

**WEST LINN CITY COUNCIL
FINAL DECISION AND ORDER
ZC-14-02**

**IN THE MATTER OF REMOVAL FROM THE
HISTORIC DISTRICT OVERLAY ZONE**

I. Background

On June 11, 1980, the West Linn City Council adopted Ordinance 1048, which included a provision that designated the Old Town Area of Willamette as the Willamette Historic District. The written description of the boundaries includes 1344 14th Street (“Property”). In 1983 the Comprehensive Plan was adopted by Ordinance 1128, and the Historic District was adopted as part of the Comprehensive Plan. The minutes from the hearings for the Comprehensive Plan adoption do not include any objections from any property owners in the proposed Historic District. Amendments to the Historic District were also made in 1985 and 1986, but throughout all of these amendments the Property remained in the Historic District. None of the records for any of these amendments include objections from property owners in the Historic District to the location of the District’s boundary.

In November 2010, the City sent a letter to the applicant welcoming them to the Willamette Historic District Overlay Zone (“Historic District”) and notifying them that alterations and remodels required approval by the City. Prior to the adoption of an ordinance modifying the historic district regulations in July 2013, the City mailed multiple postcards and a measure 56 notice to each property owner in the Historic District, including the applicant. No objection on the record was made to the inclusion of the applicant’s property in the Historic District during the adoption of Ordinance 1614 in 2013. In September 2013, a citizen called the City concerned about construction taking place at the Property in the Willamette Historic District Overlay Zone. Staff visited the property and notified the owner that work on the exterior of the property required historic district review permits before moving forward. Staff met with the owner in October 2013 at a Pre-application Conference.

Staff contacted the owner about completing the application, but it was not submitted that fall. In November 2013, the owner sent a letter demanding removal of the property from the Historic District citing ORS 197.772(3). Staff responded and sent a letter explaining the process for removal under the Community Development Code.

In May 2014, staff learned that the owner continued work on the property and completed the modifications without submitting an application or receiving approval from the Historic Review Board (“HRB”). In August 2014, the Applicant completed applications for: 1) a request to remove the historic resource designation and remove the property from the Historic District,

and 2) a design review application for a porch addition, rear dormer addition, window replacement, and garage replacement.

II. Procedural History

On October 21, 2014, the HRB denied the Applicant's request for removal from the Historic District and approved the modifications to the rear dormer subject to conditions of approval. The Applicant appealed the final HRB decision denying the design review application for the rear dormer addition and the garage replacement. In the appeal application the Applicant asked the application to be sent back to the HRB. On April 20, 2015, the applicant's attorney, Christopher Koback, submitted a letter requesting a remand of both the design review application and the zone change application to the HRB. Mr. Koback's letter stated that a remand would allow the HRB to address ORS 197.772(3). On May 11, 2015, the Council remanded AP-14-02 and DR-14-02 to the Board at the request of the Applicant, Lonny and Christine Webb, through their attorney, Christopher Koback.

At the Board's meeting on June 9, 2015, the Board held a public hearing on the Applicant's request to be removed from the Historic District Overlay Zone and the appeal of the condition of approval for the rear dormer. The hearing on the zone change recommendation was closed, and a motion was made to recommend denial of the Applicant's request to be removed from the Historic District Overlay Zone under both the state statute and the Community Development Code ("CDC"); the motion passed unanimously.

The City Council held a hearing on the zone change and removal from the Historic District Overlay Zone on July 13, 2015. The approval criteria for a zone change and removal from the Historic District Overlay Zone are found in CDC Chapter 25, Overlay Zones - Historic District; Chapter 105, Amendments to the Code and Map; and ORS 197.772(3). The hearing was conducted pursuant to the provisions of Chapter 99.

Mayor Russell Axelrod participated by phone and disclosed two ex parte contacts that occurred with the Applicant. The other three councilors all disclosed an ex parte email that was sent to them from the Mayor regarding his first ex parte conversation with the Applicant. Councilor Jenni Tan raised some concern about the Mayor's participation due to prejudgment and bias under CDC 99.180. The email the Council received from Russell Axelrod dated November 30, 2014, who was councilor elect at the time, stated that the work on the applicant's home has "met all code requirements," that the applicant's home is "incorrectly being considered historic by planning staff," and mentioned that the case should be settled before it resulted in expense and litigation. Council President Thomas Frank and Councilor Tan both expressed concern that the email statements suggested the Mayor had prejudged the application. A vote for disqualification of the Mayor was taken, and the Mayor was disqualified by a 2-1 vote. Therefore, the Mayor did not participate in the hearing.

The hearing commenced with a staff report presented by John Boyd, Planning Manager, and Christopher Koback presented for the Applicant. There was also public testimony from Alice

Richmond. The hearing on the zone change application was closed and a motion was made by Councilor Brenda Perry and seconded by Councilor Jenni Tan to tentatively approve the application for the zone change and removal from the Historic District Overlay Zone. The motion passed 2-1. The hearing was continued to July 20, 2015, and staff was directed to draft findings in support of the Council's decision for its July 20, 2015, hearing.

III. The Record

The record was finalized at the July 13, 2015, hearing. The record includes the entire file from ZC 14-02 and DR-14-02, including without limitation the supplemental records entered on May 18, 2015, and June 9, 2015.

IV. Burden of Proof

The general rule is that the applicant is required to carry the burden of meeting each and every criterion for approval of the applicant's land use application. Thus, an applicant is required to demonstrate that the application complies with the applicable approval standards, and a local government is not required to approve a noncomplying development proposal.¹

The Council finds that the City has the burden to prove that notice of the hearings to determine the boundary for the Historic District Overlay Zone was given to individual property owners in the proposed Historic District. The City must demonstrate that there is substantial evidence in the record to show that notice was given to individual property owners prior to the formation of the Historic District Overlay Zone.

V. Notice of Formation of the Historic District Overlay Zone

The record does not include the notices that were in the newspaper in 1983 or posted to notify citizens that legislative changes to the Comprehensive Plan were being considered by the Council, such as the Historic District boundary. There is evidence in the record that generalized notice was given because the minutes for the hearings that took place on October 19, 1983, Joint Planning Commission and City Council Public Hearing; November 2, 1983, City Council Final Public Hearing; November 9, 1983, Regular Meeting; November 21, 1983, Regular Meeting; November 28, 1983, Continued Meeting; indicate that citizens attended and participated. For example, four citizens made requests for zone changes at the October 19 meeting.²

In addition, the Minutes for the November 2, 1983, hearing state that Mayor McIntyre "pointed out that public notice has been made regularly regarding workshops being held on the Comprehensive Plan."³ That particular meeting was so well attended that the "Council Chambers were filled past capacity and people were out in the hall, down the stairs and out in

¹ *Adler v. City of Portland*, 25 Or LUBA 546 (1995).

² City Council Meetings 1983 Minutes, October 20, 1983, Joint P/C and C/C Public Hearing, 264-265.

³ City Council Meetings 1983 Minutes, November 2, 1983, City Council Final Public Hearing.

the parking lot waiting to get in...Madson pointed out that there were probably one hundred persons out in the hallway that couldn't hear the testimony." 265(A)-(B). The meeting had to be moved to the high school due to fire code violations. During the November 2, 1983, hearing, the City Council heard two other requests for zone changes from individuals and nine individuals spoke about the mobile home zone; however, there were no requests in the minutes to change the Historic District boundaries in 1983. 265(B)-(D).

There are generalized statements in the record stating that the hearing had been continued for other matters so that staff could "notify citizens that live in the area of site "D" of the possible zone change," but there are no specific references to providing individualized notice to property owners in the proposed historic district.⁴ There are some handwritten notes that appear to correspond to one of the City Council hearings for the 1983 Comprehensive Plan adoption, but the minutes are not dated. Those meeting notes indicate that City Staff, Mike Butts, stated that a survey was not completed of the property owners in the proposed Historic District. These same notes mention the Historic District Designation and show that at least one person, DeAnn Troutman, spoke in favor of the historic area. However, one individual speaking at the hearing does not constitute substantial evidence that the individuals in the Historic District received notice of the potential designation of their properties.

Council finds that the only notices for Historic District Boundary changes are the posted and published notices associated with the 1986 amendments to the Comprehensive Plan and the associated affidavits of publication.⁵ These notices are generalized notices for legislative action, and there is no affidavit of posting. There is no list of property owners or affidavit of notice and mailing from City staff to verify who, if anyone in the Historic District, notice of these hearings was mailed to, which would be required today under Measure 56 and public records retentions laws. The record does not contain clear evidence of notice; show that the actual owner of the property was aware of the proceedings; or that anyone in the proposed Historic District refused or accepted the designation.

The Council finds that there is not substantial evidence in the record to conclude that the property owners in the Historic District received individual notice during the 1983 Comprehensive Plan adoption and designation of the Historic District.

VI. Findings of Fact

- 1) The Background and Procedural History set forth above are true and correct.
- 2) The Applicants are Lonny and Christine Webb, and they were represented by their attorney, Christopher Koback, on the zone change recommendation.
- 3) The Council finds that it has received all information necessary to make a decision based on the Staff Report and attached findings; public comment, if any; and the evidence in the whole record.

⁴ City Council Meetings 1983 Minutes, November 28, 1983, Continued Meeting, 271.

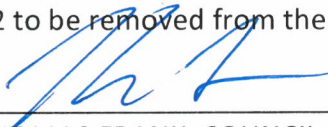
⁵ MISC-86-06 Amendment Comprehensive Plan and Development Code Changes, 22-24, 44-45.

VII. Findings and Determinations


The Council concludes that it was not necessary for the Applicant to demonstrate compliance with the approval criteria for removal from the Historic District in CDC Chapter 25 or ORS 197.772 because the City did not meet its burden of proof to demonstrate that specific notice was given to the property owner at the time of designation in 1983. Therefore, the Council finds that it is not required to make findings regarding the CDC Chapter 25 criteria or ORS 197.772.

VIII. Order

Based on the Burden of proof, the Findings of Fact, and the lack of substantial evidence of notice in the whole record, the City Council approves the Applicant's request pursuant to ZC-14-02 to be removed from the Historic District Overlay Zone.



THOMAS FRANK, COUNCIL PRESIDENT
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 21st day of July, 2015.

Therefore, this decision becomes effective at 5 p.m., August 11, 2015.