

**WEST LINN CITY COUNCIL
FINAL DECISION AND ORDER**

AP-20-05

**IN THE MATTER OF AN APPEAL OF THE PLANNING COMMISSION
APPROVAL OF A SIX-LOT SUBDIVISION AT 4096 CORNWALL STREET
(SUB-20-01)**

I. Overview

Icon Construction & Development filed a land use application on January 13, 2020 and it was deemed complete on April 22, 2020, to develop a six-lot subdivision (“Willow Ridge”) at 4096 Cornwall Street. The approval criteria for the application are found in Community Development Code (CDC) Chapters 11, 48, 85, 92, and 99. The hearings were conducted pursuant to the provisions of CDC Chapter 99.

The West Linn Planning Commission (Commission) held the initial evidentiary hearing on October 7, 2020. The hearing commenced with a staff report presented by Jennifer Arnold, Associate Planner. Rick Givens, presented on the applicant’s behalf with assistance from Michael Ard, Bruce Goldson, James Imbrie, and Mike Robinson as the applicant’s attorney. The initial hearing was continued to November 4, 2020 with a limited open record for additional written evidence and oral testimony on four key issues: Geotechnical Report, Traffic, Gated Access, and Stormwater. The applicant was given to October 28, 2020 to submit additional documents related to the four items of open record. The public was given one week, until noon on November 4, 2020 to submit written testimony in response to the new information.

At the continued hearing on November 4, 2020, Jennifer Arnold, Associate Planner gave a brief presentation. Rick Givens presented for the applicant assisted by Jason Ard, Roger Smith, James Imbrie, and Beth Rath. All written and oral testimony submitted for the continued hearing abided by the four topics of the limited open record. The Commission heard oral testimony from six individuals and accepted a number of written comments during the two meetings. The hearing was closed and after deliberations, a motion was made by Vice Chair Mathews and seconded by Commissioner Kelly to approve the application with 11 conditions of approval. The motion was passed with five votes in favor (Commissioners Kelly, Mathews, Metlen, Pellett and Chair Walvatne) and one vote opposed (Commissioner King).

On November 30, 2020, Pam Yokubaitis on behalf of BHT Neighborhood Association (Appellant) filed a timely appeal of the Commission decision. The appeal hearing was held by the City Council on January 11, 2021. . The Appellant presented oral argument, followed by oral argument from the Applicant and the public, and rebuttal by both the Appellant and Applicant. Council closed the public hearing and after deliberations, Councilor Relyea moved to deny the appeal and modify the Commission decision to approve SUB-20-01 with two additional

conditions of approval. Councilor Baumgartner seconded the motion and the motion passed four votes in favor and none opposed.

II. The Record

The record was finalized at the January 11, 2021 appeal hearing. The record includes the entire file for SUB-20-01 and AP-20-05.

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 Icon Construction & Development.
- 3) The appellant is Pam Yokubaitis on behalf of BHT Neighborhood Association.
- 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; the Applicant's oral argument; oral argument by the public; and the evidence in the whole record.

1. Introduction.

A. Planning Commission Decision.

The West Linn Planning Commission approved the Application (the "Decision"), a tentative six-lot subdivision in the R-10 zoning district, on November 6, 2020.

B. Appeal.

The Appellant filed a timely appeal by November 20, 2020 of the Decision meeting the requirements for an appeal under West Linn Community Development Code (the "CDC") Chapter 99.

C. Appeal Hearing.

The City scheduled a *de novo* quasi-judicial appeal hearing before the West Linn City Council (the "City Council") on January 11, 2021 after providing notice of the public hearing to those entitled to notice no later than December 22, 2020.

D. Appeal Hearing Announcements and Disclosures.

The City Council with all four members present constituting a quorum were present and participating in the appeal hearing.

The Mayor opened the public hearing, described the quasi-judicial hearing process and described the particular hearing process and time allowed for testimony.

The City Attorney read the notice required by ORS 197.763(5) for quasi-judicial hearings. The City Attorney asked the City Council members to disclose potential or actual conflicts of interest, bias, site visits and *ex parte* contacts. No City Councilor disclosed a conflict of interest or bias. Each City Councilor disclosed a site visit and Mayor Walters and City Councilor Baumgartner disclosed *ex parte* contacts and said they would be unbiased in deciding the appeal of the Decision. The City Attorney asked each City Councilor if they learned anything through the site visits that was substantially different from the information in the record. Each City Councilor said no. The City Attorney asked if anyone wanted to challenge the City Council's jurisdiction to hear the appeal or rebut the site visits or *ex parte* disclosures. No one did so.

E. Procedural Issues Raised During the Hearing.

a. Hearing continuance request.

Ms. Oakes asked for a continuance of the appeal hearing. Because the City Council appeal hearing is not the initial evidentiary hearing, ORS 197.763(4)(b) does not require that a continuance hearing be granted. The City Council, therefore, took no action on the request.

b. Unspecified procedural objections.

Ms. Yokubaitus and Ms. Oakes each made generalized and unspecified procedural objections regarding the Planning Commission process used to make the Decision and the appeal hearing. Neither person specified how the alleged procedural errors at either the Planning Commission hearings or the City Council appeal hearing prejudiced their substantial rights to a full and fair hearing or the right to make their cases. Each person was allowed to testify to the City Council for the amount of time provided (20 minutes for the Appellant and 5 minutes for members of the public) and to submit argument and evidence. The City Council appreciates their participation as it does all West Linn residents but nothing they raised rises to a procedural error. Finally, the City Council's *de novo* hearing cured (corrected) any procedural errors in the Planning Commission hearings.

c. Ex parte contacts with staff.

Ms. Oakes asked the City Council to disclose contacts between City Council members and staff members, characterizing those discussions as *ex parte* contacts. The City Council disclosed some information and is committed to a transparent public hearing process but also notes that ORS 227.180(2) excludes communications between City Council members and staff from *ex parte* contacts that must be disclosed in a public hearing.

F. Appeal Hearing.

The City Council followed its announced hearing procedure and testimony timelines. After hearing all persons who wished to testify (the Appellant, the Applicant and four members of the public), the City Council closed the public hearing and record and deliberated to a tentative decision.

The Applicant did not assert its right to final written argument and the City Council finds that it waived that right.

2. City Council Decision on the Appeal.

Following the close of the appeal hearing and record, Councilor Relyea moved to reject the appeal and approve the Application (thus affirming the Planning Commission's decision to approve the Application) and including two new conditions of approval. The two new conditions of approval included in the motion are in addition to the eleven conditions of approval found in the West Linn Planning Commission Final Decision and Order for SUB-20-01, which was signed and mailed on November 6, 2020. The two new conditions of approval included in the motion are:

1. The Applicant shall provide a warranty bond for public stormwater improvements of up to four years, or as long as is reasonably possible.
2. The engineered solutions for the stormwater control system shall be included in the recorded conditions, covenants and restrictions (the "CC&Rs") and submitted to the City with the recorded subdivision plat and the City shall recognize its responsibility to the community to enforce the provisions of the CC&Rs regarding stormwater.

Councilor Baumgartner seconded the motion.

The motion passed by a vote of 4-0 and included thirteen conditions of approval.

3. City Council Findings.

The City Council hereby adopts the following Findings supporting approval of the Application and rejecting the appeal.

- A.** The City Council incorporates the eight-page Staff Report to the City Council (the "City Council Staff Report") dated January 11, 2021 but excludes Section 2, "Appeal Issue 2" on Pages 6-8 and replaces Section 2 with the Findings set forth in Part D, below.
- B.** The City Council incorporates the thirty-three-page Staff Report to the Planning Commission (the "Planning Commission Staff Report") dated October 11, 2020 but excludes the following Findings to the extent that they rely on prior condition of approval 4 (recommended by staff but not adopted by the Planning Commission) and to the extent that they find the relevant CDC sections not satisfied; otherwise, the Findings are relied upon and included in the incorporation: Finding 13 on Page 10, Finding 14 on Page 11, Finding 17 on Page 12, Finding 18 on Page 12, Finding 24 on Pages 14 and 15, Finding 25 on Page 15, Finding 26 on Page 16, Finding 28 on Page 16, Finding 29 on Page 17, Finding 30 on Page 17, Finding 31 on Page 18, Finding 32 on Page 18, Finding 33 on Page 19, Finding 35 on Page 19, Finding 36 on Pages 19 and 20, Finding 39 on Page 20, Finding 55 on Page 27, Finding 56 on Page 28, Finding 61 on Pages 30 and 31 and Finding 63 on Page 31.
- C.** Finding 44 on Pages 23 and 24 of the Planning Commission Staff Report is replaced with Finding 44 on Page 5 of the City Council Staff Report.

The incorporated Planning Commission Staff Report and City Council Staff Report are collectively referred to as the “Incorporated Findings.”

If there is a conflict between these Findings and the Incorporated Findings, these Findings shall control.

D. Findings on the Extension of Landis Street.

The Planning Commission approved the Applicant’s plan not showing the extension of Landis Street to Cornwall Street but instead terminating with a bollard design (Subdivision Application Page 4, “Willow Ridge Tentative Plan”; SUB-20-01, packet Page 54). The City Council affirms the Planning Commission’s decision on this issue and finds that the West Linn Community Development Code (the “CDC”) cannot require the extension of Landis Street because CDC 85.200.A.1, 85.200.A.20, 48.025.C and 48.025.C.I are subjective and may not be applied to this residential application under ORS 197.307(4). Further, the City Council finds that the West Linn Transportation System Plan (the “TSP”) may not be applied to this limited land use application because the provisions relied upon in the Staff Report to require the Landis Street extension are not specifically incorporated as is required by ORS 197.195(1) and are also not clear and objective.

E. Findings on issues concerning the geotechnical report and stormwater issues.

In addition to the Staff Report, the City Council also adopts these Findings. The City Council also finds that the Application satisfies the relevant approval standards in CDC 85.200.E.5, E.6 and F and 92.010.E based on the January 5, 2021 GRI Report.

The City Council has considered all of the oral and written testimony of the Appellant, Mr. House and others on these issues and finds that the evidence supporting the conclusion that the relevant approval standards are satisfied is believable and substantial. The City Council appreciated the neighborhood’s testimony, particularly that of Mr. House, but concludes that a review of the substantial evidence in the whole record supports its decision on this point, including the Applicant’s geotechnical reports and its oral and written testimony on the geotechnical and stormwater issues that any identified geotechnical hazards can be mitigated with the recommended actions in the GRI Report and the Applicant’s reports. Further, the same is true for the stormwater issues and this conclusion is supported by the GRI Report, the Applicant’s geotechnical reports and the testimony of Mr. Bruce Goldson.

4. Conclusion.

For the reasons contained herein, the City Council hereby rejects the appeal, affirms the Planning Commission decision and approves the Application based on the Incorporated Findings and subject to thirteen conditions of approval.

1. Site Plan. With the exception of modifications required by these conditions, the final plat shall conform to the submitted and approved plans.

2. Engineering Standards. All public improvements and facilities including street improvements, utilities, grading, onsite storm water design, driveway placement and construction, pavement mitigation, street lighting, street trees, easements, and easement locations are subject to the City Engineer's review, modification, and approval per the City adopted Public Works standards. All improvements must be designed, constructed, and completed prior to final plat approval. The Director of Public Works may allow a waiver of improvements as allowed by Code.
3. Public Utilities. The applicant shall upgrade the water main in Cornwall Street to serve this proposed subdivision. The applicant shall extend the sanitary sewer mains to the north property lines in Landis Street and the unimproved Cornwall right-of-way to allow for future connection. All utilities shall be located within the public right-of-way or within recorded utility easements along property lines, as approved by the City Engineer.
4. Tree Protection. The applicant shall coordinate with the City's Arborist to obtain any necessary tree permits for the significant trees proposed to be removed. The applicant must also get approval from the City's Arborist that the tree protection is correctly in place. Mitigation of removed trees due to right-of-way improvements and grading shall be approved by the City Arborist prior to approval of the final plat.
5. Public Utility Easement. The applicant shall record, on the face of the plat, an eight-foot wide Public Utility Easement per Engineering Standards on all street frontages.
6. Pedestrian Trail. A pedestrian trail shall be constructed in the Cornwall Street right-of-way south of the shared drive and Cornwall Street intersection. The trail shall connect with the existing pedestrian trail to the south.
7. Stormwater Analysis. The developer shall submit a final stormwater report with the subdivision construction drawings to be reviewed and approved by the City Engineer prior to issuance of a Public Works public improvement permit, per the *City of West Linn Public Works Construction Standards*.
8. Fee in lieu. The applicant shall initiate vacation of the unimproved right-of-way along Cornwall or submit an application for a fee in lieu for the cost to actually construct the improvements to the Public Works/Engineering Department and get approval by the City Engineer prior to approval of the Public Works public improvement permit.
9. Building Sites. All building sites exceeding 25% slopes (Proposed Lots 3, 4, 5 & 6) shall require geotechnical conformation stating the proposed lots are buildable prior to the final plat approval. Additional analysis at the time of a building permit application as it relates to Type I and Type II lands may be required by the City's Building Official.
10. Restricted Access. The access plan submitted by the applicant showing a hammerhead design and 25' shared access for Lots 5 and 6 and emergency vehicle easement that does not connect through to Cornwall Street is approved. At the end of the shared access and

emergency vehicle easement, applicant shall install appropriately spaced locking bollards in the location where the applicant's submittal proposed a gate on the Tentative Plan. The number of bollards shall be approved by Public Works/Engineering to prohibit motorized vehicular traffic between the bollards while allowing for pedestrian and bicycle access.

11. Shared Access Maintenance. The applicant shall prepare and record covenants, conditions and restrictions (CCRs) that establish responsibility for maintenance of the private shared accessway and emergency vehicle easement, as well as the bollards, is that of the property owners of lots 5 and 6. The applicant shall also record a pedestrian/bicycle public access easement over the private shared accessway/emergency accessway from Landis Street to Cornwall Street prior to the final plat approval.
12. Warranty Bond. The Applicant shall provide a warranty bond for public stormwater improvements of up to four years, or as long as is reasonably possible.
13. Recorded CC&Rs. The engineered solutions for the stormwater control system shall be included in the recorded conditions, covenants and restrictions (the "CC&Rs") and submitted to the City with the recorded subdivision plat and the City shall recognize its responsibility to the community to enforce the provisions of the CC&Rs regarding stormwater.

V. Order

The Council concludes that AP-20-05 is denied. The Council upholds the Planning Commission's approval of SUB-20-01 based on the entire Record, Findings of Fact, and Findings above.



January 14, 2021

JULES WALTERS, MAYOR
WEST LINN CITY COUNCIL

DATE

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

Mailed this 14 day of January, 2021.

Therefore, this decision becomes effective 21 days from the date of approval at 5 p.m.,
February 4, 2021.