

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

FILE PT 06-43

October 25, 2006

INTRODUCTION

Our firm represents Paul T. Conte, 1461 W. 10th Ave., Eugene, Oregon, and the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, in appeal of the Planning Director's decision to approve the above captioned application for a partition tentative plan. Mr. Conte is a Co-chair of the JWN; and he, along with Ms. Rene Kane, the other JWN Co-chair, are the duly elected representatives of the neighborhood association.

The JWN adamantly opposes this lot partition. The proposal manipulates the land use code to thwart City Council's intent in prohibiting alley access lots and circumvents the carefully considered local refinement plan policies that neighborhood residents established in the Westside Neighborhood Plan, and which Council subsequently adopted into Eugene Code.

The Planning Director has made multiple, serious errors by failing to conduct the process according to legal requirements, by misstating facts, by ignoring and incorrectly interpreting evidence in the record, and by his erroneous application of the required approval criteria. The following testimony focuses on portions of staff's October 16 Memorandum to the Hearings Official and incorporates by reference appellants' previously submitted Opposition Testimony and Appeal Statement. Any "Appeal Issues" discussed in the Staff Memorandum that are not specifically addressed below (including appeal items 3 and 10) are not waived. Rather, appellants rely on arguments and evidence already submitted due to the fact that many of staff's comments merely reiterate the Planning Director's findings or justifications.

The decision in this case has profound implications throughout Eugene's "traditional" neighborhoods in the urban core. If the Planning Director's decision is upheld, similar "back door" partitions with the potential for severe negative impacts will be allowed on hundreds of lots throughout the Jefferson and Westside neighborhoods, as well as hundreds more in other "traditional" Eugene neighborhoods.

This application seeks to create a new lot with "gerrymandered" boundaries, which by applicants' own admission doesn't provide street access, but which the applicant hopes will circumvent City Council's prohibition against alley access lots.

This application also seeks to exploit a "shell game" with the approval process for lot partitions and building permits whereby applicants can escape scrutiny of their

explicitly proposed four-plex development for compliance with the adopted policies of the Westside Neighborhood Plan. If the Planning Director's decision is upheld, the resulting precedent would render a vast spectrum of other local refinement plan policies as meaningless in controlling the most basic elements of neighborhood character: lot patterns and development intensity.

We urge the Hearings Official to consider how the Planning Director's Findings and Decisions would apply to other applications to divide a typical street-to-alley lot into a front lot on the street and a flag-shaped lot in the rear. As our testimony establishes, the Planning Director's approach not only erroneously interprets the code, it does so in a way that will wreak havoc with orderly and compatible development in many established neighborhoods.

ARGUMENT

I. LACK OF PUBLIC NOTICE AND OPPORTUNITY TO COMMENT ON APPLICATION SUPPLEMENT (APPEAL ITEMS 1 AND 2)

A. **The Planning Director erred by allowing Applicants to revise their application and submit new evidence and arguments after the completed application has been submitted and public comment period begun but failed to inform opponents and refused to allow them to address the new information.**

Applicants submitted three letters to the Planning Division, dated August 2, 8, and 9, 2006, seeking to revise their application and submit new evidence in support of their claim that the requested partition complies with applicable approval criteria in 9.8215(1)(a), (b), and (k). (See Attachments [A](#), [B](#), and [C](#), attached hereto and incorporated herein by reference.)

In their August 9 letter of transmittal, which included copies of the August 2 and 8 letters, applicants state:

"Please find attached two letters that supplement the applicant's written statement."

In their August 2 letter, applicants state:

"The purpose of this letter is to provide supplemental information to our written statement that clarifies the proposal regarding lot width."

Applicants therefore explicitly asserted that their August 2 and August 8 letters are "supplements" to their application, not just comments or arguments about the evidence and claims presented in their original application. Thus applicants sought to revise their application by substituting new evidence and claims for sections of their original application and by providing evidence for criteria that were not addressed in the supposedly completed original application.

i. **August 2 letter replaced evidence in original application.**

In their August 2 letter, applicants sought to revise their application with respect to criterion EC 9.8215(1)(a). Specifically, applicants supplied text that would effectively

replace the entire text of the original application, including facts and claims concerning minimum lot width requirements that they submitted under the “Minimum Width” section on page 3 of their application.

The main purpose of the letter is to replace their original approach to Parcel 2 with a similar approach as they used for Parcel 1 in an attempt to avoid the obvious inconsistency that was described in Mr. Conte’s original testimony in section 7.A (page 9).

However, applicants cannot undo the clear evidence in their original application that they were perfectly aware of the correct approach to determining whether a parcel complies with EC 9.2760. Moreover, as sections 6 and 7 of Mr. Conte’s original testimony amply prove, applicants’ approach of measuring the lot width of Parcel 1 (and now Parcel 2) along the line equidistant from the lot front and rear lines has no basis in law and seeks to circumvent Council’s prohibition against lots with only alley access.

ii. August 8 letter revises and adds evidence in the original application.

In their August 8 letter, applicants further revised and added to their application with respect to criteria EC 9.8215(1)(a), (b) and (k), again including new facts and claims. Applicants introduced a totally new basis for circumventing Council’s prohibition against lots with only alley access based on provisions of EC 9.5500. However, applicants made no reference to EC 9.5500 in their original facts or claims related to EC 9.8215(1)(a).

Applicants also introduced EC 9.5500 as justification for circumventing the alley right-of-way and paving requirements of EC 9.6870. In addition, applicants submit purported data, such as on page 3 where applicants state: “Currently, there are 9 homes that take their primary access off of the alley.” This is a concrete, contestable fact used as evidence by the applicants in support of their application, and which the public was entitled to review and comment on.

Applicants also introduced new facts and claims for compliance with EC 9.6880. In their original application, applicants failed to address compliance with EC 9.6880(1)(a) in any manner whatsoever. However, in their August 8 supplement, applicants devote an entire page to this standard. Again, they include facts that weren’t in their original application, such as “The area is currently dominated by single family homes” and “The development proposed here ... will provide an affordable high quality residential unit for the largest growth sector of the Eugene-Springfield housing market.” The applicants also cite a lengthy finding from the Metro Plan as evidence their proposed development complies with EC 9.6880(1)(a). The public was entitled to review and contest these purported facts and other evidence submitted by the applicants *before* the Planning Director rendered his decision.

B. Opponents are entitled to a reasonable opportunity to address all evidence and revisions presented in the final application.

EC 9.7000 through 9.7030 and EC 9.7200 through 9.7230 define the required process for Type II Land Use Decisions, such as apply to this request. According to these rules,

after an applicant has submitted a “completed” application, the public must be notified and has 14 days to submit comments on the evidence and claims as submitted in the application and how the submitted facts meet, or don’t meet, applicants’ burden of proof to demonstrate the application complies with the applicable approval criteria.

Likewise, under Section 9.7210(2) the City must provide public notice of the completed application and provides for the 14-day comment period. This notice must include:

- (d) A statement that copies of all evidence relied upon by applicant are available for review and can be obtained at cost.
- (e) A statement that issues that may provide the basis for an appeal to the Land Use Board of Appeals must be raised in writing and with sufficient specificity to enable the decision maker to respond the issue.

In this case, while the comment period may have permitted applicants to submit comments or additional arguments related to the evidence in their completed application, there is no provision in this process for an applicant to revise their application or submit new substantive evidence in support of the request after the application has been submitted and notification of the public comment period has been issued.

Obviously, for the public to be able to examine and comment on the complete substance of the application and all justifications the applicant has submitted in support of their claims, the application and evidence cannot be revised or augmented after public notification unless the public is in turn notified and provided ample opportunity to consider and comment on this additional information. Otherwise, the public cannot raise all issues in writing sufficiently to preserve them for review on appeal.

Neither applicants nor staff made any attempt to inform the public of applicants’ new information. Applicants submitted their substantial new evidence in their August 8 letter (delivered on August 9) just two days prior to the end of the public comment period thereby severely limiting any reasonable opportunity for the public to discover this new evidence much less comment on it.

Both Mr. Conte and the Jefferson Westside Neighbors (JWN) neighborhood association (of which Mr. Conte is a co-chair) submitted extensive testimony based on the original, “complete” application and would have included in their testimony arguments related to the new “justifications” and information that applicants submitted. Once, after the comment period ended, Mr. Conte learned that applicants had loaded the record with supplemental information, Mr. Conte submitted timely and responsive testimony, which is included as [Attachment D](#), attached hereto and incorporated herein by reference . Yet, the Planning Director prejudiced opponents’ ability to rebut applicants’ supplemental information by rejecting Mr. Conte’s good faith response as untimely.

To add salt to the wound, the record shows numerous e-mail exchanges during the public comment period between Mr. Conte and Ms. Shawna Adams, the planner

assigned to this application.¹ Despite Ms. Adams apparent proactive efforts to alert applicants to issues that might jeopardize approval of their request² (See [Attachment E](#), attached hereto and incorporated herein by reference), Ms. Adams avoided informing Mr. Conte (or the JWN) that applicants had materially supplemented their application.

In sum, the Planning Director's attempt to avoid public scrutiny of a flawed application prejudiced appellants' ability to participate in this land use process and the decision must be remanded.

II. PROPOSED FOUR-PLEX (APPEAL ITEM 4)

Staff response to appellants' Appeal Issue 4 illustrates the double standard underlying this appeal process as well as a "divide and conquer" strategy to dilute the public's ability to challenge the application.

On the one hand, staff tries to dismiss the possibility of a four-plex actually being constructed on Parcel 1 by referring to it as an "ambiguous reference." Staff Report at 4. Similarly, the Planning Director's decision claims the four-plex is not "specifically proposed." Decision at 9. These characterizations, however, fly in the face of the applicants' repeated and unequivocal written statements to staff that "As you area aware, the proposal is for the creation of a four-plex." Record III-110; "There is one existing single-family residence and four proposed units that will be built on Parcel 1." Record III-122; "The proposed Parcel 1, being designed for a multi-family development, will be accessed by the alley." Record III-123. (Emphasis added).

Staff is apparently trying to ignore the proposed multi-family development because it makes it easier to avoid addressing the adverse impacts on alley traffic particularly

¹ During the public comment period, Mr. Conte sent Ms. Adams e-mails with questions about the application on July 29, 31, and August 4, 7, 9. Ms. Adams sent Mr. Conte e-mails on July 31 and August 6, 10. In none of those e-mails did Ms. Adams indicate applicants intended to, or had, submitted a supplement to the application, despite the fact that she sent an e-mail to the applicants representative showing she was aware as early as August 4 that applicants were considering a supplement. On August 7 at 11:34 a.m., Ms. Adams sent an e-mail to the applicants representative saying "Thanks for the heads up." That applicants were "submitting and addendum." Less than three hours later, at 1:58 p.m., Ms. Adams sent an e-mail to her supervisor, Mr. Gabe Flock seeking assurance that she didn't have to provide additional notice or forward comments. Then two minutes later, at 2:00 p.m. Ms. Adams replied to an e-mail from Mr. Conte and chose to keep silent about the "heads up" she had just received. The nature and timing of Ms. Adams' actions suggest a conscious decision to withhold any notice formal or informal from the primary opponent of this application. (See Attachment F, attached hereto and incorporated herein by reference.)

² On <http://jwneugene.org/documents/AppealAttachF.pdf> August 1, Ms. Adams sent an e-mail to applicants' representative, Robert Stevens, alerting him to the JWN's opposition arguments, and Ms. Adams advised Mr. Stevens to attend an emergency JAN board meeting that has been called to respond to the partition application.

given the inadequate width and paving of said alley. Staff's Ignoring the proposed multi-family development is also essential to their argument for completely ignoring extensive evidence presented by appellants that the proposed partition and development conflicts with the local refinement plan policies. Moreover, if the partition is approved without conditions on subsequent development, anything allowed in the R-2 zoning will likely be subsequently approved subject only to building code provisions. This tactic should not be sanctioned.

Furthermore, the Planning Director's decision and the staff report are disingenuous because while they discount the development of the four-plex, they continuously reiterate that the "tentative partition plan shows that the existing house will remain on Parcel 2, the parcel adjacent to West 13th Avenue." Staff Report at 4. In other words, staff attempts to mitigate the impacts from the proposal by insisting that the residence on Parcel 2 will not be replaced or expanded despite the fact Parcel 2 could be developed into three distinct units, while at the same time staff continues to treat the proposed four-plex as speculative.

III. POTENTIAL USE OF ALLEY FOR ACCESS (APPEAL ITEM 5)

The staff analysis on this appeal item calculates the potential number of units that could access the alley if the parcel remains a single lot at seven (7) units. Appellants concur with this figure. However, staff repeats the error in the Decision by calculating the "potential" maximum units after a partition that might use the alley by excluding all units on Parcel 2 (including existing house) and counting only the five theoretically allowed on Parcel 1.

Staff insists that this is valid because Parcel 2 only provides street access because it doesn't abut the alley. Yet, staff studiously ignores the fact that these three additional units could have access via an easement across Parcel 1, particularly if a large parking area is developed to accommodate the proposed multi-family dwelling. Nothing prevents a grant of future easement to Parcel 2 to facilitate alley access. Accordingly, the alley could very well experience greater impacts as a result of the partition, contrary to staff's conclusion. The Decision erred by failing to account for this contingency.

IV. BURDEN OF PROOF (APPEAL ITEM 6)

Irrespective of whether or not the Planning Director should have required applicants to meet the burden of proof, EC 9.7085 *does* place the burden of proof on the applicants in this appeal process. Consequently, the Hearings Official must still examine whether applicants met the burden of proof in their application for each appeal item raised herein.

V. MAXIMUM DENSITY (APPEAL ITEM 7)

Appeal Item 7 established that the result of the proposed partition would be to allow development in the "high-density" range, as defined by the Metro Plan whereas the

current lot allows development in the “medium-density” range appropriate to its designation on the Metro Plan Diagram.

This result directly conflicts with the Metro Plan, and a partition that creates such a conflict where none currently exists cannot be allowed, regardless of the provisions of the R-2 zone.

This result also creates a significant impact that the Planning Director neglected to consider in his decision with respect to compliance with the Westside Neighborhood Plan.

VI. ALLEY ACCESS (APPEAL ITEMS 8 AND 9)

This section addresses a central issue in Appeal items 8 and 9. Specifically that the Planning Director failed to properly interpret and apply code provisions encompassed by EC 9.8215(1)(a) that implement City Council’s prohibition against alley access lots.

Appellants’ response to staff’s vague analysis on these two appeal issues can be summed up by a simple question:

Does the proposed Parcel 1 meet clear and objective criteria for providing street access?

Summary

The requirement for a proposed lot, such as Parcel 1, to provide street access is a direct consequence of City Council’s prohibition against creation of new “alley lots” and the land use code’s implementation of that prohibition.

It remains uncontested that the “[p]roposed Parcel 1 will receive access from the alley” and that this alley provides the only proposed access to Parcel 1. Record III-128.

In his Findings and Decision, the Planning Director tries to evade this fact by reconstruing the plain language and intent of the Council’s prohibition against such lots by insisting that the EC 9. 2760 Frontage Minimum standard is the sole standard that implements the street access requirement and then using the front lot line, instead of lot frontage, as the actual standard applied to Parcel 1.

However, because the Planning Director’s decision relies on frontage to provide an access corridor from the street to the main portion of the lot, applying his theory *requires* that the frontage standard apply to the *entire* portion of Parcel 1 extending from the street to the main portion of the lot. Otherwise, the frontage standard doesn’t assure street access.

Not only is this the necessary interpretation of “frontage” for a lot such as Parcel 1, the land use code specifically describes how frontage on a flag-shaped lot³ such as Parcel

³ On page 8 of their application, applicants specifically refer to the “pole” of Parcel 1, implicitly indicating applicants themselves consider Parcel 1 a flag lot in form and function. Planning staff have specifically called Parcel 1 a “flag lot,” as well,

Although Parcel has a flag lot shape and functions as a flag lot, with the “pole” providing the access corridor to the “flag” portion that is behind another lot and which is the

1 encompasses the entire portion of the lot that extends from the street to the main portion of the lot. As the code's definition of "Flag Lot" explains, on a flag-shaped lot like Parcel 1, the lot's frontage comprises the entire "flag pole" and "serves primarily as a vehicle access corridor"⁴ to the main part of the lot.

Despite the fact that Parcel 1's frontage area extends from W. 13th Ave. to the main portion of the lot and must be adequate to provide the required street access corridor, the Planning Director erroneously applied the R-2 zone's 20 foot frontage minimum *only* to Parcel 1's *front lot line*, rather than to Parcel 1's entire frontage area.

The only rational application of the R-2 zone's 20 foot frontage minimum requires that Parcel 1's frontage must be at least 20 feet wide for its entirety, not just at the front lot line as the Planning Director allowed. The pole portion of Parcel 1 narrows to 13.9 feet for most of its extent, and thus, Parcel 1 does not meet the EC 9. 2760 Frontage Minimum standard.

The following provides a more detailed explanation of why the Planning Director's analysis and the staff report analysis is fundamentally flawed on this key issue.

A. City Council and land use code prohibit creation of alley access lots

On October 25, 2000, City Council unanimously adopted a motion prohibiting the creation of new "alley lots," with one exception noted for new subdivisions.⁵ In this motion Council stated their explicit and carefully considered intent for the land use code amendments Council adopted in Ordinance 20224, on February 26, 2001.

Two City Councilors who voted for the aforementioned motion and ordinance assured appellants in writing that the intent of the motion and the adopted code was to "prohibit lot partitions that would create a new lot accessible only from an alley," with the one exception noted for new subdivisions.⁶ (See [Attachment G](#), attached hereto and incorporated herein by reference.)

The Eugene Planning Division staff has confirmed on multiple occasions that current Eugene Code prohibits lot partitions that would create a new lot accessible only from an alley.

area where development is proposed, Parcel 1 is not a *legal* R-2 flag lot and is not directly bound by flag lot development standards. The original lot from which Parcel 1 is carved is not at least 13,500 square feet and Parcel 1's "pole" is not 15 feet wide for its entirety, as required by EC 9. 2760 lot development standards for all residential flag lots.

Note that Opposition Testimony section 7.A.iv incorrectly stated that the R-2, R-3, and R-4 zones don't provide for flag lots. According to Table 9.2760, these zones *do* allow flag lots, but may not require the *additional* flag lots standards in EC 9.2775, as does the R-1 zone.

⁴ As stated in the EC 9.0500 definition of "Flag Lot."

⁵ Section 6.A of Opposing Testimony provides further discussion of Council's motion.

⁶ At a September 18, 2000 Council work session on the Land Use Code Update, Councilor Kelly had also explained in response to a question by Councilor Meisner that by "alley access", he meant "a lot that only took automobile access from an alley."

On July 31, 2006, Catherine Zunno, the “Planner on Duty” and Kent Kullby, also on the Planning Division staff, directly stated to Mr. Conte that he could not partition a street-to-alley lot to create a lot that has access only from the alley.⁷

On September 20, 2006, Steve Nystrom, the Interim Planning Director responsible for the decision in this case, confirmed during a Planning Commission public forum:

“When we adopted our land use code back in 2001, the Council did amend the standards dealing with alley access provisions. Prior to that, there were, there was the ability to create lots that had its only access off of an alley, and the code was amended to prohibit that.”⁸

The September 8, 2006 “Findings and Decision of the Planning Director” states on page 3:

“Prior to the adoption of the Updated Land Use Code in 2001, alley access lots and parcels were permitted through the partition or subdivision process subject to specific alley access lot standards. Under the current land use code, parcels created through the subdivision and partition process must have frontage on a public or private street, as opposed to an alley alone.”

The October 16, 2006 Memorandum from staff states on page 7:

“... the current land use code does not permit the creation of alley access lots. ...”

Thus, the Planning Director and Planning staff acknowledge Council prohibited lots accessible only from an alley and the code was duly amended and now implements that prohibition.

B. Land use code requires street access

The Planning Director appears to agree and does not dispute that street access is a requirement of Parcel 1. Acknowledging this requirement, the Planning Director asserts, and has relied on in his decision, a finding that Parcel 1 will provide “actual” access from the street. Indeed, at the same Planning Commission public forum referenced earlier⁹, the Planning Director stated that with respect to Parcel 1:

“There’s a lot being created that has access actually from the street and from the alley.

Planning staff have also made the same assertion that Parcel 1 will provide actual street access. According to testimony by Ms. Aimee Code, Shawna Adams, the planner responsible for analyzing this application, stated in a phone conversation with Ms. Code that Parcel 1 was a “flag lot” and will provide access via the “pole” portion of the lot.¹⁰ to any four-plex the developers build on the rear of the lot (See [Attachment I](#), attached hereto and incorporated herein by reference.)

⁷ See Section 6.A of Opposing Testimony, pages 5-6, for more details about Planning staff’s statements.

⁸ See [Attachment H](#), attached hereto and incorporated herein by reference.

⁹ See Section 6.B of Opposing Testimony, pages 6-8, for more details on the code’s direct references to alley access lots.

¹⁰ According to Ms. Code’s testimony, Ms. Adams used the specific terms “flag lot” and “pole” in describing Parcel 1.

To affirm the Planning Director's (and staff's) position requires the Hearings Official reach all the following conclusions:

- a) The Planning Director was correct in his finding that lot frontage is the sole clear and objective standard that implements Council's prohibition against alley lots; and
- b) The Planning Director correctly applied the lot frontage standard to Parcel 1. His approach must assure that when the standard is consistently applied to other lots, any lot that meets the standard will provide street access; and
- c) If the lot partition is approved, applicable standards and approval conditions assure applicants cannot subsequently take action that would eliminate or prevent street access, thus circumventing Council's intent.

Hence, only by reaching all three conclusions, can the Hearings Official find that the Planning Director's decision complies with Council's intent in adopting the 2001 Land Use Code Update.

C. Applicants state Parcel 1 will not provide street access

In their application, applicants present no evidence or arguments that Parcel 1 will provide street access. Instead, they assert the lot will not, and *cannot*, provide a connection to the street. Applicants' request for an exception (page 6 of the application) unambiguously claims Parcel 1 meets the conditions of EC 9.6815(2)(g)(2)(b) which states:

"Buildings or other existing development on adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection [to the street] now or in the future, considering the potential for redevelopment."

In other sections of their application, applicants' repeatedly represent that Parcel 1 will not provide street access.¹¹ The reason for applicants' representation that Parcel 1 will take all access from the alley and that it cannot provide a connection to the street is no mystery – there's a house in the front of the existing parcel that prevents an adequately wide access corridor from W. 13th Ave. to the main part of Parcel 1 where applicants propose to build a four-plex.¹²

As with all criteria that must be met for approval of a lot partition, applicants bear the burden of proving Parcel 1 will provide street access; and in this case, applicants' own statements are more than sufficient to settle the question of whether Parcel 1 will provide street access. Applicants have correctly understood the land use code in this regard and the physical constraints on the existing parcel, and they acknowledge the proposed Parcel 1 will not provide street access.

¹¹ See Section 4 of Opposing Testimony for a more detailed description.

¹² In an August 7, 2006 e-mail to Shawna Adams, applicants characterized their August 8, 2006 supplement as "clarifying our access proposal". (See [Attachment F](#).) However, despite having been made aware by then that opponents were raising objections to the lack of street access, applicants made no attempt in their supplement to explain how Parcel 1 would provide street access. Nor did they change or qualify their assertion in their original application that existing development *precluded* a connection to the street.

D. Planning Director's theory and flawed application of "street access" criterion

In his Findings and Decision, however, the Planning Director claims – *contrary* to applicants' own statements – that Parcel 1 *will* provide street access. The Planning Director presents his entire analysis of the requirement for street access in the final two paragraphs (plus a code citation) on page 3 of the Findings and Decision.

The only criterion related to street access the Planning Director cites for his decision is stated in the final paragraph:

"Under the current land use code, parcels created through the subdivision and partition process must have frontage on a public or private street, as opposed to an alley alone.

In short, the Planning Director asserts that a minimum lot frontage (as defined by EC 9.0500) assures a lot provides street access.

EC 9.2760 states the only standard for R-2 lot frontage found in the land use code, and this standard simply states lot frontage must be at least 20 feet wide.

Because the Planning Director claims the frontage standard assures street access, the Planning Director must explain *how* the EC 9.2760 requirement that lot frontage be at least 20 feet wide accomplishes that effect. The Planning Director's theory requires at least that the "frontage" area extend from the street to the portion of the lot where development will occur, which is the rear of the lot on Parcel 1. If frontage were treated as some lesser extent that didn't reach the main portion of the lot, then nothing under the Planning Director's theory would ensure an adequate access corridor continues beyond the frontage limits to the main portion of the lot.

Notably however, the Planning Director provides no explanation of how Parcel 1's frontage will actually provide street access despite the fact that this frontage *narrows* to 13.9 feet for the greater extent of it's distance from the street to the main portion of Parcel 1 on which development is proposed. This 13.9 foot segment of the frontage lies along the lot's sole access corridor to the street and is substantially less than the minimum frontage standard of 20 feet.

As described above, even the applicants themselves have asserted the existing building physically precludes a connection to the street. And it's the presence of this building that forces the frontage to narrow to only 13.9 feet for most of its extent.

Given applicant's own representations and the obvious obstruction from the house, the Planning Director should have at least provided an explanation of how the 13.9 foot wide segment does not conflict with the 20 foot frontage standard and how such a constricted corridor will provide street access according to clear and objective standards. Similarly, the Planning Director should have explained the purpose of the 20 foot frontage requirement if not to provide a 20 foot wide access corridor to the rear R-2 multifamily units.

Instead, the Planning Director's provides no analysis, no finding, and no legal criteria for how deep or wide the *area* of a lot's frontage beyond the front lot line must be to assure the lot provides street access. Nor does the Planning Director provide any

analysis or finding that Parcel 1's frontage area meets such criteria and will thus provide street access.

Obvious questions left unanswered by the Planning Director's decision (and staff's October 16 Memorandum) are:

- Would Parcel 1 be approved if the 13.9 foot wide segment were only ten feet wide? Three feet wide? One foot wide? One inch wide?
- Would Parcel 1 be approved if the 13.9 foot wide segment began eight feet behind the front lot line? Three feet behind? One foot behind? One inch behind?
- What is(are) the clear and objective standard(s) used to answer these questions?

Such questions are not mere academic exercises. The answers would reveal whether or not the Planning Director actually applied a clear and objective standard that effectively assures "street access" when he approved creation of Parcel 1.

In the Findings and Decision, the Planning Director appears to have entirely neglected to consider the two-dimensional aspect of lot frontage. Instead he applied a much more limited interpretation requiring only that an R-2 lot have a 20 foot *front lot line*.¹³ This myopic approach leads to absurd results as described in appellants' prior Opposition Testimony submittal.

If the Planning Director used some other standard than a 20-foot front lot line, then he failed to describe it in his Findings and Decision.¹⁴

If the Planning Director used some other standard than a 20 foot front lot line, then he failed to describe it in his Findings and Decision, and must at a minimum do so now in defending his decision, and appellants must be provided the opportunity to further rebut any new theory he introduces at this late stage.¹⁵

¹³ As we explain below, the applicable land use code in Table EC 9.2760 establishes a criterion for the lot's frontage, not for the lot's front lot line. Lot frontage is an *area*, not a *line*, a critical distinction.

¹⁴ See section 7.A.iii of Opposition Testimony for a discussion of [Attachment F](#). As noted in that testimony, Planning staff were unable to cite any standard under the Planning Director's theory that would prohibit such lots. Neither the Planning Director in his Findings and Decision, nor staff in their October 16 Memorandum (or in any other statement) have yet explained how their interpretation of the code would prohibit such lots as shown in Figure F. The failure to address the problems this example raises – even in response to the current appeal – suggests the Planning Director and Planning staff lack a satisfactory explanation.

¹⁵ In their October 16 Memorandum (page 7), staff restates the Planning Director's statement that lot frontage is the sole criterion for street access: "An 'Alley Access Lot/Parcel' is a parcel that is created with only alley frontage and not street frontage."

On the same page, staff adds a note – without providing any supportive evidence or explanation of legal relevance: "Staff further emphasizes that the configuration of Parcel 2 would enable one-way vehicular access to West 13th Avenue, should access be permitted by the land use code." This note doesn't alter the fact that the Planning Director based his decision regarding street access *solely* on the code's lot frontage standard. Staff appears to be suggesting the real criterion for "street access" is that the frontage be at least as wide as the EC 9.5500 Multi-family development standard for a one-way driveway. There is simply no legal foundation for using driveway standards as the criterion for "street access," and the possibility

E. Properly applying lot frontage as the sole “street access” criterion

The Planning Director has rested his theory of how the land use code prohibits alley access lots solely on lot frontage, and he must accordingly apply the code’s lot frontage standard in a way that effectively implements the prohibition, i.e., in such a way as to assure a lot will provide street access according to some consistent, clear and objective standards

Since the EC 9. 2760 standard says simply that lot frontage must be a minimum of 20 feet, the most direct interpretation – and one that *does* provide a clear and objective standard that consistently assures street access – is that an R-2 lot’s frontage area must be at least 20 feet wide from the street to at least the portion of the lot on which the dwellings will be built. As discussed earlier, any interpretation of frontage that doesn’t extend to the main portion of the lot, fails to assure adequate street access and renders the frontage requirement meaningless.

The pivotal misstep the Planning Director appears to have made in his decision was to treat lot frontage as equivalent to the front lot line. But lot frontage is clearly defined in EC 9.0500 as “The portion of a single lot abutting the street.” A portion denotes an area, not a line; and the code contains numerous uses of “frontage” as an area, including for the specific purpose of requiring sufficient frontage to provide “access.”¹⁶ The most directly relevant example is an almost perfect match for the configuration of Parcel 1:

EC 9.0500 **Flag Lot.** A lot with less frontage on a public street than is generally required by this land use code and where that lot frontage serves primarily as a vehicle access corridor. The “flag pole” of a flag lot is the access corridor to the “flag portion” of the lot. The “flag portion” of the flag lot is located behind a lot that has the generally required street frontage.

These definitions makes abundantly clear that the frontage of a flag lot is necessarily the entire “pole”.

isn’t even mentioned in the Planning Director’s decision. Further, as the residential flag-lot requirement for a 15 foot wide “pole” clearly demonstrates, the required width of a lot’s “access corridor” may well be greater than the required width of a driveway across that access corridor. (A residential flag lot requires a 15 foot wide pole even when the lot also has alley access that would allow a one-way driveway across the pole.)

Ironically, on page 9 of their Memorandum, staff states the west side lot line of Parcel 1 “could be adjusted over 2 feet [east] to satisfy fire separation requirements ...” Such an action would result in the restricted part of Parcel 1’s access corridor being 11.9 feet or narrower. Thus, staff at one point suggests a 12 foot corridor has some bearing on the approval of Parcel 1 and then later in the same document indicates the 12 foot width doesn’t really have any bearing at all since in their minds a narrower access corridor wouldn’t create a noncompliant situation. This inconsistency shouldn’t be surprising because staff has never actually come up with a tenable interpretation of how the code assures street access, and instead are simply making up the rules as they go along. (See further discussion on this point under Section XI, below.)

¹⁶ See for example: EC 9.2430(2)(c): “Sufficient street frontage to accommodate structures, parking, and access in character with adjacent non-industrial properties.”

Furthermore, the “Frontage Minimum” standard in Table 9.2760 specifies the minimum width of this area, specifically 20 feet for R-2 lots. Because the code contains no other frontage standards that apply to R-2 lots, the Planning director must apply this standard in a direct and sensible way that assures street access.

Thus, for flag-shaped parcels, such as Parcel 1, where the main portion of the lot is behind another lot, the most direct, consistent and rational reading of the minimum frontage standard is that it applies to the entire segment that connects the street to the main portion of the lot. *Only* in this way can frontage provide a clear and objective standard for safe street access.¹⁷

On the other hand, treating lot frontage as identical to a lot front line has no similar basis in the code. To the contrary, the code specifically defines “lot frontage” and “front lot line” differently, and therefore minimum front lot line cannot be used as a substitute for the minimum lot frontage standard.

Thus, the Planning Director may have a valid theory that frontage is a necessary and sufficient standard to assure street access, but he must treat frontage as an appropriate area to make that theory viable.

The “Frontage Minimum” standard in Table 9.2760 specifies the minimum width of this area, specifically 20 feet for R-2 lots. Because the code contains no other frontage standards that apply to R-2 lots, the Planning director must apply this standard in a direct and sensible way that assures street access.

F. Assuring street access as condition of approval

As both the appellants and Planning Director agree, Council’s intent was to prevent creation of new lots with only alley access, and the land use code implements that prohibition.

Therefore, any lot partition that’s approved must assure not only that a newly created lot provides street access, but also that the owners take no action to *eliminate or prevent* street access on the new lot as soon as its created.

This requires the portion of the lot that provides street access not be obstructed by development and that no legal or land use action be taken that would eliminate or prevent street access.¹⁸ If such actions were to be allowed, both Council’s intent and the code’s implementation could be improperly circumvented by the owners after the partition occurred.

¹⁷ On page 8 of their application, applicants themselves explicitly describe Parcel 1 as having a “pole” and this reference is even more specifically directed at granting an easement along 25 feet of the frontage section of Parcel 1 that is only 13.9 wide. In other words, the applicants themselves have identified the *constricted* section of Parcel 1’s access corridor as part of a “pole” and therefore as part of what the code treats as frontage. As mentioned earlier, the planner in charge of this application has also referred to the access corridor of Parcel 1 as the “pole” of a “flag lot”.

¹⁸ For reference, note how EC 9.2775(5)(d)(5) requires: “Whether or not the portion of the flag lot with public street frontage is used for access, it shall remain free of structures and be available for possible future access to a public street.”

For example, construction of a swimming pool or storage building that obstructs the access corridor must be prohibited, even if a swimming pool or storage building would otherwise comply with development standards and building code.

Further, because current EC 9.5500 Multiple-Family Standards prohibit street access on *existing* lots that also have alley access¹⁹, development of more than two dwellings on Parcel 1 after it was created must be explicitly prohibited or otherwise Parcel 1 could immediately become a lot that has *only* alley access.

Thus, if a partition to create Parcel 1 is approved, the Hearings Official must require a condition such as the following:

“Development is not allowed on Parcel 1 that would physically or legally preclude street access to the development.”

The fact that the applicants have not only specifically proposed a four-plex on the lot, but have used that fact to argue they must have only alley access²⁰ makes abundantly clear that if the Hearings Official approves the lot partition without such a condition, applicants fully intend to take action that will legally preclude street access on Parcel 1. This is exactly what Council desired to prevent.

Applicants cannot be allowed to circumvent Council’s intent simply by exploiting the piecemeal way the Planning Division has implemented the development review process. A thorough reading of the Council discussions before and after they adopted the prohibition against alley access lots makes clear it was precisely overdevelopment of alley access lots that they intended to prevent, and applicants in this case are using every conceivable manipulation of the code and process to circumvent Council’s intent.

The recommended condition would place no unreasonable restriction on the development of the lot because, should Council decide either to revoke the prohibition against alley access lots or to amend the multi-family development standards, Parcel 1 could then be developed according to revised code requirements with respect to street access.

VII. MINIMUM LOT WIDTH (APPEAL ITEMS 8 AND 9)

This section addresses a second related and issue raised in Appeal items 8 and 9, namely, that the Planning Director failed to properly interpret and apply code provisions encompassed by EC 9.8215(1)(a) regarding minimum lot width.

Sections 6 and 7 of Opposition Testimony present a full explanation of how a sensible interpretation of the minimum width lot standard requires that the pole portion of an R-2 lot such as Parcel 1 be 20 feet wide for its entire extent.²¹

¹⁹ These standards are *not* part of the lot partition criteria and do not effect the requirement that a *newly created lot* provide street access.

²⁰ See applicants’ August 8 supplement, in which they state: “proposal is for the creation of a four-plex” (page 1) and “this development has to take access from the existing alley” (page 2).

²¹ We note that, if the Hearings Official accepts the Planning Director’s theory that lot frontage alone implements the Council’s prohibition against creation of new alley access lots, then the

The Opposition Testimony also established how the interpretation of the minimum lot width requirement used by the Planning Director produces patently nonsensical results and is inconsistent with Council’s intent when they adopted the Land Use Code Update in 2001.

The absurd results produced by using the Planning Director’s approach to minimum lot width are further shown by [Attachment J](#) (attached hereto and incorporated herein by reference). This outline of a hypothetical lot (“Lot X”) is superimposed on an outline of Parcel 1. In this diagram, Lot X is the unshaded area, and the portion of Parcel 1 that lies outside the area of Lot X is shaded.

Note in this example that at *every* point, Parcel 1 is *wider* than Lot X. Yet, according to the Planning Director’s approach, Lot X has a *greater* width (58 feet 5 inches) than Parcel 1 (55 feet 8 inches).

Using a similar diagram, it is straightforward to construct an example in which – according to the Planning Director’s approach – the outer (i.e., wider) lot has a “lot width” *less than* the 20 feet minimum, while the inner (i.e., narrower) lot has a “lot width” *greater than* 20 feet. This produces the patently untenable result that a *wider* lot *fails* to meet the minimum lot width standard (as interpreted by the Planning Director) while a *narrower* lot *complies* with the standard.

Despite such compelling evidence that the Planning Director’s interpretation produces ludicrous scenarios, the October 16 staff Memorandum (page 7) claims this isn’t so:

“Further, the Planning Director’s application of lot frontage and width standards will not create nonsensical results; Lot 2 will have a sizeable buildable area with access to public services in adjacent streets, and vehicle access to the alley.”

Yet, The absurdity of the Decision is easy to see when one looks at how the Planning Director’s interpretation of the minimum lot width standard fails to provide even the most basic conclusion that the “lot width” of a wider lot is greater than the “lot width” of a narrower lot.

Staff’s rationale is wholly inadequate. First, staff references “Lot 2,” whereas it is the misapplication of minimum lot width to Parcel 1 that appellants have raised in Opposition Testimony and the Appeal Statement. But even if staff intended to reference Parcel 1, their justification is without legal foundation. The Planning Director’s interpretation of a development standard must not produce patently untenable results. All staff has provided in response to concrete examples of nonsensical results is to offer their own *ad hoc*, self-justifying assessment that the lot in this particular case has a sizeable building area and provides alley access, so (presumably) it doesn’t matter that the minimum lot width standard hasn’t been

frontage standard by itself must necessarily also require the pole portion of an R-2 lot such as Parcel 1 be 20 feet wide for its entire extent. For if neither the frontage nor the minimum width standards were to require the pole portion of such lots to be 20 feet wide for the entire extent, the code would fail to implement Council’s prohibition against alley access lots, as we explained in the previous section of this testimony.

sensibly applied.²² Staff's opinions about the lot's building area and alley access are not clear and objective standards relevant to minimum lot width, and they don't excuse the Planning Director's erroneous application of the minimum lot width standard in this case.

In an attempt to provide cover from such an obviously indefensible interpretation of the code, staff proposes in their October 16 Memorandum to measure lot width according to the R-1 flag lot standards if the Hearings Official finds the Planning Director's approach to minimum lot width isn't appropriate. In the previous section of this testimony, we address staff's proposal more fully. Again, measuring minimum lot width across the "flag" portion of Parcel 1 has no basis in law and serves only as a fig leaf to cover the Planning Director's erroneous interpretation and finding regarding the minimum lot width requirement.

As we explained in section 7.B of Opposition Testimony, for a *newly created* rectilinear lot, with all lot lines either parallel or perpendicular to both the abutting street and alley, a lot's minimum width is easily and unambiguously determined. Parcel 1 is just such a lot, and its minimum width is 13.9 feet.

Therefore, Parcel 1 fails to meet the only reasonable interpretation of the code's 20 foot minimum lot width requirement and fails to comply with EC 9.8215(1)(a).

Consequently, the Planning Director's decision must be reversed.

VIII. STREET WIDTH (APPEAL ITEM 11)

Appeal Item 11 established that the lot partition does not comply with EC 9.6870 Street Width with respect to the alley right-of-way and paving.

Staff's response says the Planning Director "did not make the findings" that were necessary to require an adequate alley right-of-way or paving. However, appellants' appeal statement explanation of why the Planning Director must make the necessary findings is not refuted. Rather, the staff memorandum merely reiterates the false premise that under the current zoning configuration the single parcel could support seven units. Despite street access, staff assumes that all seven units would use only the alley. This assumption is unsubstantiated and in any event could be easily avoided by requiring a deed restriction at the building permit stage that would limit the seven units to access primarily via the street rather than the alley.

In contrast, it is undisputed that the partition will result in at least four and potentially five units that have no choice but to use the alley, as conceded by applicants and reluctantly by staff. It is also undisputed that the alley is currently in a substandard condition.

Staff's dismissal of the inconsistency between the Planning Director's treatment of the alley right-of-way and paving versus the special setback requirement misses the point.

²² Neither the applicants, Planning Director, or Planning staff have *yet* stated what they think is the actual width of Parcel 1. At a minimum, the Hearings Official should not allow staff to get away with claiming a proposed lot meets a development standard when they don't even have a measure of that dimension of the lot.

If proposed or potential development resulting from a partition application justifies a special setback for safe passage along the alley, then the same justification warrants the Planning Director finding that the proposed partition and development necessitates an adequate right-of-way and paving now. Put another way, the Planning Director's basis for requiring the special setback is sufficient to provide the necessary "Dolan findings" based on the minimum width and paving standards established under the code. These standards have already passed muster under the *Dolan* analysis and must be applied as mandatory criteria to a partition application as plainly spelled out under EC 9.8215(1)(b) and EC 9.6870.

Unfortunately, staff is trying to collaterally subvert these standards. The Planning Director's finding that "the proposed partition does not create the potential for increased alley use above what is currently allowed" begs the question. This is a partition. Partitions must comply with EC 9.8215(1)(b). Nothing in this criterion suggests the Director can or should compare the proposed use after partition to the pre-partition use. Consequently, the Planning Director's interpretation violates the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Rather, the code can only be interpreted rationally to mean that if the partition will impact the alley above and beyond its current use level, it must be improved to the minimum width and paving standards, especially if, as in this case, it is currently substandard.

Staff's reliance on *Dolan* in this case is like the wizard of Oz hiding behind the curtain. The proposed partition will increase alley use. Therefore, a condition that the alley be upgraded to the minimum standards imposed by the code has a nexus and rough proportionality to this partition application and cannot be avoided by claiming no findings are required as a matter of constitutional law.

Finally, as further evidence of the need for adequate right-of-way and alley paving, we include testimony from Charles Snyder whose property abuts the alley. (See [Attachment K](#), attached hereto and incorporated herein by reference.)

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.

IX. STORM WATER DRAINAGE (APPEAL ITEM 12)

Appeal Item 12 and appellants' Opposition Testimony (Section 10) establish that the Planning Director erred by failing to find the application did not comply with criterion EC 9.8215(1)(c) requirement that Parcel 1 comply with EC 9.6510 Stormwater Drainage. In his Findings and decision, 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 storm water 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.

In the staff October 16 Memorandum, staff attempts to correct this error by stating:

“Based on a review of the Polk Street Subbasin of the Amazon Basin and existing maintenance records, the City concluded that this the existing stormwater drainage facilities had adequate capacity to accommodate the drainage from the proposed partition.”

However, the staff presented no data on the projected storm water runoff that will be generated by the proposed four-plex and accompanying on-site parking, nor provided any details on their review. Staff cannot just ask the Hearings Official and appellants to take their opinion on faith, especially since there have been incidents of local flooding and storm sewer overflows on and near the proposed Parcel 1. (See testimony submitted by John and Pam Sheridan who own a house on Adams Street. [Attachment L](#), attached hereto and incorporated herein by reference.)

EC 9.6510 requires applicants to “submit documentation” that “the new development will drain into existing stormwater drainage facilities that ... have the capacity to handle the stormwater drainage that will be generated by the proposed new development.” Applicants did not submit such documentation; and neither the Planning Director, the Public Works department, nor the Planning staff has produced any documentation for scrutiny by appellants and the Hearings Official. Until such time as the required documentation is produced, the application does not meet the applicants' clear burden of proof, and the partition approval must be reversed for lack of compliance with EC 9.8215(1)(c).

X. NEW NONCONFORMING SITUATION (APPEAL ITEM 13)

Appeal Item 13 and referenced Opposition Testimony (section 12) establish that 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. The Planning Director's errors described in items 7-12 of the

Appeal Statement, underlie his error in finding the application complied with EC 9.8215(2).

The October 16 staff Memorandum merely asserts the Planning Director did not err in the specific items cited by the Appeal Statement. As demonstrated in the Opposition Testimony, the Appeal Statement, and this testimony, the Planning Director *did* err in the cited instances, and the partition will therefore create nonconforming situations, as appellants state.

XI. IMPACT OF FURTHER LOT LINE ADJUSTMENTS (APPEAL ITEM 14)

Appeal Item 14 established that any potential adjustments to the proposed lot side lines necessary to ensure compliance with fire separation requirements will narrow the 13.9 foot segment of Parcel 1's "pole" and further exacerbate compliance with applicable lot standards, including frontage and minimum lot width.

The October 16 staff Memorandum merely reasserts the Planning Director's erroneous interpretation of the frontage and minimum width standards, essentially asking the Hearings Official to ignore the fact that staff's argument would consequently allow Parcel 1's "pole" portion to be reduced to 11.9 feet.

Staff's justification provides more evidence of the inadequacy of the Planning Director's interpretation of the frontage and minimum lot width standards because it illustrates how the interpretation essentially provides no standard for the minimum width of the segment of the lot that provides an access corridor from the street to the main portion of the lot.

Staff has apparently even overlooked that reducing the "pole's" width to 11.9 feet would make it narrower than even the minimum width for a one-way driveway, which they suggest should can used to show that Parcel 1 provides "actual" street access.

It's clear from the internally inconsistent and legally unfounded rationales that staff has grasped at in their Memorandum, that they, in fact, have no solid legal theory for how the code implements the Council's prohibition against creating new alley access lots, despite their own acknowledgement that the code implements such a prohibition.

Appellants on the other hand have presented reasonable interpretations that follow directly from the code's language and that implement the Council's prohibition in an effective and commonsense manner.

The Hearings Official must find not only that the applicants cannot further narrow the 13.9 foot segment of the "pole" portion of Parcel 1, but that the entire "pole" portion must be at least 20 feet wide.

XII. COMPLIANCE WITH WESTSIDE NEIGHBORHOOD PLAN (APPEAL ITEM 15)

Appeal Item 15 and referenced Opposition Testimony (section 13) establish that 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, including EC 9.9680(1)(a) “Prevent erosion of the neighborhood’s residential character.”

Staff response in their October 16 Memorandum maintains the four-plex which is, in fact *explicitly* proposed by applicants in multiple instances, should be completely ignored because insufficient details have been provided by the applicant. Yet applicants *rely* on the proposed four-plex as evidence for the “net density” argument they present on page 1 of their August 8 supplement to their application²³:

“As proposed, the four-plex coupled with the existing single family home that will remain will result in five units on the development site or a net density of approximately twenty (20) units per acre.”

The Planning Director cannot merely choose to ignore an integral part of the application, especially when the applicants have stated the whole purpose of the partition so clearly on page 2 of their application:

“Parcel 1 is being designed as a fourplex lot.”

Because the stated purpose of the partition is to create a new lot on which a four-plex will be built that takes access only from the alley, the Planning Director must determine whether such development would comply with the adopted refinement plan policies.

Appellants, as representatives of the City-recognized neighborhood association, and including one of the authors of the applicable refinement plan policy, emphatically contend that a four-plex with alley-only access – by its very nature – conflicts with well-documented elements of the neighborhood character. This conflict arises from the *unavoidable* impacts of putting four dwelling units and required parking in this location and taking all access from the alley.

Even if the Planning Director ultimately disagrees with the assessment of the appellants as to whether an alley-access four-plex inherently conflicts with adopted refinement plan policies, he cannot simply refuse to address their specific objections by pretending the four-plex isn’t proposed and won’t necessarily be built.

The proposed four-plex is only one of the elements requiring the Planning Director to actually address the specific requirements of Westside Neighborhood Plan policy EC 9.9680(1)(a). The partition, in and of itself, will allow an additional dwelling unit to be built on the site.

To paper over the fact that the Planning Director missed this fact in his Findings and Decision, staff in their October 16 Memorandum (page 10) attempt to finesse the increase in the number of allowable units by wrongly claiming:

“... the act of dividing the parcel would have little, if any, direct affect on future development...” (page 10)

Staff also misrepresents appellants’ basis for this appeal item and injects a self-serving opinion, with no basis in fact or law:

²³ See [Attachment B](#).

“It is staff’s position that any potential for redevelopment of both parcels with a total of 8 units taking access to the alley, versus redevelopment under the current configuration with 7 units taking access off the alley, remains a remote possibility based on ownership and site constraints and does not provide sufficient reason to conclude that the proposed partition fails to comply with the plan policy.”

To be clear, on this point appellants have stated that the increase in total allowable units from 7 to 8 is based *solely* on the effect of the partition, and this increase is a significant impact that requires the Planning director to assess whether this impact conflicts with the adopted plan policies. This increase in allowable dwellings is a significant impact, *regardless* of how the units are accessed. Staff has provided no analysis to support their purported assessment that development with 8 units is a “remote possibility” and this type of hand-waving is not legally sufficient to justify the Planning Director ignoring the detailed evidence presented in the Opposition Testimony.

As covered in Section V, above, the fact that the partition, in and of itself, allows development density that conflicts with the applicable Metro Plan Medium Density Maximum is also sufficient cause to require the Planning Director to make a good faith effort to assess whether the resulting high-density development that could occur after the proposed partitioning would conflict with the specific requirements of Westside Neighborhood Plan policy EC 9.9680(1)(a).

Further evidence of the need for a careful assessment of the impacts of this partition and the proposed and/or potential development was provided on page 24 of the Opposition Testimony. In the December 12, 2005 city council Agenda Item Summary, on page 3 of AIS Attachment B, Planning staff calls out the importance of preventing erosion of neighborhood character and the legal requirement to protect the neighborhood character against incompatible development:

“Preventing the erosion of this neighborhood character is a high priority for neighbors, and has been part of official Eugene City land use policy since the *Westside Neighborhood Plan* was approved by City Council in 1987. A number of Metro Plan policies (see section XXX, above) [sic] also support protection of neighborhood character against incompatible development.”

This staff comment may restate the obvious, but it highlights that the Planning Director must apply criterion EC 9.8215(1)(k) and EC 9.9680(1)(a) using the best supported and concrete definition of “residential character” and cannot simply dismiss this requirement with generalities or by relying on R-2 standards.

On page 4 of the Findings and Decision, the Planning Director states that:

“... specific requirements for small lot development and multi-family development will be addressed at the time of building permit application and review for future structures on the parcels.”

However, the Planning Director doesn’t explain at what stage in the overall process, the result of this partition and four-plex development *will* be evaluated for compliance with adopted refinement plan polices.

Following the Planning Director's approach, applicants can play a "shell game" in which the four-plex "doesn't exist" when the lot partition is reviewed and the Westside Neighborhood Plan policies "don't apply" when the building permit for a four-plex on an R-2 lot is reviewed.

Therefore, at a minimum, the Hearings Official must impose a condition on approval of the partition that any development on Parcel 1 must comply with the specific requirement of EC 9.9680(1)(a) using the best supported and concrete definition of "residential character" and that future development cannot be approved *solely* because the development meets R-2 standards. Without such a condition, approval criteria EC 9.8215(1)(k) becomes meaningless because the adopted policies are never actually brought to bear during the complete process.

CONCLUSION

For the foregoing reasons, the Hearings Official must reverse the Planning Director's decision.

Respectfully submitted this 25th day of October, 2006.

Hutchinson, Cox, Coons,
DuPriest, Orr & Sherlock, P.C.

William H. Sherlock
Of Attorneys for Paul Conte and Rene Kane
Co-Chairs, Jefferson Westside Neighbors

ATTACHMENTS

- A. [August 2, 2006 letter from applicants](#)
- B. [August 8 letter from applicants](#)
- C. [August 9 letter from applicants](#)
- D. [August 24 supplemental testimony by Paul Conte](#)
- E. [Shawna Adam's e-mail to Robert Stevens](#)
- F. [Shawna Adam's e-mails related to applicants' supplement/addendum](#)
- G. [City Councilors Bettman and Taylor testimony](#)
- H. [Steve Nystrom Public forum comments](#)
- I. [Aimee Code's testimony](#)
- J. [Diagram of two lots demonstrating inconsistency of width measurement](#)
- K. [Charles Snyder testimony](#)
- L. [John and Pam Sheridan testimony](#)