

**WEST LINN CITY COUNCIL**  
**FINAL DECISION AND ORDER**  
**AP-23-03**

**IN THE MATTER OF AN APPEAL OF THE PLANNING COMMISSIONS DENIAL OF A CLASS II VARIANCE TO ALLOW MORE THAN 4 LOTS (6 PROPOSED) TO BE SERVED FROM A PRIVATE DRIVEWAY ON MARYLHURST DRIVE, APPROXIMATELY MIDBLOCK BETWEEN UPPER AND LOWER MIDHILL CIRCLE (VAR-23-01).**

**I. Overview**

The applicant (Tracy & Derek Peterson) applied for a Class II Variance on March 21, 2023. The application was deemed complete on April 20, 2023, and denied by the Planning Commission on May 17, 2023.

The initial evidentiary hearing commenced with a staff report presented by John Floyd, Associate Planner, with a recommendation of approval with four conditions. Hillary Harris, Consultant with HHPR presented on the applicant's behalf. Written testimony was submitted by Arnold Sackett, Elizabeth Apen, Christine Blanche, and Richard Yep. Oral testimony was provided at the hearing by Michael Tomaszek, Arnold Sackett, and Shaun Harbour. Primary concerns raised during testimony included:

- Number of homes
- Parking
- Hazard Trees
- Traffic safety

After closing of the public hearing, the Planning Commission deliberated and discussed concerns regarding the adequacy of the proposed design and the lack of specific information, which made approval of the proposal difficult. Specific comments included the following:

- Commissioner Mathews expressed concern regarding the adequacy of a 14-foot-wide access drive given the number of potential homes.
- Commissioner Walvatne expressed concern that there was missing information that would be useful to the Planning Commission, specifically whether middle-housing was being proposed on the existing lots, and noting that the Planning Commission would not have the opportunity to review middle-housing after the fact.
- Commissioner Watton expressed uncertainties regarding the exact meaning of TVF&R comments and conditions on the Service Provider Permit, and how the future homes would relate to existing homes as a result of the access configuration.

- Commissioner Metlen expressed concern that there was insufficient information regarding potential alternatives to the proposed access configuration, and a lack of sufficient information to meet approval criterion 75.020.B.1.a that requires the proposal be the “minimum variance necessary to make reasonable use of the property.”

A motion was made by Commissioner Mathews to deny the application, which was then withdrawn after staff intervened in deliberations to remind the Planning Commission that the city had until August 30th to make a final decision under the 120 day requirement, and could therefore continue the hearing to allow the applicant and staff time to research particular questions and provide additional information.

Immediately after the withdrawal of the initial motion, Commissioner Walvatne stated unprompted staff comments were inappropriate and made a motion to deny VAR-23-01 as the application had not demonstrated compliance CDC Chapter 48.030 regarding access widths, and CDC Chapter 75.020.B.1(a) that requires that the variance is the minimum necessary to make reasonable use of the property. Commissioner Mathews seconded the motion. The motion passed four in favor (Mathews, Metlen, Walvatne, Watton) and one opposed (Carr).

The Planning Commission denial of VAR-23-01 was appealed on June 14, 2023 by the applicant, pursuant to CDC 99.250. The applicant met the application requirements by completing an application form, providing the requisite fee, and referencing the findings of the Final Order and Decision. As the appellant is both the applicant for VAR-23-01 and owner of the project site, the appellant has standing.

The City Council finds that the grounds for the appeal specifically address and respond to the Planning Commission’s findings by providing additional information and findings in support of the variance request. This includes additional plan sheets that illustrate the slopes on the site, the potential locations of future driveways if the variance is not approved, and written justifications as to why the variable width vehicle access to the proposed houses meets city and TVF&R standards.

The appeal hearing was held by the City Council on July 10, 2023. Written testimony was submitted prior to the comment deadline of noon on July 10 (Arnold Sacket, and Susan & Mike Sandmann). The meeting commenced with the legal procedures read by Mayor Bialostosky and the City Attorney, Ed Trompke. No party challenged the impartiality of Council Members.

After the legal preliminaries, Associate Planner John Floyd made the staff presentation. This was followed by oral testimony from the Applicant and then public testimony. Applicant discussed the feasibility of a turnaround in one of the first lots served by the driveway that could accommodate trucks up to the size of a garbage truck, and locating the garbage cans in an enclosure at the turnaround, near Marylhurst Drive, and indicated that this was both feasible and an acceptable solution to traffic safety concerns raised by neighbors. In addition, the topography demonstrated that if this variance is denied, each driveway for four of the five

lots abutting upper Midhill Circle would require a separate variance (and the fifth might be too close to the intersection) resulting in five possible variances instead of the one applied for, demonstrating the necessity of this variance. Applicant also discussed widening the driveway to exceed 14 feet as being feasible, but probably not to a full twenty feet.

Six members of the public commented on the application, with one generally in support (Alice Richmond) and five expressing general opposition to the project and requesting Council deny the appeal on the grounds of tree protection, too many houses in this existing neighborhood, too much traffic added to Midhill Circle, headlights from cars exiting the proposed driveway shining into existing house windows, the speed of traffic on Marlyhurst Drive, and lack of on-street parking that may be necessary for these houses, because the shared driveway is too narrow. (Richard P. Burke, Tom Tomaszek, Arnold Sackett, Elizabeth Apen, and Mike Sandmann). The Applicant then had an opportunity for rebuttal, followed by a response by staff.

Council passed a motion of continuance that established:

1. The public hearing is continued to a date certain of July 17, 2023, at 6:00pm.
2. The continuance was to allow the applicant sufficient time to prepare an exhibit that demonstrates applicant's testimony about the feasibility of a vehicle turnaround.
3. The record was left open for the submission of written testimony.

Written testimony was submitted by the Applicant and the public within the established deadline. Within the Applicant's additional materials submitted on July 17, 2023, was a revised plan showing the inclusion of three changes to the design that had been discussed previously: inclusion of a turnaround of sufficient size to accommodate two types of delivery vehicles and a garbage truck, widening of the rear portion of the driveway from 14 to 18 feet in width, and inclusion of a dedicated space for waste receptacles. Four members of the public submitted additional written testimony (Shannen Knight, Elizabeth Apen, Susana and Mike Sandmann, and Tom Tomaszek). The public comments focused on the number of new houses, the tree canopy, disturbance of a settled neighborhood, parking in the right of way on narrow streets, car headlights shining into house windows, and traffic safety at Marylhurst Drive, where speed and volume of traffic are concerning. All written items above were provided to Council prior to the hearing and entered into the record.

Council held the continued appeal hearing on July 17, 2023. The meeting commenced with the legal procedures read by Mayor Bialostosky and the City Attorney, Ed Trompke. As part of the legal procedures, there is an opportunity for anyone to challenge the impartiality of any member of the City Council or any ex parte contacts that took place after the initial hearing of June 6, 2023. Council members were asked whether they had any ex parte contacts to declare since the initial hearing. Mayor Bialostosky disclosed two site visits, one with Associate Planner John Floyd and one with Mary Baumgardner. Council President Mary Baumgardner also disclosed a site visit with Mayor Bialostosky.

Associate Planner presented an overview of the review process and the new information submitted since the last hearing on July 10, 2023. This was followed by oral testimony from the Applicant and then public testimony from Elizabeth Apen, Tom Tomaszek, and Time Manes. The Applicant presented final oral rebuttal. The public hearing was closed, and deliberation proceeded.

During deliberations, council members noted that they had considered all testimony, and determined that statewide housing laws obligate the city to accommodate housing through variances where necessary to avoid a regulatory taking and achieve statewide housing goals. Council members also noted that the site could not be developed without at least one variance, and the proposed design reduced the number of variances necessary, and would likely result in greater tree preservation along Midhill Circle. Council members also noted that while they shared the neighborhood's concerns regarding existing traffic conditions in the area, to require the applicant to solve this through off-site improvements would be beyond the scope of what the city could require.

Councilor Baumgardner made a motion to direct staff to return with findings of approval, subject to the following conditions:

1. To require the driveway be sited to avoid impacts to neighboring windows;
2. To protect trees on site as much as possible consistent with the tree code;
3. To include the truck turnaround as proposed by the applicant at both hearings;
4. Adopt these conditions as amended and bring back findings on August 7, 2023

Concurrent with the motion, Council directed city staff to work with Applicant's staff on potential traffic calming and safety options in the project area in parallel with the review and construction of the project, but not make it the applicant's responsibility and not a condition of this decision.

Councilor Groner seconded the motion. The motion passed with four votes in favor, and none opposed.

## **II. The Record**

The record was finalized with the receipt of written and oral testimony at the continued public hearing on July 17, 2023. The record includes the entire file for VAR-23-02 and AP-23-03.

## **III. 120-Day Period**

This application became complete on April 18, 2023. The 120-day maximum application-processing period ends on August 16, 2023. The City Council final decision was issued within the extended 120-day period.

## **IV. Scope of Review**

The Appellant and Applicant agreed that the scope of the City Council hearings was de novo.

## **V. Findings of Fact**

- 1) The Overview set forth above is true and correct.
- 2) The Applicant/Appellant is Tracy & Derek Peterson.
- 3) The Council finds that it has received all information necessary to make a decision based on the agenda reports, appeal application, the Applicant/Appellant's oral argument, oral argument by the public, and evidence in the whole record.

### **City Council Findings of Fact Approving the Application and Rejecting the Appeal**

City Council hereby adopts the following Findings supporting approval of the Application and Appeal based on the Incorporated Findings and the Application's Substantial Evidence.

- A. The City Council incorporates the Staff Report to the City Council (the "City Council Staff Report") prepared in advance of the July 10 appeal hearing, and the Planning Department Power Point presentation (the "Power Point") presented at the July 10, 2023, appeal hearing.
- B. The City Council incorporates the staff presentation to the Planning Commission for the May 17, 2023 hearing.
- C. The City Council incorporates the Applicant submittals dated April 13, 2023; the applicants written appeal of June 14, 2023; the applicants oral arguments at the July 10, 2023 hearing; the applicant's additional information and revised plans dated July 17, 2023, and the Applicant's Final Oral Argument at the July 17, 2023 continued hearing, as supplemental findings of approval.
- D. The above referenced documents are referred to in these supplemental findings as "Incorporated Findings".

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

### **Supplemental Findings in Response to the Substantive Appeal Issues**

#### **1. CDC 48.030 – Minimum Access requirements for residential uses.**

The Planning Commission and some objectors found the applicant did not meet its burden of proof to show compliance with minimum driveway width requirements of 48.030.B(2). Specifically, the Planning Commission interpreted the CDC to require the full 20 feet of width (between 14 feet and 20 feet permitted). The Council disagrees with the Planning Commission interpretation, and interprets this code to mean that a driveway must be a minimum of 14 feet wide. The Council finds the applicant's testimony of July 10, 2023, and revised civil engineering plans of July 17, 2023 demonstrate sufficient width to provide for

two-way vehicular traffic on the narrowest portion of the accessway, and a vehicle turnaround of sufficient size to allow delivery vehicles and a garbage truck to avoid having to back onto Marylhurst Drive. Furthermore, the applicant has revised the design to include a waste receptacle area to avoid blocking vehicle access on waste collection days. The Council finds that the applicant's civil engineer is a licensed expert, and that the project opponent's have not provide contrary expert testimony. Council also notes the TVF&R comments on the application and finds those comments are substantial expert evidence that the driveway is adequate for fire and life safety purposes. As revised, Council finds the standards of CDC 48.030 to be met.

**2. CDC 75.020.B.1(a) – Minimum Variance necessary to make reasonable use of the property**

The Planning Commission and some objectors found the applicant did not meet its burden of proof to demonstrate that all six lots required access from one driveway, and that no evidence had been provided that the four lots exclusively fronting Midhill Circle could not reasonably take access from the street. In response to this finding, the applicant provided detailed topographic information and a cross-section documenting the slope along the Midhill frontages to be approximately 28% at the steepest point, well in excess of the maximum permitted driveway slope of 15%, and that there was insufficient frontage on Marylhurst Drive to provide access to comply with spacing standards for multiple driveways (Sheets EX-1 through EX-4, dated 03/15/23). Council finds the revised plans are expert testimony and demonstrate the variance is the minimum necessary, as it would result in only one variance for access, rather than multiple variances for access.

**3. Number of Homes**

Some parties of record objected to the number of homes the proposed private accessway would potentially serve, including the potential for middle housing. Council finds that the project site contains six lawfully established nonconforming lots of record zoned Residential R-10, and that the city is obligated to grant minor adjustments to permit the lots to be developed for housing consistent with the requirements of the West Linn Community Development Code, HB 2001, and ORS 197.761.

**4. Tree Removal**

Some objectors opposed the project over the concern for tree removal. Council finds approval of the variance results in more tree preservation along the frontage of Midhill Circle because only one driveway is needed instead of six, and a condition of approval has been added to ensure those trees are protected during development. Tree removal and preservation for the remainder of the site will proceed consistent with the city's municipal tree ordinance.

**5. Traffic Impacts**

Some objectors opposed the project due to safety issues associated with cars, delivery vehicles, and garbage cans potentially having to back onto the street and/or block the private accessway. Council notes the applicant revised the plans to provide a truck turnaround to address this concern, and finds the turnaround is feasible and adequate.

Objectors also noted that existing traffic on Marylhurst occurs at high speed and is already of concern to residents, and development of the lots will exacerbate the issue. Council finds the revised civil engineering plans were prepared by a licensed expert to adequately address delivery and access issues as described in supplemental finding 1. Council finds that access to the six lots is only available through Marylhurst Drive, as the looped nature of Midhill Circle requires all people going to and from the site to transit along Marylhurst Drive regardless of the mode of travel, and consolidation of access onto a single driveway constructed in compliance with the Public Works Design Standards to be the safest option. Council notes the objectors have not presented expert testimony to contradict the applicant's civil engineer. Council has also provided city staff to study options for traffic calming in the area in the near term, to be constructed at city expense.

## **VI. Conclusion.**

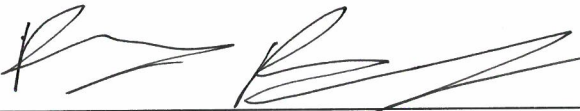
For the reasons contained herein, the City Council hereby approves the appeal, reverses the Planning Commission decision, and approves the Application with the following conditions of approval:

- 1. Site Plan, Elevations, and Narrative. With the exception of modifications required by these conditions, the project shall substantially conform to TVF&R Service Provider Permit 2023-0034 and all Tentative Plan Sheets, inclusive of the revised access widths and turnaround and waste refuse storage area submitted on July 17, 2023 in Sheets EX-1 through EX-4.**
- 2. Engineering Standards. All public improvements and facilities associated with the approved site design, including but not limited to street improvements, driveway approaches, curb cuts, utilities, grading, onsite and offsite stormwater, street lighting, easements, easement locations, and connections for future extension of utilities are subject to conformance with the City Municipal Code and Community Development Code. The City may partner with the applicant to fund additional improvements as part of the project.**
- 3. Demolition and Construction. Prior to issuance of building permits on the affected lots, the applicant shall obtain a demolition permit and receive final demolition inspection for the existing home on the site.**
- 4. Easement. Prior to the issuance of building permits, the applicant shall record a private access and utility easement for the shared access drive. A draft of the easement shall be presented to the City Engineering and Planning Divisions for review and approval prior to recordation.**

5. **Improvements.** Prior to final inspection and issuance of a certificate of occupancy for a new dwelling unit on the affected lots, all proposed private and public improvements shall be completed and accepted by the city.
  
6. **Tree Protection.** Prior to issuance of building permits, the applicant shall erect tree protection fencing around all trees identified for preservation on Sheet C4.0, dated February 2, 2023. Tree protection fencing shall be included in all construction plan documents, shall remain in place for the duration of development activity on site, and shall comply with the protection standards of the West Linn Tree Technical Manual.
  
7. **Headlights and Driveway Apron Design.** Final slope and design of the driveway entrance onto Marylhurst drive shall take into consideration the reduction of headlight impacts to existing residential structures on the north side of the street.

**VII. Order**

The Council concludes that AP-23-03 is approved. The Council reverses the Planning Commission's denial of VAR-23-01 based upon consideration of the entire Record, Findings of Fact, and Findings above.

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RORY BIALOSTOSKY, 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 9 day of August, 2023.

Therefore, this decision becomes effective at 5 p.m., August 30, 2023.