

**APPEAL STATEMENT**  
**RE DECISION APPROVING AULD/JOHNSTON**  
**PARTITION, TENTATIVE PLAN REQUEST**

FILE PT 06-43

September 25, 2006

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The following statement by representatives of the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, lists the issues on appeal and explains how the Planning Director's decision is inconsistent with the criteria applicable to the above captioned application for approval of a partition tentative plan.

The JWN neighborhood association encompasses the subject property, and the membership voted unanimously at the September 12, 2006 General Meeting to direct the JWN Co-chairs to appeal this decision.

On August 11, 2006 the JWN co-chairs, on behalf of the association, and pursuant to Executive Board direction, filed testimony in opposition of the above captioned application (hereinafter referred to as "Opposition Testimony").

1. The Planning Director erred in not properly following the required process specified in EC 9.7010 and 9.7015 (Application Filing and Completeness Review), EC 9.7045(1) (Quasi-judicial decision Type II), EC 9.7200 through 9.7215 (Type II Application Procedures), and EC 9.8200 through 9.8215 (Partitions, Tentative Plan).

Specifically, the Planning Director erred by allowing applicants to submit significant revisions on August 9, 2006, including new evidence and entirely new sections dealing with approval criteria, for an application that Planning Division staff had deemed "complete" on July 26, 2006 and for which public notice of the comment period had been issued on July 28, 2006.

The Planning Director compounded his error by failing to provide any public notice of the new application material and failing to extend the public comment period to allow the required 14 days for the public to review, and submit comments on, "all evidence relied upon by the applicant," as required in EC 9.7210(2)(d) Notice of Application.

Applicants submitted two letters to the Planning Division on August 9, 2006, only two days before the deadline for public comment closed, significantly revising their application and submitting new evidence in support of their claim that the requested partition complies with applicable approval criteria in EC 9.8215(1)(a), (b), and (k). These letters, dated August 2nd and August 8th replaced entire sections of the original application and provided new arguments to address deficiencies in the original application.

As part of the process for Type II applications, EC 9.7210 clearly provides for adequate public notice of a complete application and 14 days for the public to submit comments on all material facts in the application. In light of the eleventh hour submittal of substantial additions and revisions to the application, the Planning Director was required to either reject the additional material and base his decision on the evidence in the record or require the applicants to resubmit their application and re-start the application process with proper public notification to allow the public a full 14 day period to review the entire application.

The Planning Director cannot allow applicants to play “hide-the-ball” with evidence applicants claim establishes how the application meets approval criteria.

2. The Planning Director erred in rejecting testimony from Mr. Paul T. Conte, a JWN co-chair, that was submitted in a timely manner after applicants submitted additional evidence at the end of the comment period.

When Mr. Conte belatedly learned of the last minute submittal of substantial revisions to the application, as noted in item 1, above, Mr. Conte requested in writing that the Planning Director consider additional, timely testimony in response to applicants’ amended and supplemented application. Without explanation, the Planning Director denied Mr. Conte’s request, an error that resulted in substantial prejudice to Mr. Conte and the Jefferson Westside Neighbors association that he represents.

3. The Planning Director erred in failing to base his decision on evidence properly entered in the record, as required by 9.7085 Quasi-Judicial Hearings - Burden of Proof. (Reference Opposition Testimony, section 3.)

As established in item 1, above, the Planning Director improperly allowed applicants to place additional evidence in the record, and the Planning Director erred in relying in part on this inadmissible evidence for his decisions on criteria in 9.8215(1)(a), (b), and (k).

The Planning Director also not only ignored, but blatantly misstated, a central fact relevant to the application when he claimed, on page 9 of the “Findings and Decision,” the application materials “do not otherwise provide details that suggest the four-plex is specifically proposed.”

The applicants, in fact, specifically state: “The applicant is proposing to construct a four-plex, a permitted use in R-2, on Parcel 1.” (See page 2 of application, and reference Opposition Testimony, section 5.) The Planning Director cannot pretend this fact isn’t in the record and must consider it in making his decision.

The Planning Director also misstated the facts regarding the increase in potential development and use of the alley, as covered in item 5, below, and erred in relying in full or in part on this factual error in several of his decisions, as covered in items 7, 8, 10, 11, and 15, below.

4. The Planning Director erred by not considering the request in a constructive legal manner to establish a density and usage that is based on four units on Parcel 1, the proposed alley access lot.

As explained in item 3, above, and established thoroughly in Opposition Testimony, section 5, applicants repeatedly made clear they propose and intend to develop four units on Parcel 1.

The Planning Director erred in ignoring this fact in his decisions on EC 9.8215(1)(a), (b), (c), (k), and EC 9.8215(2).

5. The Planning Director erred repeatedly by incorrectly claiming the partition would not increase “potential” use of the alley, and then relying in full or in part on this error for several of his decisions.

The subject lot currently allows 7 units, all of which potentially could have primary or secondary access from the alley or the street. The two partitioned lots would allow a total of 8 units (5 on Parcel 1 and 3 on Parcel 2). All the units on Parcels 1 and 2 could also potentially have primary or secondary access from the alley – either while both parcels are in common ownership or by an easement

Thus, the partition would, in fact, increase the potential use of the alley by one unit. Furthermore, by applicants own admission, none of the 5 units allowed on Parcel 1 could have access from the street “now or in the future”. (Reference Opposition Testimony, section 4.) Thus, the partition would increase the number of units (from zero to 5) that must have their primary access from the alley thus requiring greater use of the alley than would be necessary with the unpartitioned lot.

Whether or not applicants intend to develop the lots created by the partition in a manner that would ultimately exploit the increased potential for alley use is immaterial, and the Planning Director must not make any such assumption. The fact is that the partition clearly does increase potential use of the alley.

The Planning Director based his decisions on several criteria, including EC 9.8215(1)(a), (b), (c), (k), and EC 9.8215(2), in full or in part on his misstatement of this point, and those decisions were consequently in error. (See items 8, 10, 11, and 15, below.)

6. The Planning Director erred by not meeting the requirement that the burden of proof fall squarely upon the applicants, as per 9.7085 Quasi-Judicial Hearings - Burden of Proof. (Reference Opposition Testimony, section 2.)

As one example, on page 7 of the “Findings and Decision,” the Planning Director “confirms that the applicant’s proposal to direct stormwater runoff towards weepholes in the curb along West 13th Avenue is acceptable” when absolutely no evidence was submitted by the applicants or provided by Public Works Department as to the amount of storm water runoff that may be generated or the capacity of the existing systems to handle it, as required by EC 9.6510 Stormwater Drainage.

Rather than place the burden of proof on the applicants, the Planning Director improperly assumed the specific requirement for adequate capacity was met, thus implicitly placing the burden of proof on parties, such as the JWN, who contended in their Opposition Testimony that the proposed development does not meet the criteria.

Faced with a reasonable argument that the applicants have not demonstrated compliance with a criterion, the Planning Director must require applicants to provide sufficient evidence to meet their burden of proof; and, if such evidence is not provided or does not meet the burden of proof, the Planning Director must deny the application.

The Planning Director erred in his decisions on the criteria EC 9.8215(1)(a), (b), (c), and (k) by not requiring applicants to meet their burden of proof in demonstrating how the application complies with these criteria. (See items 7-12 and 15, below.)

7. The Planning Director erred by failing to properly address the EC 9.8215(1)(a) requirement that the partition comply with EC 9.2750 Maximum Density requirements and related Metro Plan Policy A.9.

As established in item 5, above, partitioning the lot will, in and of itself, allow an additional dwelling unit to be developed on the site. This increase in allowable dwelling units would cause the resulting parcels to exceed the allowable maximum density of the Metro Plan Policy A.9 “Medium density” residential designation applicable to the subject parcel and essentially produce a “stealth” change in the maximum density requirement from the R-2 range to the R-3 range.

The Metro Plan “Medium density” residential (MDR) designation in Policy A.9 allows precisely: “over 14.28 units per net acre through 28.56 units per net acre.”

According to the “Findings and Decision” (page 2) the current lot is approximately 10,715 square feet and can be developed under the current R-2 zoning at a maximum of 7 dwelling units for a potential density of 28.45 dwelling units per net acre (du/na). This is below the MDR maximum allowable density of 28.56 du/na and therefore complies with the Metro Plan.

After partitioning, however, the same area will allow 8 units total for a potential density of 32.52 du/na – substantially in excess of what the MDR designation allows. Parcel 1 will allow 5 dwelling units on approximately 7,490 square feet for a density of 29.08 du/na, and Parcel 2 will allow 3 dwelling units on approximately 3,226 square feet for a density of 40.51 du/na – in both cases, the resulting parcels will exceed the maximum allowed by the MDR designation. Thus after partitioning, both the individual lots and the aggregate area will conflict with the Metro Plan designation.

The Planning Director erred in approving a partition that would produce results so clearly conflicting with the Metro Plan, particularly when EC 9.8200 specifically states the purpose of a partition, tentative plan is to “enable

development to occur consistent with applicable provisions of the Metro Plan.”

Metro Plan policy A.9 also requires local governments to “Establish density ranges ... that are consistent with the broad categories of this plan.” The Eugene City Council has complied by establishing five residential zones, each with clearly stated purposes that are *directly* tied to Metro Plan policy A.9 density categories.

It follows that any requested land use action, including a partition, must be a legal use of an appropriate zone, and must not subvert its intent, as defined in Chapter 9 of Eugene Code. EC 9.2710 identifies the R-2 zone as implementing *only* the Metro Plan “Medium density” residential designation:

**EC 9.2710 Purpose of R-2 Medium-Density Residential Zone.** The purpose of the R-2 Medium-Density Residential zone is to implement the Metro Plan by providing areas for medium-density residential use and encourage a variety of dwelling types. The R-2 zone is also intended to provide a limited range of non-residential uses to help provide services for residents and enhance the quality of the medium-density residential area.

Sections EC 9.2720 and 9.2730 just as clearly establish the R-3 and R-4 zones as Eugene’s *only* zones implementing the Metro Plan “High density” residential designation, which allows “over 28.56 units per net acre”.

The previous Hearings Official decision in the “Taylor” zone change request (Z 04-19) made clear that neither applicants nor City staff can convert the R-2 zone “to change the manner in which it implements the Metro Plan.” (See page 3, ¶ 1 in the “Taylor” Findings and Decision.)

And yet, an incontrovertible result of the proposed partition will be to allow high-density (i.e., over 28.56 du/na) development under R-2 zoning where previously only the appropriate medium density development was allowed on the subject lot. Such a “stealth” change to allow a level of development that only R-3 and R-4 zones permit circumvents the appropriate land use process required for a zone change, as well as conflicts with the Metro Plan.

8. The Planning Director erred by entirely neglecting to address extensive evidence in Opposition Testimony establishing that in 2001, City Council amended the standards dealing with alley access provisions to prohibit creation of a lot that has its only access off of an alley. (See Opposition Testimony sections 4, 6, and 7.) Consequently, the Planning Director erred in finding the application complies with EC 9.8215(1)(a).

The Planning Director’s only response to this critical issue is on page 3 of the “Findings and Decision,” where he merely “clarifies” the code’s definition of “Alley Access/Lot or Parcel” by doing nothing more than quoting the definition in EC 9.0500. Opposition Testimony, *already* quoted this definition and established the definition is not how the land use code implements Council’s prohibition against lots with access only from the alley. In fact,

section 6.B of Opposition Testimony establishes that Eugene land use code has no *direct* language that prohibits “alley access lots” or any similar term, and thus the Council’s prohibition against creation of a lot that has its only access off of an alley must be implemented through other mechanisms in the code, specifically through the combination of minimum lot frontage and width and/or street connectivity.

Beyond the Planning Director’s “clarification” of a term that is already defined in code, but that ultimately has no legal bearing on this issue, the Planning Director makes no attempt to address any of the evidence or arguments relevant to this issue that were raised in Opposition Testimony.<sup>1</sup>

9. The Planning Director erred by entirely neglecting to address Opposition Testimony establishing that Parcel 1 fails to meet criteria EC 9.8215(1)(a) because it has a minimum width less than 20 feet along the segment connecting the main portion of the lot to the street, and therefore does not comply with Council’s prohibition against creation of alley access lots and does not comply with a proper interpretation of the code’s requirements for minimum lot frontage and width. (See Opposition Testimony sections 4, 6, and 7.)

The Planning Director’s only response to this critical issue is on page 3 of the “Findings and Decision,” where he merely claims the length of a diagonal measurement that does not even connect to one side of the lot is nevertheless adequate to meet both these requirements.<sup>2</sup>

The Planning Director cannot simply ignore the evidence in Opposition Testimony establishing the interpretation he used in his decision isn’t correct, produces patently nonsensical results, and conflicts with Council’s intent when they adopted the Land Use Code Update in 2001.

10. The Planning Director erred by failing to properly address the EC 9.8215(1)(b) requirement that Parcel 1 comply with EC 9.6815(2)(b) Street Connectivity Standards.

On page 5 of the “Findings and Hearings”, the Planning Director cited Public Works’ conclusion that the fully developed street infrastructure meets all connectivity requirements. However, the requirements of EC 9.6815(2)(b) apply to Parcel 1 as a “proposed development,” regardless of the status of the surrounding streets; and, as established in Opposition Testimony, EC 9.6815(2)(b) requirements are not met by the proposal. As also established in section 8 of Opposition Testimony, EC 9.6815(2)(b) requires Parcel 1, as a “proposed development”, to be directly connected to the street, which applicants themselves assert is impossible “now and in the future.” The fact

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<sup>1</sup> On page 3, the Planning Director also cites, “as an informational item,” irrelevant code sections on multi-family development. Ironically, this “informational item” appears to have been taken from page 1 of applicants’ August 8 letter in which they attempted to provide additional evidence for their application, as described in item 1, above. Also on page 3, the Planning Director repeats the misstatement, covered in 5, above, that the partition will not increase the potential number of units using the alley for access.

<sup>2</sup> The Planning Director fails to state the length of this measurement in the findings.

that the surrounding street network is fully developed does not remove the requirement for Parcel 1 to be directly connected to the street.

In addition, the Planning Director erred altogether in failing to address the requirements EC 9.6815(2)(b) based on an erroneous conclusion that if there were no change in the theoretical number of units allowed after the partition, he was prevented from applying EC 9.6815(2)(b) to this partition. This reasoning begs the question posed by the code. The standard does not ask if more or less units will result from the proposed partition, only if the partition can be served by sufficiently connected traffic facilities within a quarter mile of the development site. (See further discussion of this point under item 11, below.)

We also note that if the hearings official determines there is no requirement that Parcel 1 be directly connected to the street, such a decision would have two significant implications in this decision:

- a) Such a determination would establish that the combined requirements for lot frontage and width minimums are the only code mechanisms that implement City Council's prohibition against creating new lots with only alley access. (See Opposition Testimony, section 6.B.)
- b) Such a determination would further establish that the partition will significantly impact alley use because no units developed on Parcel 1 will be required (or able, according to applicants' own statements) to have their primary access from the street.

11. The Planning Director erred by failing to properly address the EC 9.8215(1)(b) requirement that Parcel 1 comply with EC 9.6870 Street Width.

The Planning Director incorrectly justifies his decision by stating on page 7: "the proposed partition does not create the potential for increased alley use above what is currently allowed. Therefore, even though the alley is in substandard condition, City staff are unable to make the findings needed to require alley improvements as a condition of partition approval."

Obviously, the proposal to add a four-plex, will increase the actual usage of the alley significantly over current usage. (See items 3 and 4, above.)

The Planning Director misstates other facts in this case, as well. As established in item 5, above, the proposed partition could result in an increased usage of the alley beyond what is currently allowed because the partition would allow 8 units instead of 7 to be developed on this site; and the partition would force up to 5 units to use the alley for primary access, whereas without the partition, no units would be forced to use the alley.

The Planning Director erred altogether by failing to acknowledge that the approval criteria must be applied irrespective of potential or actual increase in usage. Approval of a partition is subject to non-waivable standards as spelled under Section 9.8215 "Approval shall be based on compliance with the following criteria:" One of the applicable criterion identified is EC 9.8215(1)(b). It requires compliance with EC 9.6800 through 9.6875. In

particular, EC 9.6870 establishes the minimum Street Width (right-of-way and paving) for streets and alleys. In this case, the minimum right of way width for the alley is 20 feet and the minimum paving width is 12 feet.

The Planning Director's decision makes an undefined future improvement of the alley a condition of approval but will allow the existing "substandard" alley to remain as the sole access for the partitioned Parcel 1. Yet, he has not identified any legal basis for avoiding the minimum width and paving standards. His statement that "the proposed partition does not create the potential for increased alley use above what is currently allowed" is legally deficient (as well as incorrect). The criterion does not contemplate such maneuvering. It is far more simple. Either the proposed partition will be served by a sufficiently wide, adequately paved alley or it will not. If not, it fails to comply with the clear and objective standards in EC 9.6870 and the partition must be denied.

The Planning Director references "consistency with constitutional requirements" on page 6 (and elsewhere) in the "Findings and Decision" without properly citing or applying the relevant rulings. While there is a constitutional requirement (established in *Dolan*) for "rough proportionality", the requirement is that the limitation or condition of development (widening and/or paving in this case) must rationally relate to, and be approximately commensurate with, the development's impact. In this case, the partition will create a densely packed lot with only alley access and such partitioning and development will clearly have a major impact on alley use.

The Planning Director appears to assume, with no supporting evidence in his "Findings and Decision," that if the underlying zoning already allows an equal or greater number of units without the partition (which we note again is not the case), inadequate alley access to the lot can remain inadequate despite the impact on alley use that will result from the partition. But the Planning Director's assumption has no basis in law; and the alley width and paving standards, which are designed to ensure safe passage, clearly apply to this partition application and would not be deemed constitutionally excessive.

The Planning Director contradicts his own reasoning (on page 8) by requiring "as a condition of approval to comply with EC 9.6750, the applicant shall show a special setback line for future right-of-way acquisition at a distance of 10 feet from the centerline of West 12th Alley. This will ensure that sufficient public right-of-way is available to allow the improvement of West 12th Alley to the standards required in EC 9.6505 Improvements – Specifications."

Why would the Planning Director impose this requirement, unless he recognized the inherent inadequacy of the current alley configuration to handle the impacts of the proposed partition and development? And if the impact of the partition on alley usage requires a setback to allow the inadequacy to be addressed, then so too must the impacts of the partition require that the applicants actually bring the alley up to the required

standards as a condition of approval. The delay of actual implementation of adequate alley width and paving to the unknown future is an inconsistent application of the law that panders to the developer and merely gives lip service to the plain purpose of the code.

12. The Planning Director erred by failing to properly address the EC 9.8215(1)(c) requirement that Parcel 1 comply with EC 9.6510 Stormwater Drainage. (Reference Opposition Testimony, section 10.) The Planning Director (and Public Works) entirely ignored the requirement to establish that the facilities into which storm water will drain have the capacity to handle the stormwater drainage that will be generated by the proposed four-plex and accompanying on-site parking. Neither applicants, nor Public Works provided any quantitative data or other evidence in the record for the Planning Director to conclude this criterion was met. (See also items 3 and 6, above.)
13. The Planning Director erred by failing to find the application did not comply with criterion EC 9.8215(2) because it creates a new nonconforming situation, as established in opposition testimony. (Reference Opposition Testimony, section 12.) The Planning Director's errors described in items 7-12, above, underlie his error in finding the application complied with EC 9.8215(2).
14. The Planning Director erred by claiming on page 9 of the "Findings and Decision" that "any potential adjustments to the proposed lot side lines necessary to ensure compliance with fire separation requirements will remain in compliance with applicable lot standards." In fact, required lot line adjustments may make the portion of the segment of Parcel 1 that connects to the street even narrower, thus exacerbating noncompliance with the minimum lot width standards, as described under items 8 and 9, above.
15. The Planning Director erred by failing to find the application did not comply with criterion EC 9.8215(1)(k) because Parcel 1 fails to comply with EC 9.9680 Westside Neighborhood Plan Policies, as established in Opposition Testimony, section 12. Specifically, Opposition Testimony established that the application failed to comply with the adopted policy in EC 9.9680(1)(a) "Prevent erosion of the neighborhood's residential character."

As established in item 1, above, the Planning Director erred in allowing applicants to submit additional evidence without providing required public notice or opportunity for comment. In their application deemed "complete" on July 26, 2006, applicants failed to provide any evidence or argument related to EC 9.9680(1)(a). However, in the additional evidence submitted August 9, 2006, applicants included over a page of new evidence and arguments addressing this policy. This material contained the statement that: "The proposal will not result in the demolition of any existing single-family home ..." as the primary evidence supporting applicants' newly introduced claim that the proposed partition and four-plex is consistent with EC 9.9680(1)(a).

The Planning Director based his decision in part on this inadmissible evidence, as can be seen in the following statement on page 10 of the "Findings and Decision":

*"staff concludes the proposed partition is configured to facilitate preservation of the existing residence and yard ...."*

The Planning Director also based his decision in part on an incorrect conclusion on page 9 that: "The four-plex referenced in written testimony is not considered a feature specifically included or authorized as part of the application, given that the application materials only reference a proposed four-plex and do not otherwise provide details that suggest the four-plex is specifically proposed or that enable evaluation of such a proposal for compliance with applicable code standards." As covered in items 3 and 4, above, the applicants' own statements contradict the Planning Director's assertion.

The Planning Director's only other basis for his decision also relies on a misstatement of the facts. On page 10, he states: "the act of dividing the subject property into two parcels does not significantly impact the nature of development that can occur on the subject site, and therefore does not pose a significant impact on neighborhood character in the context of the above criterion."

As established in item 7, above, partitioning the lot will, in and of itself, allow an additional dwelling unit to be developed on the site and to take access from the alley. Contrary to the Planning Director's claim, this increase in allowable dwelling units is a significant impact that cannot be summarily dismissed. Further, as established in item 7, above, the partition would also cause the entire site and both new parcels to exceed the allowable maximum density of the applicable Metro Plan "Medium density" residential (MDR) designation. As a consequence, the partitioned parcels could both be developed at high-density levels (greater than 28.56 du/na) instead of the currently allowed medium-density level, an obviously major change in the character of development that would be allowed.

Because of the aforementioned errors, the Planning Director also erred in completely ignoring the substantial amount of testimony from the neighborhood association and area residents, as well as evidence from City analysis of a portion of the "Central Residential Area" encompassing the subject lot, that establishes the specific character of the area and the specific manner in which the proposed partition and four-plex development would grossly conflict with the adopted refinement plan criteria, EC 9.9680(1)(a) "Prevent erosion of the neighborhood's residential character."

## **CONCLUSION**

As established in this statement of appeal, the Planning Director has made multiple, serious errors by failing to conduct the process according to legal requirements, by mis-stating facts, by ignoring and incorrectly interpreting evidence in the record, and by his erroneous application of the required approval criteria.

For the foregoing reasons, the approval of this partition must be reversed.

Respectfully submitted this 25th day of September, 2006.

**Jefferson Westside Neighbors**

Paul T. Conte  
**Co-chair**

Rene Kane  
**Co-chair**