applicable to this application prohibits or addresses cut-through traffic.

h. The Planning Commission found that CDC 85.170(f), “Storm”, was not satisfied. For the reasons explained below, the Planning Commission failed to rely on substantial evidence in the whole record in making this decision.

i. The Planning Commission found that CDC 85.200(J)(1) was not satisfied. However, the Planning Commission failed to explain how wetland and natural drainageways, not present on the subdivision site, are regulated by this CDC provision.

For all of the above reasons, the Referee can find that the Planning Commission erred by failing to properly apply substantive provisions of the CDC and in those cases where it did apply the CDC, erred by improperly applying the substantive provisions.

**B. The Planning Commission’s Decision is Unsupported by Substantial Evidence in the Whole Record.**

a. The Planning Commission erred by failing to find that the applicant has met its burden of proof to demonstrate that the proposed Expedited Land Division meets the requirements of ORS 197.360(4) and ORS 197.360(3). The record before the Referee shows that the application satisfies all relevant elements of the substantive CDC provisions by addressing physical characteristics of the permitted use, the proposed lot dimensions and transportation right-of-way and facility standards. Substantial evidence in the whole record demonstrates that the Applicant satisfied ORS 197.360(3).

b. The Applicant satisfied ORS 197.360(4) by demonstrating, pursuant to ORS 197.360(1)(a)(E)(i.), that the proposed expedited land division application would create enough lots to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site. Substantial evidence from the Staff Report to the Planning Commission and the Applicant's submittal demonstrates that the standard is satisfied.

c. The Planning Commission's reliance on CDC 85.200 to deny the application based on "unanswered questions", including cut-through traffic, fire access, and a gated public street, are not based on substantial evidence. First, no substantial evidence demonstrates that cut-through traffic from five new single-family dwellings will adversely affect either of the streets' level of service or safety, nor did the Planning Commission properly relate this issue to relevant approval criteria. Additionally, as noted above, the Tualatin Valley Fire and Rescue District noted that it was satisfied with the proposed Expedited Land Division's ability to provide fire access to the subdivision site. Finally, the impermissibility of a gated public alley can be remedied by a reserve strip owned by the City and a temporary gate at the reserve strip.

d. The Planning Commission's reliance on CDC 85.200(A)(15) regarding the alleyway is not supported by substantial evidence because, as noted above, the standard is not a mandatory approval standard and the Referee may impose a Condition of Approval addressing 85.200(A)(15)(f).

e. The Planning Commission's reliance on CDC 85.170(F) and CDC 85.200(J)(1) is not based upon substantial evidence. The record contains substantial evidence in the form of Mr. Goldson's storm drainage analysis and the record does not demonstrate that wetlands or natural drainageways are found on the subdivision site.

f. The Planning Commission's decision finding ORS 197.360(1)(a)(B) is not met can be remedied by a condition of approval regarding a reserve strip at the connection of the public alley and Cornwall Street. Moreover, the Planning Commission decision failed to relate ORS 197.360(1)(a)(D) to an applicable provision of the CDC as it is required to do and, in the alternative, failed to identify a relevant Statewide Planning Goal or administrative rule.

### **3. Request for Relief.**

The Applicant respectfully requests that, pursuant to ORS 197.375(4)(a) and (b), the Referee approve the application with the recommended condition of approval regarding the reserve strip in favor of the City and a temporary gate and adopt findings not inconsistent with the application and Appellant's submittals during the appeal period. In the alternative, in the event the Referee wishes to remand the application to the Planning Commission, the Appellant respectfully requests that the Referee do so with specific instructions to the Planning Commission as to how it must address the reasons for the remand.

Mr. Joe Turner  
City of West Linn  
March 1, 2018  
Page 5

Very Truly Yours,

A handwritten signature in blue ink that reads "Michael C. Robinson". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael C. Robinson

MCR:gv

cc: Mr. Mark Handris (via email)  
Mr. Darren Gusdorf (via email)  
Mr. Rick Givens (via email)  
Mr. John Boyd (via email)