

**WEST LINN CITY COUNCIL
FINAL DECISION AND ORDER
AP-20-03**

**IN THE MATTER OF AN APPEAL OF THE PLANNING COMMISSION
APPROVAL OF A 2-YEAR EXTENSION TO A PREVIOUSLY APPROVED 34-
LOT SUBDIVISION AT 18000 UPPER MIDHILL DRIVE (MISC-20-04)**

I. Overview

Upper Midhill LLC submitted a land use application on October 21, 2015, to develop a 34-lot subdivision (“Chene Blanc”) at 18000 Upper Midhill Drive. The 6.1 acre site is zoned R-4.5. After a denial by the West Linn Planning Commission (Commission), an appeal was heard by West Linn City Council (Council). Council upheld the denial and the decision was subsequently appealed to LUBA. The City voluntarily remanded the decision. The Commission held another public hearing and approved the subdivision proposal. The decision was once again appealed and Council denied the appeal and upheld the Commission approval. The Council Final Decision and Order became effective on July 19, 2017. An appeal was again made to LUBA and the City’s approval was affirmed.

West Linn Community Development Code (CDC) 85.090 requires that the subdivision plat is recorded with the County within three years from the date of approval (July 19, 2017). Emerio Design, on behalf of the owner, submitted an application for a 2-year extension per CDC 99.325, which was deemed complete on June 11, 2020.

At its meeting on July 15, 2020, the Commission held the initial evidentiary public hearing to consider the request by Emerio Design, LLC, applicant on behalf of Upper Midhill Estates, LLC (owners), to approve a two-year extension to a previously approved 34-lot subdivision at 18000 Upper Midhill Drive. The approval criteria for an extension of approval are found in Chapter 99.035, of the CDC. The hearing was conducted pursuant to the provisions of CDC Chapter 99.170. The applicant requested a continuance as to develop a more detailed final written argument with no new information. The record was left open for 7 additional days for the applicant to submit the final written argument and the Commission set a date certain of August 19, 2020 for the continuance.

At its meeting on August 19, 2020 the Commission opened the hearing with City Attorney Ramis addressing the preliminary legal matters, the hearing was closed, and the Commission deliberated. A motion was made by Vice Chair Mathews and seconded by Commissioner Pellett to approve the application as presented with the staff proposed conditions of approval. The motion passed 4-3.

On September 8, 2020 Jason and Jessica Harra filed a timely appeal of the Commission decision. Both established standing by submitting written testimony into the record of the Commission hearing. Mr. Harra also testified at the July 15, 2020 hearing. Mr. Harra noted a number of deficiencies in the MISC-20-04 application, but filed an appeal to the Planning Commission's decision "because the material in the record does not support a finding that adequate public facilities are available, particularly transportation facilities, and the impacts to sewer facilities after design changes to paved surface area".

The appeal hearing was held by the Council on October 5, 2020. The Appellant presented oral argument followed by the Applicant. There was no oral public testimony presented at the hearing. Staff recommended denial of the appeal based on the Planning Commission's August 19, 2020 approval. The motion was made by Council President Sakelik and seconded by Councilor Cummings to tentatively approve the appeal (overturning the Planning Commission's approval) and directed staff to bring back findings for adoption. The motion carried 3-1 with Councilors Walters, Sakelik and Mayor Axelrod voting yes, and Councilor Cummings voting no. This was not a final decision and the Council continued its deliberation to a date certain to further consider the decision and findings.

The applicant did not grant any further extensions of the 120-day period (expires October 15, 2020), therefore these findings were scheduled to be adopted at the scheduled October 12, 2020 Council meeting. However, at the October 12, 2020 Council meeting a motion was made by Councilor Relyea to deny the appeal which would uphold the Planning Commission approval with the addition of a condition of approval requiring a 28-foot pavement width throughout the subdivision to comply with recent policy changes enacted since the 2017 approval. The motion was seconded by Councilor Cummings and the motion carried 3-2 with Councilors Cummings, Relyea and Sakelik voting yes, and Councilor Walters and Mayor Axelrod voting no.

II. The Record

The record was finalized at the October 5, 2020 appeal hearing. The record includes the entire file for MISC-20-04 and AP-20-03.

III. Procedural Issues and Scope of Review

The Appellant and Applicant agreed that the scope of the hearing was de novo.

IV. Findings of Fact

- 1) The Overview set forth above is true and correct.
- 2) The applicant is Upper Midhill LLC.
- 3) The appellant is Jason and Jessica Harra.
- 4) The Council finds that it has received all information necessary to make a decision based on the Agenda Report; appeal application; the Appellant's oral argument; and the evidence in the whole record.

V. Findings

Hearing participants raised an issue of code interpretation. Specifically, whether the action of the City in adopting a policy requiring construction of a minimum 28-foot street width in subdivisions of this type. Section 99.325(A)(1) establishes the relevant criteria:

The applicant has demonstrated that the application is in conformance with applicable CDC provisions and relevant approval criteria enacted since the application was initially approved;

We determine that the adoption of a mandatory 28 foot street width standard by the City was the enactment of “relevant approval criteria enacted since the application was initially approved.”

It is not disputed that the standard was made a mandatory requirement of all applications by formal action of the Planning Commission after notice and a hearing at which testimony was offered on various options. The decision, which was not appealed, was that within the range of street widths identified by the CDC, the 28 foot standard would be applied as an approval criteria to all future applications. In addition to the testimony and evidence in the record, we take notice of the decision and Planning Commission minutes of August 5, 2020.

Section 99.325(A)(1) requires conformance with not only CDC provisions but also other approval criteria enacted subsequent to the initial approval criteria. Limiting the City’s decision-making to simply provisions set forth in CDC would render the additional language of “relevant approval criteria enacted” in this Section superfluous. The City’s decision to apply the 28 foot street width policy standard is such an approval criteria. This extension application is therefore subject to review under the clear and objective requirement of 28 foot width street design.

With clear direction from the Council on February 19, 2019 regarding the street width standard, staff reviewed the Municipal Code and Public Works Standards and has determined staff can incorporate this direction into decision-making without code amendments. Therefore, City Public Works Engineering staff is now requiring all new subdivision streets to use a minimum 28-foot local street width cross-section, where the previous standard would have permitted a 24-foot local street standard. The applicant’s original approved subdivision was designed with the 24-foot local street standard in 2015 (approved in 2017).

CDC 85.090 requires applicants to record a final plat within three years of the City issued approval, or apply for a 2-year extension under the provisions of CDC 99.325. The applicant submitted their application for extension of their 2017 approved 34-lot subdivision on May 13, 2020. The applicant’s submittal for an extension of approval (MISC-20-04) indicated compliance with the 2019 street width policy change, but only in 5 locations. The applicant did not change the right-of-way width to accommodate this

new standard, but removed the planter strip to achieve the 28-foot local street width in their proposed locations. The new Condition of Approval 19 brings all areas of this application into compliance with the newly enacted code standards for 28-foot street widths. The Council concludes that all of the required approval criteria are met subject to the following conditions of approval:

- 1. Site Plan.** With the exception of modifications required by these conditions, the project shall conform to all submitted Plan Sheets dated 1/11/2016 (C000, C100, C105, C110, C111, C112, C113, C114, C130, C200 (Preliminary Plat), C201, C210, C220, C230, C280, C300) and sheet LI (landscaping) dated 10/14/15. Street widths will be per Road Section History Exhibit last revised October 2019 (see MISC-20-04, Exhibit PC-3).
- 2. Engineering Standards.** All public improvements and associated facilities including street improvements (per sheets C201, C210, C220), utilities (per sheet C300), grading (per sheet C230), onsite storm water design (per sheet C230 and C300), street lighting (per sheet C280), easements (per sheet C200), and easement locations shall comply with all applicable City standards. These improvements must be designed, constructed, and completed prior to final plat approval or secured by instruments acceptable to the City Engineer.
- 3. Off-Site Traffic Mitigation.** To mitigate the traffic impacts from the proposed subdivision until the Highway 43 Multimodal Transportation Project is constructed, and prior to the-issuance of a grading permit or site development permit for the development site-, the applicant shall construct their proposed interim solution as depicted in Figure 9 of Kittelson Associates' March 1, 2017, memorandum ("KAI Memorandum") (Exhibit PC-5B) that includes restriping the highway with a northbound left turn pocket on the south leg of the intersection and a left turn refuge/storage area on the north leg of the intersection, subject to ODOT review, modification, and approval. The applicant shall also pay a proportionate fee to the City of West Linn in the amount of \$11,600 as Applicant's proportionate share contribution toward the long-term Highway 43 Multimodal Transportation Project.
- 4. Storm water Tract C.** Prior to approval of the final plat, the applicant shall dedicate Storm water Tract C to the City of West Linn.
- 5. Mutual Maintenance and Easements.** Prior to approval of the final plat, the applicant shall provide the City of West Linn, along with the final plat, a Mutual Maintenance and Reciprocal Access and Public Utility Easement for platted Lots 13-15 to ensure continued access and necessary maintenance of the shared drive in perpetuity. Lot 12 shall be excluded from using this easement.
- 6. No Parking Signs.** The applicant shall install signs reading "No Parking- Fire Lane" on one side of Hillside Drive. The signs shall be designed and installed in accordance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD).

7. Fire Flow. Prior to approval of the final plat, the applicant shall perform a fire flow test and submit a letter from Tualatin Valley Fire and Rescue showing adequate fire flow is present.

8. Significant Tree Mitigation. Prior to approval of the final plat, the applicant will mitigate for the removal of 434 inches of DBH by planting street trees and landscape trees on the project site. The remaining trees which are not able to be planted on site will be mitigated for either in off-site plantings in a location chosen by the City's arborist or the applicant will pay a fee in lieu to the City for trees which cannot be planted on site. In the event that the geotechnical findings, as required by Condition of Approval 13, require modification of the final grading plan which, in turn, requires additional tree removal, the applicant shall mitigate for the additional tree loss on an inch by inch basis.

9. Access during Construction. Approved fire apparatus access roadways shall be installed and operational prior to any combustible construction or storage of combustible materials on the site. Temporary address signage shall also be provided during construction.

10. Hillside Drive Off-Site Sidewalk Improvements. The applicant shall construct Hillside Drive road widening and tapering plus approximately 90 feet of sidewalk on the north side of the street in front of 17849 Hillside Drive and 150 feet of sidewalk on the west side of the street commencing at the south edge of the proposed subdivision boundary to fill in gaps in the pedestrian facilities (as shown in Exhibit PC-5, pages 5 and 6).

11. Traffic Management Plan (TMP). Construction vehicles for the project shall be subject to the following traffic management restrictions.

- a. Inbound project vehicle traffic shall be routed up Arbor Drive from Willamette Drive to the site and outbound project vehicle traffic shall be routed out along Upper Midhill Drive and down Marylhurst Drive to Willamette Drive.
- b. Project vehicles shall be restricted to a maximum speed of 20 miles per hour west of Highway 43 (Willamette Drive).
- c. Flaggers shall direct construction related traffic, both exiting the site and at local intersections to be determined and on Upper Midhill Drive during school bus pickup and drop off periods as determined in consultation with the West Linn Wilsonville School District/First Student Bus Company.
- d. On-site vehicle noise will be mitigated by the modifying vehicle "backup beepers".
- e. The loop route for project vehicles, which is a loop using Arbor Drive-Upper Midhill Drive-Marylhurst Drive, will be modified to an out and back route relying exclusively on Arbor Drive if there are two filed collision reports, such as an Oregon Traffic Accident and Insurance Report or a Traffic Crash Report, in which a project vehicle was determined to be at fault.

- f. The TMP shall be amended, as necessary, to meet any new conditions realized during the planning and implementation phases of the project. Applicant shall be responsible for ensuring compliance with this Plan.

12. Crosswalk on Highway 43. The Applicant shall propose to construct a crosswalk with pedestrian activated warning lights across Highway 43 at Arbor Street, subject to ODOT review, modification, and approval.

13. Supplemental Geotechnical Analysis. The Applicant shall prepare a supplemental geotechnical analysis addressing the soils conditions across the property and in the areas of the local streets within the subdivision, including an estimate of the amount of soil to be removed in order to construct the streets and develop the building sites. The Applicant shall submit the supplemental geotechnical analysis to the City Engineer for review and approval prior to approval of construction plans.

14. Tri-Met Bus Stops. The Applicant shall coordinate with Tri-Met, and subject to ODOT review, modification, and approval, assure that bus stops meeting applicable standards are available on Highway 43 near Arbor Street.

15. Subdivision Construction Management Plan (CMP). The Applicant shall prepare a Construction Management Plan to be valid during the subdivision development until acceptance of public improvements. The Construction Management Plan shall include:

- a. A truck wash shall be installed prior to initiation of on-site construction work.
- b. The Developer shall distribute a “flyer” door to door to the neighbors’ houses adjacent to the Chene Blanc Subdivision Site, and to those neighbors’ houses which will be impacted by the construction and development activities. The “flyer” shall contain information pertaining to start and potential ending dates of the project, days and hours of operation, a brief description of activities planned for the site, a description of the boundaries of the site, the name and telephone number of a resource/question line, and any other information the Developer feels relevant to homeowners residing in the impacted area.
- c. Dust control/dust abatement procedures and/or plans pursuant to West Linn Municipal Code 5.477
- d. A plan to minimize, to the extent practical, the constant idling of engines and subsequent spread of exhaust fumes into the neighborhood.
- e. No construction equipment, including “porta potties”, shall be located outside the exterior boundaries of the construction site.
- f. Off-site employee street parking shall not block driveways, mailboxes, and/or collection-day trash receptacles.
- g. No employee parking is permitted at the bottom of College View Drive in the turnaround area.
- h. The CMP shall be amended, as necessary, to meet any new conditions realized during the planning and implementation phases of the project. Applicant shall be responsible for ensuring compliance with the plan.

16. **Pedestrian Way Finding Signs.** The Applicant shall coordinate with the Neighborhood Association, and subject to the approval of the City Engineer, shall establish a series of “way finding” signs to guide pedestrians to the intersection of Oregon Highway 43 and Marylbrook Drive to reach the Tri-Met bus stop located at that intersection in accordance with Manual on Uniform Traffic Control Devices and City requirements.

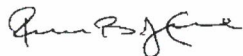
17. **Pedestrian Route.** The applicant will install a paint stripe along Upper Midhill Drive between Arbor Drive and Marylhurst Drive to establish a safety zone for pedestrian traffic. The stripe shall be four feet from the generalized east edge of the paved street section leaving a travel lane for vehicles approximately 12 feet wide. Signs shall be installed at each end of Upper Midhill Drive identifying the area east of the line as a pedestrian route.

18. **Community Outreach.** The applicant shall provide monthly updates at the monthly meetings of the Robinwood Neighborhood Association, from pre-construction phase to the commencement of the final plat phase.

19. **28-Foot Street Width.** The applicant shall make all streets within this approved development 28-feet wide by removing the planter strip where necessary.

VI. Order

The Council concludes that AP-20-03 is denied. The Council upholds the Planning Commission’s approval of MISC-20-04 based on the entire Record, Findings of Fact, and Findings above. Therefore, the application (MISC-20-04) is approved.



RUSSELL B. AXELROD, MAYOR
WEST LINN CITY COUNCIL

October 15, 2020
DATE

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

Mailed this 15 day of October, 2020.

Therefore, this decision becomes effective at 5 p.m., November 5, 2020.