

## APPEAL TESTIMONY

### RE DECISION APPROVING AULD/JOHNSTON (2) PARTITION, TENTATIVE PLAN REQUEST

FILE P 07-19

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The following testimony by appellants, including the representative of the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, is submitted in support of the appeal of the above captioned decision approving a partition tentative plan.

The JWN neighborhood association encompasses the subject property, and the JWN Executive Board voted unanimously at its December 5, 2007 meeting to direct the Chair to appeal this decision.

Charles R. Snyder and Paul T. Conte, each on their own individual behalf as residents, are also parties to this appeal.

#### PRELIMINARIES

Repeated in virtually every response to appellants' appeal issues, the city staff report erroneously insists appellants' written appeal statement fails to comply with EC 9.7605(3) because "appellants fail to specifically explain how the Planning Director's decision is inconsistent with applicable criteria."<sup>1</sup>

This defensive posture ignores the fact that the legislature has thoroughly addressed the requirements for local appeals of permit applications that are decided initially without a public hearing, as in this case. The key statute for cities appears at ORS 227.175(10) and states:

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<sup>1</sup> Staff Report at 2.

(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.

(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.

(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the city's land use regulations. A city may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. *In either case, the appeal shall be to a de novo hearing.*

(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

(ii) *The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and*

(iii) *The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing.* (Emphases added.)

Thus, the city must first provide notice of a permit decision that is rendered without a public hearing to the same persons who would have been entitled to notice of a public hearing, if a public hearing had been held before the permit decision was rendered. Second, those persons who are given notice of the decision and, in addition, any persons who are “adversely affected or aggrieved” by the decision must be given the opportunity to file a local appeal. Third, if such a local appeal is filed, the appellant must be given a de novo hearing. And finally, the city may not limit the issues in that de novo hearing to the issues raised in the local notice of appeal.

Turning to the local code language that the city staff alleges has not been met by the appeal statement, it is clear that the city reads too much into EC 9.7605(3). The two sentences that comprise EC 9.7605(3) state:

The appeal shall include a statement of issues on appeal and be limited to the issues raised in the appeal. The appeal statement shall explain specifically how the planning director’s decision is inconsistent with applicable criteria.

First, for each issue raised appellants have stated specifically what criteria they are appealing and why. Although the city may ultimately determine that those grounds do not provide a basis for reversing the Planning Director's decision, resolution of the merits of those stated grounds must take place following the required de novo hearing. ORS 227.175(10)(a)(E)(ii) was adopted in 2001 and provides that, at the de novo appeal hearing required by ORS 227.175(10)(a)(D), “[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal[.]” ORS 227.175(10)(a)(E)(ii) guarantees local appellants of permits that are granted without a prior public hearing the opportunity for a de novo hearing at which they may raise *any* relevant issue, without regard to whether the issue was specified in the local notice of appeal. It seems highly unlikely that the legislature could have intended that a city may nevertheless dismiss a local appeal, in whole or in part, without first providing a de novo hearing, because the appellant’s local notice of appeal did not sufficiently identify the issues to be asserted on appeal.

Second, the following arguments set forth with great specificity the basis for appellants’ appeal issues. Thus, both the city and the applicant not only have sufficient notice of the alleged infractions and the basis for appeal by virtue of

the initial appeal statement, but also via this testimony and the de novo hearing. In light of these opportunities, neither the city nor the applicant can rationally assert prejudice to their ability to defend on appeal, and staff's recurring contention that appellants have not complied with EC 9.7605(3) is meritless.

## **I. BACKGROUND**

### **A. Current partition is identical to previously denied partition**

The specific lot lines for the partition requested in this application are identical to the lot lines in the partition requested in PT 06-43, which was denied on appeal.

The "Tentative Partition Plan" in the current application is dated May 23, 2006<sup>2</sup>, the same date as appears on the "Tentative Partition Plan" submitted for PT 06-43<sup>3</sup>, and the proposed lot dimensions on the two drawings are identical.

Applicant asserts:

"The proposed property configuration remains the same as the configuration proposed in the previously denied application."<sup>4</sup>

Appellants are not aware of, and applicant has not cited, any changes to the surrounding environment, including lot configurations, streets, alleys, infrastructure, or other relevant physical elements.

Thus, previously submitted evidence in regards to the partition proposed in PT 06-43 is relevant to the partition proposed in the current application.

### **B. Applicant bears burden of proof**

In all quasi-judicial land use applications, such as the application at issue here, the burden of proof is on the applicant to demonstrate that all applicable approval standards have been met or can be met through the

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<sup>2</sup> This drawing has a "Received – City of Eugene Planning Department" date stamp of OCT 10 2007.

<sup>3</sup> This drawing has a "Received – City of Eugene Planning Department" date stamp of JUL 25 2006.

<sup>4</sup> Application at 25.

imposition of conditions. *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973).<sup>5</sup>

In multiple Appeal Items, the Planning Director's decision is not supported by substantial evidence, as required. The specific failures are identified under each respective appeal item, below.

**C. Substantial evidence proves the design and purpose of Parcel 1 is to build a fourplex and that applicant intends to build a fourplex**

ORS 227.175(10)(E)(iii) requires that: "The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing."

EC 9.7085 requires that: "A decision to resolve the issues presented shall be based upon reliable, probative and substantial evidence in the record."

Substantial evidence in the record reveals that the purpose of the requested partition is to build a fourplex, and the applicant intends to build a fourplex if the partition is approved.

Based on evidence presented, the Hearings Official found in the Appeal Decision for PT 06-43:

The application identifies that a four-plex is to be developed on proposed Parcel 1.<sup>6</sup>

The evidence underlying this prior finding applies with equal force in the current application, and that evidence establishes that a fourplex is to be developed on proposed Parcel 1.

In the written application for PT 06-43, applicant repeatedly made clear the intent to develop four units on the proposed Parcel 1. In fact, as shown below, the *only* reason for the partition in PT 06-43, which is identical to the current proposed partition, is to build these four additional units.

On page 2 of the PT 06-43 application<sup>7</sup>, applicant stated that Parcel 1 is "designed" *specifically* for a fourplex:

"Parcel 1 is being designed as a fourplex lot; ..."

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<sup>5</sup> PT 06-43 Appeal Decision at 5.

<sup>6</sup> PT 06-43 Appeal Decision at 3.

<sup>7</sup> PT 06-43 Record at III-122.

And on page 3 of the PT 06-43 application, applicant states that Parcel 1 is designed for “multi-family” development, which in this context reinforces applicant’s earlier assertion that the design is for a fourplex:<sup>8</sup>

“Parcel 1, being designed for a multi-family development, will be accessed by the alley.

On the same page, applicant states that applicant *will* build a fourplex on Parcel 1 and:

“There is one existing single-family residence and four proposed units that will be built on Parcel 1.”

Further testimony on the same page confirms applicant’s intent:

“The applicant is proposing to construct a four-plex, a permitted use in R-2, on Parcel 1”

Not only did applicant repeatedly state the intent of the requested partition in the PT 06-43 application, applicant used the statement of intent as the basis for several claims of compliance in the PT 06-43 application, including compliance with density standards and minimum lot area.

In a letter to Shawna Adams on August 8, 2006, applicant made it even clearer that applicant’s primary goal was to build a fourplex:

“As you are aware, that proposal is for the creation of a four-plex.”<sup>9</sup>

Note how applicant doesn’t even mention the lot partition itself, which is just the means to the end goal of creating the fourplex.

Applicant goes on to state in the same letter:

“As proposed, the four-plex coupled with the existing single family home that will remain will result in five units on the development site \*\*\*.”<sup>10</sup>

While applicant has indicated in the current application that “there is no specific development proposed as part of this application,”<sup>11</sup> applicant has neither stated, nor provided any evidence, that the design or purpose of

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<sup>8</sup> PT 06-43 Record at III-123.

<sup>9</sup> PT 06-43 Record at III-110.

<sup>10</sup> PT 06-43 Record at III-110.

<sup>11</sup> Application at 2.

Parcel 1 has changed or that applicant no longer intends to build a fourplex on Parcel 1. Applicant has simply removed prior statements of design, purpose, and intent from the current application.

In case there were any doubts about applicant's intent, on January 22, the day before the appeal hearing, an article in *The Register-Guard* quoted the applicant, Ronald Johnston:

"We could have come in and torn the existing house down and put six units on that lot, but we wanted to keep the house and put four units on the back lot because we could get better pricing and keep the rents down," Johnston said.<sup>12</sup>

Thus, applicant's intent was, and remains, to build a fourplex on Parcel 1.

Consequently, the evaluation of this proposal must consider the substantial evidence that applicant's intended outcome, which will almost certainly result if the application is approved, will be construction of a fourplex on Parcel 1, accessible only from W. 12th Alley.

As explained below, the Planning Director erred in several areas by not considering this evidence, including in the decisions regarding Appeal Items 4 (street width and connectivity), 5 (street and alley standards), 6 (storm water and pollution standards), and 8 (Westside Neighborhood Plan policies).

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Applicant and the Planning Director rely in numerous instances on an overly broad interpretation of the phrase "features explicitly included in the application" to ignore substantial evidence of applicant's stated design and purpose of the partition and applicant's repeatedly stated intent for further development of the proposed partition. However, the phrase "features explicitly included in the application" appears in *only* one of the approval criterion:

EC 9.8215(1)(k): All other applicable development standards for features explicitly included in the application.

This criterion specifically encompasses *only* "other applicable development standards" which refers to development standards *other than* those enumerated in EC 9.8215(1)(a)-(j) or (l). Thus, EC 9.8215(1)(k) *excludes* EC 9.8215(1)(a)-(j) and (l) from its scope, and therefore the criteria in EC 9.8215(1)(a)-(j) and (l) are *not* similarly constrained to features explicitly

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<sup>12</sup> *The Register-Guard*, page D-1, January 22, 2008.

included in the application. The Planning Director erred by expanding the constraint in EC 9.8215(1)(k) to apply to EC 9.8215(1)(a)-(j) and (l).

Therefore, as required by ORS 227.175(10)(E)(iii) and EC 9.7085, *all* relevant evidence, including applicant's statements of the design and purpose of the proposed partition, as well as applicant's stated intent for further development of the proposed partition, must be considered in evaluating the criteria in EC 9.8215(1)(a)-(j) and (l).

#### **D. Deferred approval criteria will not be evaluated during building permit process**

The Planning Director has used the argument that since no proposed buildings are explicitly included in this application, evaluation of EC 9.8215 approval criteria applicable to further development that will be allowed by the partition should be deferred until the building permit approval process. For example, under the discussion of EC 9.8215(1)(l):

Any future development will be subject to compliance with applicable development standards.<sup>13</sup>

LUBA has ruled that a local government may approve a partition and defer determination of an applicable approval criterion, provided the subsequent approval process provides the same notice and opportunity for public input as the original proceeding and the approval criteria are not so dependent on each other that they must be applied together. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

In the current case, the Planning Director fails to take into account that Eugene's building permit approval process does *not* adequately evaluate the following items according to the EC 9.8215 approval criteria, so if evaluation of these criteria is deferred, the effect will be to omit their evaluation altogether:

- The effect of creating parcels that allow additional dwelling units in complying with Metro Plan density ranges. The building permit process evaluates each new parcel *on its own* against the EC 9.2750 maximum density, which includes a "round up" provision. Thus the *total* increase in allowable density for the area of the current parcel (i.e., the combined area of Parcels 1 and 2) is never evaluated. (Appeal Item 1)

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<sup>13</sup> Decision at 13.

- Street connectivity and alley improvements. A less stringent set of standards is used in the building permit process, which allows would the applicant to avoid the full requirements of the EC 9.8215 approval criteria. (Appeal Items 4 and 5)
- Compliance with adopted refinement plan policies. The building permit process checks only the zoning standards and site review conditions, not compliance with adopted refinement plan policies. (Appeal Item 8)

As an example, if the proposed partition were approved, according to applicant's statements, Parcel 1 would likely be developed with a fourplex, on an irregularly shaped lot, accessible only from an alley. Yet under the Planning Director's approach to evaluating the application, the totality of this development would never be evaluated for compliance with the Westside Neighborhood Plan policy to "prevent erosion of the neighborhood character," as required by EC 9.8215(1)(k).

This "gap" in evaluation would result because the Planning Director has evaluated *only* the lot configuration for compliance, and the building permit process would not evaluate *anything* for compliance with adopted refinement plan policies.<sup>14</sup>

The fundamental error here is that the Planning Director seeks to defer a *complete* evaluation of specific lot partition approval criteria (e.g., compliance with adopted plan policies) until a building permit is applied for, yet places no conditions on approval to assure the evaluation actually occurs. Because, for some criteria, the building permit process does *not* fully evaluate the lot partition criteria, the criteria are *never* fully evaluated.

Yet City Council would not have included a criteria such as compliance with adopted plan polices as one of the lot partition approval criteria, and *not* included it as a building permit criteria, if Council had not intended the criteria to be fully evaluated via the lot partition approval process.

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<sup>14</sup> Note that in the current case, appellants also assert the Planning Director neglected to consider evidence in the record with respect to applicant's stated intent to build a fourplex. The discussion in this section addresses a more general issue that, even in the absence of evidence of the applicant's intent, the approval process must not allow lot partition criteria to be effectively ignored by deferring them to the building permit process which won't actually apply the criteria.

The Planning Director's tact is nothing more than a shell game to avoid fully applying applicable standards and policies. Such an approach undermines the integrity of the planning process as well as staff's credibility. It also defeats the purpose of the land use code "to protect and promote the health, safety, and general welfare of the public and to preserve and enhance the economic, social, and environmental qualities of the community."

There are two remedies available to the Planning Director (and Hearings Official):

- 1 Evaluate criteria based on the development that will be allowed by the lot partition, for example, the addition of five dwellings on Parcel 1.
2. Impose approval condition(s) that require evaluation of specific lot partition criteria at the time that further development is proposed.

In the current case, if the Hearings Official approves the request, appellants believe the following conditions would be necessary to assure all EC 9.8215 approval criteria are met:

**Condition 1.** Parcel 1 may be developed with no more than four dwelling units, and Parcel 2 may be developed with no more than two dwelling units.<sup>15</sup>

**Condition 2.** All further development of Parcels 1 and 2 must comply with EC 9.8215(1)(b), (c), and (l) approval criteria

Notwithstanding the discussion in this section, appellants still assert the proposed application fails to meet multiple EC 9.8215 approval criteria and must therefore be denied.

#### **E. Parcel 1 is accessible only from an alley**

Because the proposed partition in the current application is *identical* to the partition proposed in PT 06-43, and there have been no relevant changes in the encompassing environment, applicant's statements in the PT 06-43 application regarding access to Parcel 1 provide evidence with equal weight in relation to the proposed Parcel 1 in the current application.

In PT 06-43, applicant states Parcel 1 cannot take access from W. 13th Avenue because of the location of the existing house:

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<sup>15</sup> Applicant has suggested this condition. See Application at 4.

“Further, a connecting street on the subject property could not even be built because of the location of the existing single-family dwelling.”<sup>16</sup>

On page 6 of the PT 06-43 application, under the section addressing EC 9.6815(2) Street Connectivity Standards, applicant stated:

“... thus an exception to subsection (b), (c), and (d) above is being requested. The exception is being requested per EC 9.6815(2)(g)(2)(b).”

This request is repeated on pages 12-13 of the current application:

“The applicant is also requesting an exception to EC 9.6815(2)(b) pursuant to EC 9.6815(2)(g)(2) \*\*\*

The following facts are relevant to the adjustment request based on EC 9.6815(2)(g)2 b.”

EC 9.6815(2)(g) states:

**EC 9.6815(2)(g).** In the context of a Type II or Type III land use decision, the city shall grant an exception to the standards in subsections (2)(b), (c), or (d) if the applicant demonstrates that any proposed exceptions are consistent with either subsection 1 or 2 below: \*\*\*

Applicant’s request for an exception in both PT 06-43 and the current application cites EC 9.6815(2)(g)(2)(b), which states:

**EC 9.6815(2)(g)(2)(b).** Buildings or other existing development on adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection now or in the future, considering the potential for redevelopment.

In explaining the request for an exception to street connectivity in the PT 06-43 applications, applicant stated (on page 6):

“Development on adjacent properties precludes a connecting street from being constructed that would serve any properties other than the proposed site. Further, a connecting street on the subject property could not even be built because of the location of the existing single-family dwelling.”<sup>17</sup>

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<sup>16</sup> PT 06-43 Record at III-55:

<sup>17</sup> PT 06-43 Record at III-125.

In explaining the request for an exception to street connectivity in the current application, applicant states:

“Buildings and existing development on adjacent property in every direction preclude street connections now and in the future.”<sup>18</sup>

Thus, applicant insists that Parcel 1 cannot be connected to W. 13th Avenue now or in the future and will therefore always be accessible only from W. 12th Alley.

Note also the following additional places in the PT 06-43 application where applicant affirmed that Parcel 1 will be accessed only from the alley:

PT 06-43 application, Page 3. Under (b) EC 9.6810 Block length:

“Parcel 1, being designed for a multi-family development, will be accessed by the alley.”<sup>19</sup>

PT 06-43 application, Page 9. Under (f) EC 9.6735 Public Access Required:

“Parcel 1 will receive access from the alley.”<sup>20</sup>

PT 06-43 application, Page 11. Under (3) Partitions abutting collector and arterial streets comply with access management guidelines of the agency having jurisdiction over the street:

“No new access will be taken from West 13th Avenue; \*\*\*.”<sup>21</sup>

Thus, the preponderance of evidence establishes that Parcel 1 is accessible only from an alley.

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<sup>18</sup> Application at 15.

<sup>19</sup> PT 06-43 Record at III-123.

<sup>20</sup> PT 06-43 Record at III-128

<sup>21</sup> PT 06-43 Record at III-130.

## **F. City Council prohibited lots accessible only from an alley**

The appeal record in PT 06-43 established that, during deliberations on the 2001 Land Use Code Update (LUCU), City Council prohibited creation of new lots accessible only from an alley (except in new subdivisions of ten or more lots).<sup>22</sup>

The evidence included Council's October 25, 2000 motion, as recorded in the minutes:

Mr. Meisner, seconded by Ms. Bettman, moved to direct the City Manager to prohibit in residentially zoned areas the creation of new flag and alley lots and any other lot size reductions, except in new subdivisions of 10 or more lots, until staff evaluate and bring forward recommendations for other managed density strategies, such as asset mapping, cottage zoning, and nodal development.<sup>23</sup>

The work session at which this motion was adopted was attended by the Planning and Development Director, the Planning Director, the Senior Planner, and the City Attorney. Thus, this motion was a direct, carefully considered indication of Council's explicit intent for the land use code amendments that Council adopted in Ordinance 20224, on February 26, 2001.

The evidence presented in PT 06-43 also included a quote from the minutes of the September 18, 2000 City Council work session where Councilors began discussion of the prohibition:

Responding to a question from Mr. Meisner, Mr. Kelly said that by alley access he meant a lot that only took automobile access from an alley.<sup>24</sup>

The same minutes also record:

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<sup>22</sup> October 25, 2006 JWN PT 06-43 Appeal Testimony, pages 7-8. (Found in Attachment B of Appellant's November 1, 2007 Testimony in Opposition to PT 07-19.)

<sup>23</sup> Minutes of the October 25, 2000 City Council work session, page 3. Before adoption, the motion was amended to allow flag lots on residential lots greater than or equal to 13,500 square feet.

<sup>24</sup> Minutes of the September 18, 2000 City Council work session, page 7. Despite the flawed grammar in these minutes, the meaning of Councilor Kelly's comment is clear – a lot that takes automobile access only from an alley.

Mr. Farr understood the difficulties of reaching lots that were only accessible by alleyway \*\*\*.<sup>25</sup>

The PT 06-43 evidence also included testimony from two City Councilors who were on City Council at the time this prohibition was adopted and who still serve on City Council:

**Councilor Bonny Bettman:** “Council’s intent was to prohibit lot partitions that would create a new lot accessible only from an alley, with the one exception noted for new subdivisions.”<sup>26</sup>

**Councilor Betty Taylor:** “Our intention was to prohibit lot partitions that would create new lots accessible only from an alley – except in new subdivisions.”<sup>27</sup>

Thus, there is testimony from four City Councilors, who were on the Council that adopted the prohibition, clearly indicating that Council intended the motion to prohibit lots accessible only from an alley.

On September 20, 2006 – twelve days after issuing his decision in PT 06-43 and five days before the appeal in that case was filed – the Interim Planning Director at that time confirmed that Council had amended Eugene Code to prohibit creation of lots that have their only access off of an alley. At the Planning Commission Public Forum, the Planning Director stated in reference to the PT 06-43 lot partition:

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<sup>25</sup> Minutes of the September 18, 2000 City Council work session, page 7.

<sup>26</sup> October 16, 2006 JWN PT 06-43 Appeal Testimony, Attachment A. E-mail from Councilor Bettman dated October 4, 2006. (Found in Attachment B of Appellant’s November 1, 2007 Testimony in Opposition to PT 07-19.)

<sup>27</sup> October 16, 2006 JWN PT 06-43 Appeal Testimony, Attachment B. E-mail from Councilor Taylor dated October 5, 2006. (Found in Attachment B of Appellant’s November 1, 2007 Testimony in Opposition to PT 07-19.)

**Interim Planning Director Steve Nystrom:** “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.”<sup>28</sup>

The Interim Planning Director’s assertion was also supported by statements from two Planning Division staff during the period that PT 06-43 was under consideration.<sup>29</sup> On July 31, 2006, Mr. Conte, one of the appellants, was directed by Shawna Adams, the City planner assigned to the PT 06-43 partition request, to consult with the Planning Division’s “Planner on Duty” regarding questions Mr. Conte had raised about land use code relevant to this partition request.

Mr. Conte subsequently met the same day with Catherine Zunno, the “Planner on Duty” and Kent Kullby, also on the Planning Division staff. During this discussion, Mr. Conte asked both Ms. Zunno and Mr. Kullby the following, specific question:

“Can I partition a street-to-alley lot to create a lot that has access only from the alley?”

Both planners responded that he could not do so. Towards the end of the same discussion, Mr. Conte reviewed several points that had been discussed, and both planners confirmed their previous response that a lot that has access only from an alley could not be created.

To date, no evidence or claim has been presented that Council had any intent other than that their prohibition apply to lots accessible only from an alley.

Consistent with Council’s action and the Planning Director’s statement, appellants assert that *one or more provisions of Eugene Code implement Council’s prohibition against lots accessible only from an alley.*

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<sup>28</sup> October 25, 2006 JWN PT 06-43 Appeal Testimony, page 8 and Attachment H. Statement by Steve Nystrom, Interim Planning Director. (Found in Attachment B of Appellant’s November 1, 2007 Testimony in Opposition to PT 07-19.)

The meaning of the Interim Planning Director’s final sentence is unambiguous: “the code was amended to prohibit” ... “creat[ing] lots that had its only access of an alley.”

<sup>29</sup> See PT 06-43 Record at III-43.

Thus, as established in I.E, above, applicant is proposing a lot partition that would create a lot accessible only from an alley, and which is therefore in direct contradiction of City Council's express prohibition against such lots.

In the following discussion, and under Appeal Items 2, 3, and 4, appellants explain how Eugene Code implements Council's prohibition and how Parcel 1 conflicts with the relevant code provisions.

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Applicant's second attempt at the proposed lot partition still does not address at all whether or how Eugene Code implements Council's prohibition against lots, such as Parcel 1, that are accessible only from an alley. Applicant presents no evidence that contradicts appellants' assertion that one or more provisions of Eugene Code implement Council's prohibition against lots accessible only from an alley. Nor does applicant present any evidence or argument that contradicts appellants' assertion that Parcel 1 conflicts with Council's prohibition.

As far as the Planning Director's findings and decision, the Planning Director does *not* actually address Council's prohibition against lots accessible only from an alley, but instead evaluates a less stringent requirement that is demonstrably *not* what Council adopted.

The Planning Director presents no evidence contradicting appellants' assertion (or the Interim Planning Director's and Planning staff's prior statements to the same effect) that one or more provisions of Eugene Code implement Council's prohibition against lots accessible only from an alley. Nor does the Planning Director present any evidence that contradicts appellants' assertion that Parcel 1 conflicts with Council's prohibition.

Under the discussion of lot frontage in the current decision, the Planning Director states:

"Written testimony also maintains that the proposed partition fails to comply with this criterion [Frontage Minimum] because Parcel 1 violates the prohibition against alley access only lots. Staff clarifies that an 'Alley Access Lot/Parcel' is a parcel that is created with only alley frontage and not street frontage. EC 9.0500 defines an "Alley Access Lot/Parcel" as:

*A lot or parcel abutting an alley and not abutting a street and created from the rear portion of an existing lot or parcel. For purposes of EC 9.3050 through EC 9.3065, and alley access lot or parcel is one that abuts an alley but does not abut a street.*

In this case, proposed Parcel 1 has a 20-foot wide frontage on West 13th Avenue, which means that, by definition, the parcel is not an alley access parcel.”

While the Planning Director’s first sentence appears to refer to the issue raised by appellants (i.e., that Parcel 1 conflicts with Council’s prohibition against lots accessible only from an alley, aka “alley access only lots”), the Planning Director’s response doesn’t actually address appellants’ point, or Council’s prohibition, at all.

Instead, the Planning Director does nothing more than establish that Parcel 1 abuts a street and therefore is not encompassed by the EC 9.0500 definition of “Alley Access Lot/Parcel,” a point appellants don’t dispute. But Council prohibited lots accessible only from an alley, not just lots that don’t abut a street.

Thus, the Planning Director’s observation that Parcel 1 is not encompassed by the definition of “Alley Access Lot/Parcel” does *not* establish that Parcel 1 is not included in Council’s prohibition. Nor does the fact that Parcel 1 is not encompassed by the definition of “Alley Access Lot/Parcel” provide any relevant evidence to support the Planning Director’s erroneous interpretation of the Frontage Minimum standard.

By the nature of its terminology, the “Alley Access Lot/Parcel” definition might seem a likely candidate for understanding how the code implements Council’s prohibition. However, it turns out this is indisputably not the case because *this definition is never referenced in any way in any section of the land use code to limit creation of lots accessible only from an alley.*<sup>30</sup> In fact, the definition isn’t used in *any way* to limit creation of *any* kind of lot, abutting a street or not.

The inapplicability of the “Alley Access Lot/Parcel” definition to the code’s implementation of Council’s prohibition is clearly demonstrated by the fact that the definition serves *no* role – even in preventing new lots that do *not* abut a street – because the definition is *never* referenced as a lot standard or approval criteria. The definition’s lack of relevance to the implementation of Council’s prohibition may be surprising, but is nonetheless a fact. (The actual use of this definition is explained in the footnotes.<sup>31</sup>)

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<sup>30</sup> Nor is any similar term used anywhere in the code to limit creation of lots accessible only from an alley.

<sup>31</sup> A definition of “Alley access parcel” has been present for many years in versions of the land use code that existed prior to the 2001 code update to which Council’s October

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(footnote continued)

25, 2000 motion applies. The following is the version of the definition that was in the code as of March 1, 2001 (prior to adoption of the code update):

**Alley access parcel.** A parcel abutting an alley and created from the rear portion of an existing lot or parcel according to alley access provisions of the Eugene Code, 1971.

As indicated by this definition, alley access parcels created under prior versions of the code were governed by a set of “alley access provisions” (EC 9.386(11)). And – critical to understanding what happened with the 2001 Land Use Code Update – is the fact that the version of code *prior* to LUCU had an explicit Lot Frontage Minimum entry of “0” for “Alley access parcels” in section EC 9.060 Platting Standards – Lots and Parcels. Thus, a lot partition could create an “alley access parcel” with no frontage.

Furthermore, in the version of code just prior to the 2001 LUCU, the frontage of the original parcel *could not be changed*. This meant an interior alley access lot created under this earlier version of code *could not abut the street* opposite the alley. (An alley access parcel could be created on the corner of a street and an alley and thus abut a street along the *side* of the original lot, but that’s irrelevant to the current case.)

Consequently, under prior versions of code, an interior “alley access parcel” not only abutted an alley, it did not abut the street (opposite the alley).

When LUCU dropped the “alley access provisions,” the definition of “alley access parcel” had to be updated accordingly. The solution was to drop “according to alley access provisions of the Eugene Code, 1971” and add what seemed like an appropriate substitute criterion that covered the kinds of lots that had been created under the prior provisions: i.e., that an alley access parcel did not abut a street. This does, in fact serve the intended purpose of the definition, which is to delineate the lots created *prior to LUCU*, under the alley access provisions that existed in earlier versions of code.

This definition is necessary because several sections of code, both before and after the 2001 LUCU, deal with *already existing* lots created under the prior code’s “alley access provisions.” The terms “alley access parcel” and “alley access lot” have been, and are currently, used in these sections to refer to those lots that were created under *prior* versions of the code. In the current code, see for example, the EC 9.0500 definition of Lot Width and section 9.2751(10) regarding setbacks.

The definition of “alley access parcel” and references to this term existed *before* Council adopted the prohibition against lots accessible only from an alley, and this definition

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(footnote continued)

and references to it have *nothing* to do with Council's prohibition. Nonetheless, sections of code still use the term "alley access parcel" and thus require a definition of "alley access parcel" *appropriate to the purpose of the referencing sections of code*. This then explains the purpose of the EC 9.0500 definition of "Alley access lot/parcel" – not staff's assumption that the definition states the types of lots that Council intended to prohibit.

If, as staff's conclusions imply, Council had intended the EC 9.0500 definition of "Alley access lot/parcel" to be part of the code's implementation of their prohibition, then Council would almost certainly have *used* this definition in a simple and direct, explicit prohibition, such as: "New alley access lots/parcels can be created only in subdivisions of ten or more lots." However, there's no such explicit prohibition in the code and the definition of "Alley access lot/parcel" serves *no purpose at all* in implementing Council's prohibition (or any other limit on new parcels).

With no supporting evidence, then, staff has simply *assumed* Council revised the EC 9.0500 definition of "Alley access parcel" as part of the code's implementation of Council's prohibition, despite the inadequacy of this definition to achieve the intended effect of Council's prohibition.

Staff has never explained, however, why Council then made no use of this revised definition to prohibit any kind of new parcel in the updated code. Staff's assumption simply doesn't come close to meeting the requisite burden of proof, especially in light of compelling and conflicting testimony from four Councilors who participated in Council's decision.

A far more likely explanation, consistent with appellants' argument, is that Council understood that *reasonable* interpretations of minimum frontage, minimum lot width, and street connectivity, individually or collectively, would effectively require new lots to have at least the possibility of street access and thus would prevent creation of lots accessible only from the alley. And thus, Council would have seen no need to reference the definition of "Alley access lot/parcel," which had historically been used for a different purpose.

Notably, Council removed the "alley access parcel" entry from the Frontage Minimum standard in EC 9.2760 when the code was updated, and *this* change is the most plausible way the revised code was intended to implement Council's prohibition against lots accessible only from an alley. But for the Frontage Minimum requirement to be the way Council expected the code to implement their prohibition against lots accessible only

The Planning Director has either negligently or intentionally overlooked the fact that the “Alley Access Lot/Parcel” definition simply has *no bearing at all* on lot partition criteria, and thus cannot possibly be how Eugene Code implements Council’s prohibition against creating lots that have access only from an alley.<sup>32</sup> And so, the Planning Director is left having provided *no*

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*(footnote continued)*

from an alley, frontage would have to provide the possibility of actual street access, as appellants assert.

There’s no denying the history of “alley access parcel” has resulted in some confusion because it *sounds like* what Council was prohibiting, even though the term wasn’t used in Council’s motion; and the definition of “alley access lot/parcel” isn’t sufficient and isn’t used for that purpose. The code, however, is rife with confusing use of terms (“Lot” and “Parcel” aren’t even defined or used clearly and consistently). So, unlike staff’s theory of Council’s actions, there’s nothing extraordinary in the scenario appellants suggest here. More importantly, appellants’ explanation doesn’t conflict with the first-hand testimony of four City Councilors, whereas staff’s explanation directly contradicts the Councilors’ testimony.

(For additional background on Council’s actions, including a discussion of the Multi-family development standards and alley access, see section V.E in the November 1, 2006 PT 06-43 Appeal Testimony Supplement, which is found in Attachment B of Appellant’s November 1, 2007 Testimony in Opposition to PT 07-19.)

<sup>32</sup> In PT 06-43, staff presented an argument that depends on their implicit conclusion that Council’s intent was to prohibit only lots that do not abut a street, rather than to prohibit lots accessible only from the alley. Based on this unsupported conclusion, staff then asserted that the EC 9.2760 Frontage Minimum standard implements this alternative version of Council’s prohibition.

Appellants address this argument here because, to some degree, the same conclusions are implicit in the Planning Director’s response to appellants’ testimony opposing the current application on the basis of Council’s prohibition.

The staff position in the PT 06-43 case was stated most clearly in the October 6, 2006 Memorandum to the Hearings Official (See PT 06-43 Record at III-7):

“Whereas the land use code in effect prior to August 1, 2001 permitted the creation of alley access lots as part of the land division approval process subject to the specific alley access lot provisions, the current land use code does not permit the creation of alley access lots and, accordingly, no longer includes alley

*analysis at all* in this case to explain how Council’s prohibition is implemented, even though the Planning Director and Planning staff have stated in other contexts (as described earlier in this section) that the code prohibits lots that are accessible only from an alley.

The applicant has, as mentioned earlier, not addressed this pivotal issue at all.

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(footnote continued)

access lot provisions. The applicable lot and width standards, as applied by the Planning Director, clearly prohibits the creation of alley access lots or parcels by precluding the creation of lots with only frontage on an alley.”

(Note there appears to be a word missing after “applicable lot” in the final sentence. The final phrase of that same sentence suggests the missing word is “frontage.”)

Staff presents the quoted statement in a section of the Memorandum that begins: “With regard to the Opposition Testimony related to alley access \*\*\*.” In the above statement, staff observes the code was changed to prohibit “alley access lots.” Although staff never states it directly, in the context of a response to opponents’ arguments, the implication is that the referenced code change implemented Council’s prohibition.

It’s easy to miss, however, that staff has actually substituted a *different* prohibition than Council adopted. The code change staff suggests occurred would be a much more limited prohibition that encompasses only lots that don’t abut a street, whereas Council’s actual prohibition covered *all* lots that are accessible only from an alley, irrespective of whether or not the lot abuts a street.

Staff presents *no* evidence that Council reversed their decision or revised their decision to only prohibit lots that don’t abut a street, a revision that would effectively negate the intent of Council’s original motion under staff’s interpretation of frontage. Staff merely *assumes* the EC 9.0500 definition states the kinds of lots that Council intended to prohibit.

This assumption lacks any factual basis, conflicts with Councilors’ own testimony, and ignores the history and use of definitions of “alley access parcels,” as described in the previous footnote.

Accordingly, a prohibition against lots encompassed by the EC 9.0500 definition should *not* be substituted for Council’s prohibition against lots accessible only from an alley, and the Planning Director erred in doing so.

Appellants, on the other hand, have a simple and logical theory, consistent with a direct reading of the code, that explains how Council's prohibition is implemented. As detailed below, it is the code's minimum frontage and street connectivity requirements, rather than the "Alley Access Lot/Parcel" definition, that implement Council's prohibition; and Parcel 1 conflicts with criteria in these code sections. (Minimum lot width may also be an element that implements Council's prohibition.)

Appellants describe the specific mechanisms (frontage, lot width, and street connectivity) in more detail under Appeal Items 2, 3, and 4, below. The essential points made here are that the code *must* implement Council's prohibition through some means, and the implementation must be through sections of code *other than the definition of "Alley Access Lot/Parcel."* These two facts lend substantial weight to the arguments presented under the respective appeal items.

Appellants allow there may possibly be other means by which code implements Council's prohibition; but if applicant or the Planning Director believe there are other applicable sections of code, then the burden falls on them to identify specifically which code sections implement Council's prohibition and demonstrate how Parcel 1 complies. (The only attempt in the current case has been the Planning Director's reliance on the definition of "Alley Access Lot/Parcel," which has been shown to be inadequate.)

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Appellants note that the Hearings Official considered some of these issues in the appeal of PT 06-43 and suggest the issues can be methodically evaluated by considering the following series of questions. (Appellants' assertions and supporting evidence are recapped after each question.)

1. Did City Council vote to prohibit creation of new lots that have actual and legal access only from an alley (except in subdivisions of ten or more lots)?

**Yes** – Council motion on October 25, 2000.<sup>33</sup> Testimony from Councilors Kelly, Farr, Bettman, and Taylor.<sup>34</sup>

2. If the answer to Question 1 is "Yes," did City Council reverse their decision?

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<sup>33</sup> PT 06-43 Record at III-70 to III-71

<sup>34</sup> PT 06-43 JWN Appeal Testimony, October 16, 2006 Attachments A and B.

**No** – Testimony from Councilors Bettman and Taylor. No claim or evidence has been presented suggesting Council reversed its decision.

3. Does Eugene Code implement City Council’s prohibition?

**Yes** – Based on Council’s motion, which was directly related to the 2001 land use code update. Confirmed by previously cited testimony from City Councilors. Confirmed by previously cited statement of Interim Planning Director and other Planning Division staff in relation to the PT 06-43 case. No claim or evidence to the contrary has been presented.

4. Does the EC 9.0500 definition of “Alley Access Lot/Parcel,” or any code referencing this definition, implement Council’s prohibition?

**No** – As explained above, *nowhere* in the code is there any explicit prohibition against “Alley Access Lots” or any other use of this definition as a criteria for new lots.

If the Hearings Official agrees with appellants’ assertions under each of these questions, then the logical conclusion follows that some code provisions other than the EC 9.0500 definition of “Alley Access Lot/Parcel” must implement the Council’s prohibition. And neither applicant nor the Planning Director has provided any evidence or valid argument to counter that assertion. In contrast, appellants will show why the code can only be interpreted to give effect to the City Council’s ban on lots accessible only from an alley, such as the one at issue.

Appellants’ present the reminder of our arguments under the specific criteria discussed in Appeal Items 2, 3, and 4, below.

Note that appellants’ arguments for Appeal Items 2, 3, and 4 do not *depend on* the fact that the code implements Council’s prohibition against lots accessible only from an alley. Appellants present substantial, independent evidence supporting appellants’ arguments for these appeal items. Rather, appellants assert the facts presented in this section add *additional* evidence in support of appellants’ arguments for these appeal items.

## II. APPEAL ITEMS

### Appeal Item 1. Partition conflicts with allowable density

The Planning Director erred in finding Parcels 1 and 2 meet the EC 9.2750 “Maximum Net Density Per Acre” standard and the governing Eugene-Springfield Metropolitan Area General Plan (Metro Plan) Policy A.9 “Medium density” range, as required by the criteria in EC 9.8215(1)(a).

In the absence of any approval conditions on this lot partition, under Eugene’s development approval process, development would be allowed on the individual parcels, as well as in aggregate, that exceeds the applicable Metro Plan maximum density.

The subject lot currently allows 7 units. The two partitioned lots would allow a total of 8 units (5 on Parcel 1 and 3 on Parcel 2). Thus, 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.”

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.

This result is a consequence of dividing the lots and applying the EC 9.2751(1)(c) “round up” provision for calculating allowable dwelling units *twice* (once for each new lot), rather than *once* (for the original lot).

The Planning Director erred in approving a partition that would allow 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 applicant 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.

Appellants note that this conflict with Metro Plan policy A.9 and the “stealth” change in the maximum density requirement from the R-2 range to the R-3 range will *not* be prevented through Eugene’s development approval process, as explained in section I.D, above.

Thus, the Hearings Official should add the following condition to prevent this conflict:

**Condition 1.** Parcel 1 may be developed with no more than four dwelling units, and Parcel 2 may be developed with no more than two dwelling units.<sup>35</sup>

## **Appeal Item 2. Parcel 1 has inadequate frontage**

The Planning Director erred in finding Parcel 1 meets the EC 9.2760 “Frontage Minimum” standard as required by the criteria in EC 9.8215(1)(a).

The Planning Director’s interpretation is inadequate because it omits the necessary analytical steps in evaluating the required extent (depth) of the twenty-foot frontage requirement.

The question is one of code interpretation, and the city’s answer to that question should be guided by the principles set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). In addition, although not determinative at this point, it is useful to note the circumstances set forth under ORS 197.829(1) that LUBA is required to reverse or remand a city’s decision or code interpretation if it:

- (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation;

In interpreting a land use code, it is necessary to examine both the text and context of the statute or rule at issue as the first level of its analysis. If the ordinances that the city is supposedly interpreting contain no language consistent with that interpretation the city is not entitled to any deference under ORS 197.829(1)(a). *Foland v. Jackson County*, 215 Or App 157, 164, 168 P.3d 1238 (2007). In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature’s intent. *State v. Person*, 316 Or at 590, 853 P.2d 813; *State ex rel. Juv. Dept. v. Ashley*, 312 Or 169, 174, 818 P.2d 1270 (1991).

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<sup>35</sup> Applicant has suggested this condition. See Application at 4.

In trying to ascertain the meaning of a statutory provision, and thereby to inform a meaningful inquiry into legislative intent, the Hearings Official must consider rules of construction of the statutory text that bear directly on how to read the text. *Id.* Some of those rules are mandated by statute, including, for example, the statutory enjoiner "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Another basic rule of statutory construction holds that use of a term in one section and not in another section of the same statute indicates a purposeful omission, *Emerald PUD v. PP & L*, 302 Or. 256, 269, 729 P.2d 552 (1986). If the city council's intent is clear from the above-described inquiry into text and context, further inquiry (including delving into legislative history) is unnecessary. *Id.*

Applying these principles to the interpretation of the term frontage in the context of the city council's specific prohibition against lots that are accessible only from an alley, appellants assert that in order to comply with the language, intent, and policy of the code the required minimum frontage must:

1. Have some reasonable depth, i.e., frontage must be more than a mere line or some infinitesimally shallow area.
2. Extend at least to the buildable portion of the lot.

In the decision on the current application, as well as in staff testimony in PT 06-43, the Planning Director and staff essentially argue there is no requirement that lot frontage extend to any depth.

Staff also asserted their use of the *wrong* definition of Lot Frontage in their oral testimony at the PT 06-43 appeal hearing. The Hearings Official asked staff to "explain what the idea was with reference to the 20 foot frontage narrowing down to 13.9."<sup>36</sup> Mr. Gabe Flock, Sr. Planner, responded:

"I think to the degree that there is room for an interpretation there, as it relates to frontage, we interpret that as the dimension of the parcel boundary where it abuts the street. And I think we would direct your attention to the definition of Front Lot Line in conjunction with that."<sup>37</sup>

And most recently, staff confirmed their misinterpretation in the January 14, 2008 Memorandum:

\*\*\*\* lot frontage is a one-dimensional measure along the portion of a lot abutting the street \*\*\*\*

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<sup>36</sup> PT 06-43 Appeal Hearing Recording at 1:37:00

<sup>37</sup> PT 06-43 Appeal Hearing Recording at 1:38:30.

Thus, according to staff's interpretation, Lot Frontage is *identical* to Front Lot Line. And, therefore, the EC 9.2760 twenty foot Frontage Minimum requirement for an R-2 lot is identical to requiring no more than a twenty-foot Front Lot Line.

But the Planning Director and staff's interpretation of Lot Frontage is clearly wrong and conflicts with the code's own definitions in EC 9.0500, which provides distinctly *different* definitions:

**Lot Frontage.** That portion of a single lot abutting the street.

**Front Lot Line.** A lot line abutting a public street or in cases of private streets or access easements, the front lot line shall be considered to be the boundary of the private street or access easement.

Staff defines Lot Frontage as a line. But according to the code's definitions, Lot Frontage is a portion of a lot. A "lot" comprises an area, and thus the only possible meaning of a "portion of an area" is also an area, *not* a line. In both plain English and plane geometry, a "portion" of an area cannot be a line.<sup>38</sup>

Both the fact that Lot Frontage is defined as an area and the fact that the code contains an explicit distinction between Front Lot Line and Lot Frontage require that the EC 9.2760 Frontage Minimum standard be interpreted as requiring something more than a twenty foot front lot line, which is specifically what the Planning Director has done in this decision, as confirmed by the staff Memorandum.

Although the extent of Frontage is arguable, there is no question that Lot Frontage is not Front Lot Line, and Frontage Minimum cannot be interpreted as a Front Lot Line Minimum. Thus, regardless of how the extent of Frontage should be interpreted, the Planning Director has applied the wrong standard in evaluating compliance with EC 9.8215(1)(a), and the decision must be reversed.

Examining this error further, by interpreting the EC 9.2760 Frontage Minimum standard as if it required no more than a twenty-foot Front Lot Line, the Planning Director impermissibly conflated the two definitions,

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<sup>38</sup> Also note that treating "front lot line" as equivalent to "frontage," as staff suggests, would conflict with other sections of code, as well. For example, this would mean the EC 9.0500 definition of Flag Lot could be read as: "A lot with less front lot line on a public street than is generally required by this land use code and where that front lot line serves primarily as a vehicle access corridor." Obviously, a *line* can't serve as an access *corridor*. Other such examples are cited below.

thereby misconstruing the Lot Frontage definition and robbing the Frontage Minimum standard of its intended purpose and its effectiveness in prohibiting lots accessible only from an alley. *Emerald PUD v. PP & L*, 302 Or. 256, 269, 729 P.2d 552 (1986).

This interpretation, combined with the Planning Director's interpretation of minimum lot width, would allow scores of the regular, rectangular, street-to-alley lots that are a pervasive and fundamental element of the Westside neighborhood character to be partitioned into alley-access-only lots with skinny "poles" serving no purpose other than to "touch" the street so applicant can circumvent the clear intent of the code and Council's prohibition against lots accessible only from an alley. In the extreme case, lots such as the one depicted in Attachment A (attached hereto and incorporated herein by reference) would be allowed under the Planning Director's interpretation.<sup>39</sup>

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<sup>39</sup> Appellants do not contend there will actually be requests to create new lots as extreme as that shown in Attachment A. Attachment A shows the allowable range of frontage depth and "pole" width. However, given what appellants know about the Westside neighborhood, we believe it would be entirely likely that "poles" just a few feet wide would be necessary to skirt existing dwellings in the manner of Parcel 1, and that an indeterminate number of owners would exploit the Planning Director's approach to create new lots with this type of "pole."

Appellants also note that on page 8 of the PT 06-43 Appeal Decision, the Hearings Official posited that "setback provisions limit how narrow a lot can be." Appellants respectfully observe that setbacks are *not* part of EC 9.2760 Residential Zone Lot Standards, but are instead included under "Minimum Building Setbacks" in EC Table 9.2750 Residential Zone Development Standards.

From the placement of setback requirements in the code, as well as the various ways that setbacks are used in the code, appellants believe the EC 9.2750 "Minimum Building Setbacks" do *not* limit how narrow (or deep) a lot can be. Instead, minimum setbacks constrain how close buildings and other physical features can be to a lot line.

In addition, even after repeated requests from appellants in the PT 06-43 case, staff has *never* acknowledged there was *any* minimum depth of lot frontage, nor any minimum width for the narrowest part of a lot. If the Hearings Official would like clarification on the Planning Director's theory, we hope she will ask staff to clarify their interpretation of these two questions.

What's more, the Planning Director's interpretations of Frontage Minimum, Width Minimum, and Street Connectivity would allow creation of interior, flag-shaped lots that do *not* abut an alley and that have a "pole" that narrows to a width that doesn't allow street access. (Lot 3700 on applicant's "Vicinity Map of Land Use" is an example of a lot that could be divided this way.) The result would be a new lot with "frontage" but *no* access from street *or* alley, a nonsensical and unfortunate result.

The definition of Lot Frontage (as well as the uses of this term, as discussed below) establishes that Lot Frontage is an area, not a line, but the code doesn't explicitly state the extent of Lot Frontage. Therefore, it's necessary to look at the purpose of a minimum frontage requirement and how frontage is used in other relevant sections of code.

The best available context for interpreting the minimum frontage requirement is found in the definition and standards for residential flag lots:

**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.

**EC 9.2775 Residential Flag Lot Standards for R-1.** Section (5)(d)(4). 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.

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*(footnote continued)*

In any case, appellants' argument still holds no matter how the applicable five-foot interior setback requirement is interpreted. Even if the five-foot interior yard setback were to limit how narrow a lot could be, a lot could still be as narrow as five (or perhaps ten) feet, which is still less than necessary to provide a vehicle access corridor. (Although appellants don't believe this affects the points being made by appellants, appellants also note that, by being as narrow as the setbacks, the "pole" would provide no buildable area.)

To reiterate appellants' point: An essential purpose of the Lot Frontage requirement is to provide a vehicle access corridor, and so the full width of the frontage must extend from the street to the buildable portion of the lot. Further, this same requirement is how code implements Council's prohibition against lots accessible only from an alley.

An essential purpose for “lot frontage” couldn’t be more clearly stated than in the flag lot definition – “lot frontage serves primarily as a vehicle access corridor” to the buildable portion of the lot.<sup>40</sup> And the applicable flag lot standard reinforces this point by requiring the *frontage* “shall remain free of structures and be available for possible future access to a public street.” (Emphasis added).

In *Thompson v. City of St. Helens*, 30 Or LUBA 339, LUBA was faced with a very similar fact pattern regarding the interpretation and purpose of a frontage standard in the local code. The Board found:

ORS 197.829(3) permits LUBA, in cases where a local government fails to interpret adequately a provision of its land use regulations, to make its own determination of whether the local government decision is correct. Not only is the argument in the city's brief at odds with the actual language of the challenged decision, but here it is clear on the face of the ZO that it applies. Not to apply the appropriate frontage requirements at the time of a lot line adjustment would result in the creation of lots that do not comply with the ZO. That would render the ZO frontage requirements moot.<sup>41</sup>

Note that appellants are *not* asserting Parcel 1 is a Flag Lot according to the EC 9.0500 definition, nor that R-1 flag lot standards apply to Parcel 1. The point here is that the cited definition and standard provide a reasonable basis for determining the code’s intended purpose in requiring a new residential

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<sup>40</sup> As a side note, observe how the term “portion” is used in “flag portion” to refer to an *area*. This supports appellants’ contention that “portion” cannot be interpreted as a line.

<sup>41</sup> LUBA noted that that the City of St. Helen’s requirement for frontage as a feature of a flag style is based on its code standard that mandates all lots or parcels must have road frontage of various amounts. The minimum is 25 feet for flag lots. LUBA looked to the frontage criterion for flag lots and found:

Street Frontage. Flag lots with a minimum street frontage of 20 feet shall be permitted provided that the Planning Director or Planning Commission finds that the following conditions exist:

- a. The flag lot is the only reasonable method by which the rear portion of an unusually deep land parcel, in comparison to other lots on the block, may be provided with access.
- b. The private accessway shall provide access to not more than two parcels. *Id.*

lot to provide adequate frontage area. The flag lot definition and R-1 flag lot standard are particularly relevant in determining the code's intent for the frontage of a *flag-shaped* residential lot, such as Parcel 1.

Although appellants are not asserting that Parcel 1 is a flag lot under the code's definition, and appellants' argument in no way depends on that conclusion, flag lots are allowed in R-2 zones, and EC 9.2760 Frontage Minimum standard requires a minimum 15-foot frontage for R-2 flag lots that, by definition, provides a vehicle "access corridor to the 'flag portion' of the lot." It would be completely inconsistent with this requirement for the code to allow a *less-than* 15-foot-wide "pole"<sup>42</sup> on an R-2 flag-shaped lot, such as Parcel 1, that is required to have an even *greater* frontage than a true flag lot.

The plain and simple fact is that the frontage requirement for a *flag-shaped* lot serves the same purpose as for a "flag lot" in providing a vehicle access corridor. And, even if that purpose were then construed to allow the frontage to narrow to less than 20 feet wide along the access corridor, it's not reasonable to expect the corridor would be allowed to narrow to less than the 15 feet required for *all* flag lots, in *all* residential zones.<sup>43</sup>

There's additional evidence to support appellants' assertion that a fundamental purpose of frontage is to provide a vehicle access corridor. "Frontage" also occurs in section EC 9.2100 Purpose of C-1 Neighborhood Commercial Zone:

"Neighborhood commercial areas should enhance rather than intrude on the character of a neighborhood by providing landscaped buffering and ensuring sufficient street frontage to provide safe and efficient access." (Emphasis added).

In this case, the purpose of frontage is specifically "to provide safe and efficient access." Obviously, to provide such access, the frontage must extend to the buildable portion of the lot.<sup>44</sup>

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<sup>42</sup> As established in the PT 06-43, both applicant and Planning staff themselves referred to the section of Parcel 1 between the street and the buildable portion of the lot as the "pole."

<sup>43</sup> Staff may argue that even an R-2, R-3, or R-4 flag lot's frontage has no requirement to extend to the flag portion of the lot. However, that interpretation (coupled with staff's interpretation of street connectivity), would allow lots with *no vehicle access at all*.

<sup>44</sup> It would be interesting for staff to explain how they would apply the EC 9.2180 Commercial Zone Lot Standards requirement that new C-1 lots have a minimum

Another relevant use of “frontage” occurs in section EC 9.2430(2)(c) Industrial Zone Siting Requirements:

“Sufficient street frontage to accommodate structures, parking, and access in character with adjacent non-industrial properties.”

In this case, frontage is the required area sufficient for access and other purposes. To provide access, the frontage must extend to the buildable portion of the lot.

The previous discussion has provided evidence, based on the definition of “Lot Frontage” and relevant uses of “frontage” in the code, that an essential purpose of the EC 9.2760 Frontage Minimum standard is to provide an access corridor to the buildable portion of the lot. Consequently the correct interpretation EC 9.2760 Frontage Minimum is to require the minimum frontage to extend to the buildable portion of the lot.

Appellants also assert that a specific purpose of the Frontage Minimum under the residential zoning standards is to implement Council’s prohibition against lots accessible only from the alley.

In prohibiting lots that are accessible only from an alley, Council was necessarily requiring that new lots have access from the street, since access must be from either the street or the alley (or both) – there are no other possibilities for access.

The two most direct ways Eugene Code requires access from the street (or at least the possibility of access from the street) are adequate frontage to provide an access corridor and by requiring street connectivity (as covered under Appeal Item 4, below).

If, however, the Frontage Minimum standard in EC 9.2760 is interpreted to allow frontage that is too shallow and/or too narrow to provide an access corridor to the buildable portion of a lot, as is the result of the Planning Director’s interpretation of Lot Frontage as Front Lot Line, then the Frontage

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*(footnote continued)*

frontage of fifty feet. Would staff approve a new C-1 lot with a comparable configuration as Parcel 1; for example, a lot that narrowed from fifty feet abutting the street to a 13.9 foot wide “neck” (such as in Parcel 1) before widening again where the buildable portion of the lot occurred?

This hypothetical case illustrates how broadly the Planning Director’s myopic interpretation of frontage would undermine one of the foundations of lot standards.

Minimum standard *cannot* be the implementation of Council's prohibition against lots accessible only from the alley.

Thus, the Interim Planning Director's interpretation that the Frontage Minimum standard does *not* require sufficient frontage to extend to the buildable portion of a lot (coupled with the Planning Director's interpretations of minimum lot width and street connectivity) irreconcilably conflicts with his statement (cited above) that: "Prior to [the code update], 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."

In a nutshell, the Interim Planning Director has expressly asserted the code *prohibits* lots that are accessible only from the alley, yet the Planning Director decision then interprets the code to *allow* lots that have no possibility of access from the street.

Referring to the issues discussed in I.F. above: Does the code implement Council's prohibition against lots that are accessible only from the alley, or does it not? If the code implements this prohibition, then the Planning Director *must* identify how this prohibition is implemented. If the Frontage Minimum standard implements Council's prohibition, then the Planning Director must interpret the standard in a way that actually achieves the intended prohibition.

Summing up, evaluating the EC 9.2760 Frontage Minimum standard requires a determination of whether "frontage" in this standard requires the frontage to extend beyond an infinitesimal depth, and if so, what the required extent is for purposes of this standard. This determination can be methodically approached by answering a series of questions:

1. Is a purpose of the Frontage Minimum standard to provide an access corridor?
2. Is a purpose of the Frontage Minimum under the residential zoning standards to implement Council's prohibition against lots accessible only from the alley?
3. If the answers to both Question 1 and 2 are "No," what *is* the purpose of the Frontage Minimum standard and on what evidence is the purported purpose based?
3. Is "frontage" in the Frontage Minimum standard equivalent to "front lot line" (i.e., no depth at all is required)?

4. If the answer to Question 3 is “No,” can the extent (depth) of “frontage” (for purposes of meeting this requirement) be infinitesimally shallow?
5. If the answer to Question 4 is “No,” what is the minimum extent of “frontage,” and on what evidence is this minimum extent based?

Appellants have provided substantial evidence that the purpose of the Frontage Minimum standard *does* include providing an access corridor and implementing Council’s prohibition against lots accessible only from the alley, and that the minimum frontage must extend to the buildable area of the lot.<sup>45</sup>

In contrast, neither applicant nor the Planning Director have met applicant’s burden of proof to provide a preponderance of evidence supporting their implicit claims that the purpose of the Frontage Minimum standard does *not* include providing an access corridor or implementing Council’s prohibition against lots that have access only from the alley, and that there is no required extent for the minimum.

Further, by misinterpreting Lot Frontage as a line, the Planning Director has clearly erred in a way that by itself requires reversing the decision.

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Appellants note that the Hearings Official also considered the Frontage Minimum standard in the appeal of PT 06-43. Appellants believe our prior explanation in that appeal may not been clear on several key points, particularly in that the issues of frontage and lot width became intertwined in a way that may have been confusing.

To clarify an apparent misunderstanding of appellants’ assertion regarding frontage that appears in the Planning Director’s PT 07-19 decision and staff Memorandum<sup>46</sup>, as well as the PT 06-43 Appeal Decision, appellants do *not*

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<sup>45</sup> Appellants also note the evidence presented in section I.E, above, establishes that Parcel 1 does not provide access, and applicant has provided no evidence to the contrary. See also the discussion under Appeal Item 4, below.

<sup>46</sup> Decision at 3. “As defined, the lot frontage standard is met irrespective of whether a 20 foot width is maintained for the entire depth of the parcels.”

January 14, 2008 Staff Memorandum at 4: “As found by the Planning Director, the lot frontage standard is met irrespective of whether a 20-foot width is maintained for the entire depth of the parcel.”

assert that the code intends frontage width to be maintained for the whole length of the parcel, but rather only to the buildable portion of the lot. In the particular case of Parcel 1, appellants would agree that Parcel 1 would comply with the Frontage Minimum standard if the “pole” portion of Parcel 1 were at least twenty feet wide from the street to the rear, buildable portion of the lot (a depth of about 64.3 feet from the front lot line). In the general case, the minimum frontage does not apply to areas *behind* the buildable area of a lot (i.e., on the side opposite the street).

Appellants also do not base their interpretation of the Frontage Minimum standard *in any way* on the minimum lot width standard. Appellants assert that the Frontage Minimum standard alone is sufficient to require that Parcel 1’s “pole” section be at least twenty feet wide from the street to the buildable portion of the lot.

On another point, in the PT 06-43 Appeal Decision, the Hearings Official observed that “applicant is correct that the city’s code defines ‘lot frontage’ as ‘that portion of a single lot abutting the street’.” Appellants agree and did not dispute that fact in the PT 06-43 case. Appellants’ point in both PT 06-43 and the current case is that the “portion,” or *area*, of frontage must have some meaningful depth in addition to abutting the street.

Appellants further argue that, in light of the substantial evidence appellants have presented in support of our assertion, the Planning Director must at least address the issues appellants have raised by presenting some plausible theory as to the required depth of frontage and must provide substantial evidence in support of that theory. The Planning Director apparently has no theory other than that Lot Frontage is a line, which appellants have demonstrated is untenable.

Appellants respectfully request the Hearings Official give this issue further consideration.

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*(footnote continued)*

Opponents have never contended the minimum lot frontage width must be maintained for the entire depth of a parcel, and staff has not provided a rebuttal to appellants’ actual assertion in both PT 06-43 and the current case, which is that Parcel 1’s frontage must extend to the main (buildable) portion of the lot.

### **Appeal Item 3. Parcel 1 has inadequate minimum width**

The Planning Director erred in finding Parcel 1 meets the EC 9.2760 “Width Minimum” standard as required by the criteria in EC 9.8215(1)(a).

The Planning Director incorrectly allowed a lot with a minimum width less than twenty feet.

The record in PT 06-43 established that the Planning Director’s interpretation of EC 9.2760 “Width Minimum” standard produced nonsensical results, in which a lot everywhere wider than another lot would nevertheless have a lesser “width.”<sup>47</sup>

Appellants assert this result requires the Planning Director to apply the Width Minimum standard in a way that avoids such results and, for a rectilinear lot, such as Parcel 1, this should be the minimum width between the two parallel side lot lines, or 13.9 feet, which is less than the 20 foot requirement.

As stated under Appeal Item 2, appellants assert the Frontage Minimum standard, when properly interpreted, is sufficient to implement Council’s prohibition against lots accessible only from an alley. However, to the degree staff argues that minimum lot frontage *and* width standards, *together*, implement Council’s prohibition, while at the same time arguing that lot frontage is merely the front lot line, then appellants also assert the Width Minimum standard must be interpreted to assure the “pole” portion of Parcel 1 provides a vehicle access corridor to the buildable portion of Parcel 1 (as explained under Appeal Item 2). And, therefore, if Width Minimum is an element in how code implements Council’s prohibition, it must not be interpreted as the Planning Director has done.

### **Appeal Item 4. Parcel 1 does not meet street width and connectivity standards**

The Planning Director erred in finding Parcel 1 meets the EC 9.6870 “Street Width” standards and EC 9.6815(2) “Street Connectivity Standards,” specifically subsections (b) and (d), as required by the criteria in EC 9.8215(1)(b).

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<sup>47</sup> October 25, 2006 PT 06-43 Appeal Testimony at 16 and Attachment J.

## A. Street Width standards

The Planning Director incorrectly interpreted the requirement for right of way and minimum paving width for W. 12th Alley.

Applicant makes two spurious claims that EC 9.6870 doesn't apply to W. 12th Alley.<sup>48</sup> The first of these is that the standard doesn't apply because the applicant is not dedicating W. 12th Alley. But W. 12<sup>th</sup> Alley is *already* a dedicated alley, which the standard covers.

Secondly, applicant claims that the following sentence in EC 9.6870 excludes alleys:

When a street segment right-of-way width is not designated on the Street Right-of-Way map, the required street width shall be the maximum shown in Table 9.6870 \*\*\*

The fact that EC 9.6870 covers both streets and alleys is clear from the first sentence under EC 9.6870, and Table 9.6870 includes two rows for "Alley" under the subheading "Local Streets." Both these facts establish that, in the referenced sentence, "street segment" and "street width" encompass alleys.

Applicant's sole argument for failing to comply with this standard is that:

"The applicant cannot do anything about the fact that the alley right-of-way width does not meet the standard of Table EC 9.6870."<sup>49</sup>

This may be unfortunate for the applicant, but the code does not provide for an exception just because applicant cannot comply.

As established above, and uncontested by applicant or Planning Director, Parcel 1 will use W. 12th Alley for *primary* access. Accordingly, the alley must meet right-of-way and width standards for primary access. This can be accomplished for two-way travel to and from Adams Street by a twenty-foot right-of-way and twenty-foot paving. Alternately, primary access can be provided for one-way travel by a twenty-foot right-of-way and twelve-foot paving between Adams and Jackson Streets.

The current alley is not just substandard (as the Planning Director admits), it is *severely* inadequate for safe and efficient access of residents and emergency

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<sup>48</sup> Application at 19.

<sup>49</sup> Application at 19.

vehicles, as depicted in the photographs in Attachment B. The EC 9.8215(1)(b) approval criterion requiring the alley to meet city standards isn't something that can be reasonably ignored (as applicant suggests) or deferred (as the Planning Director proposes).

The Planning Director claims:

Because it is uncertain how the partitioned property will be developed and because the specific alley design for West 12th [sic] will not be determined until the City solicits and receives input from adjacent impacted property owners on both sides and along the entire length of the alley, the type of improvement and the necessary right-of-way cannot yet be determined. \*\*\* As such, applicant is not required to dedicate any additional right-of-way for the alley pursuant to EC 9.6805.<sup>50</sup>

But EC 9.6805 provides discretion for requiring applicant to dedicate *new* "public ways," such as a new alley or street on a development site.

EC 9.6870 covers the standards which dedicated streets and alleys, including W. 12th Alley must meet. W. 12th Alley doesn't meet the required standards, and the application thus fails to comply with EC 9.8215(1)(b).

Appellants also point out that the Planning Director *does* know, but has ignored in the analysis of alley standards, the critical fact that the proposed configuration of Parcel 1 necessitates W. 12th Alley being used for *primary* access because Parcel 1 does not provide street access. And thus, W. 12th Alley requires a twenty-foot right-of-way.

Appellants also point out that applicant's whole problem arises from the fact that applicant has chosen to save money<sup>51</sup> by not moving the existing house and simply configuring Parcel 1 so it has a twenty-foot access corridor from W. 13th Avenue to the buildable portion of the lot. If Parcel 1 had street access, the *existing* 14-foot right-of-way on W. 12th Alley would be adequate for *secondary* access. In fact, the whole root of applicant's problem is that the proposed lot configuration *conflicts with* the character of Westside alleys, which were designed and intended for *secondary* access.

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<sup>50</sup> Decision at 5.

<sup>51</sup> Applicant Ronald Johnston is quoted in the January 22, 2008 *The Register-Guard* (page D2: "[W]e wanted to keep the house and put four units on the back because we could get better pricing \*\*\*."

Applicant has also incorrectly stated that the EC 9.5500 Multiple Family dwellings section (11)(2) *requires* Parcel 1 to take access from the alley.<sup>52</sup> This is wrong on two counts. First, EC 9.5500(11)(2) would not apply if one or two dwellings were proposed for Parcel 1, again, consistent with the neighborhood character. Second, EC 9.8030(8)(e) allows adjustment of the EC 9.5500(11)(2) with minimal constraints. Thus, Parcel 1 could be developed and use W. 13th Avenue for primary access, if a Parcel 1 had a legal and actual access corridor.

The EC 9.6870 standards also allow an alternative to the right-of-way width in Table 9.6870, as covered in the following clause:

\*\*\* unless a lesser width is approved by the planning director and public works director based on adopted plans and policies, adopted "Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways, and Accessways," or other factors which, in the judgment of the planning and public works director allow for a lesser street width.

However, the Planning Director's decision did not provide any indication that the Planning Director and Public Works Director had approved a lesser width for W. 12th Alley, and no such lesser width is stated anywhere in the decision.

To the contrary, the Public Works evaluation dated November 14, 2007 stated:

Staff does not agree that existing development would prevent the dedication of additional right-of-way in West 12th Alley.<sup>53</sup>

Therefore, the current application must be evaluated on the basis of the requirement for a twenty-foot right-of-way. Since the application doesn't meet this requirement, it must be denied.

## **B. Street connectivity standards**

The Planning Director incorrectly interpreted the requirement for connectivity of Parcel 1 to W. 13th Avenue and the conditions necessary for an exception.

Applicant provides no evidence or claim that Parcel 1 complies with EC 9.6815(2)(b), and applicant's *only* basis for claiming that Parcel 1 complies

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<sup>52</sup> Application at 27.

<sup>53</sup> Public Works Referral, from Ed Haney to Shawna Adams, dated November 14, 2007 at 3. See Attachment C.

with the relevant criteria in EC 9.8215(1)(b) is to request an exception to EC 9.6815(2)(b), based on EC 9.6815(2)(g)(1) or EC 9.6815(2)(g)(2)(b).

EC 9.0500 defines "Develop" as "... to construct or alter a structure ... to divide land ...."

EC 9.0500 defines "Development" as "The act, process or result of developing."

Applicant proposes a development that will divide a lot to create Parcel 1.

EC 9.6815(2)(b) states:

The proposed development shall include street connections in the direction of all existing and planned streets within 1/4 mile of the development site. The proposed development shall also include street connections to any streets that abut, are adjacent to, or terminate at the development site.

Parcel 1 abuts W. 13th Avenue, and thus Parcel 1 is required to include a connection to W. 13th Avenue.

Applicant unequivocally asserts that Parcel 1 does not, and cannot, include a connection to W. 13th Avenue by their request for an exception to the requirement based on EC 9.6815(2)(g)(2)(b), which asserts that a connection to W. 13th Avenue is precluded, now and in the future. Applicant's other statements also support this fact, as established in section I.E, above.

Applicant's only basis for claiming Parcel 1 can't be connected to W. 13th Avenue via the subject property itself is because of the location of the existing single-family dwelling on the lot that is proposed to be subdivided, as stated in their application for PT 06-43:

"Further, a connecting street on the subject property could not even be built because of the location of the existing single-family dwelling."<sup>54</sup>

This fact can also be determined by looking at the submitted "Tentative Partition Plan." As discussed above, it is precisely the location of this existing single-family dwelling that prevents the section of Parcel 1 that connects to W. 13th Ave from being 20 feet wide, and providing an adequate access corridor to connect to W. 13th Avenue.

Applicant cites EC 9.6815(1)(g)(1) as a basis for an exemption, which requires that:

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<sup>54</sup> PT 06-43 Record at III-125.

1. The applicant has provided to the city, at his or her expense, a local street connection study that demonstrates:
  - a. That the proposed street system meets the intent of street connectivity provisions of this land use code as expressed in EC 9.6815(1); and
  - b. How undeveloped or partially developed properties within a quarter mile can be adequately served by alternative street layouts.

Applicant has not submitted a local connection study, and therefore has not met the requirements for EC 9.6815(1)(g)(1). At the very least, a local connection study should include a map and/or a comprehensive written inventory of the streets and properties within a quarter mile of the subject property. However, applicant provided neither.

Applicant states “a map showing all streets within a quarter mile radius centered on the subject property” has been provided as part of the application packet.<sup>55</sup> However, applicant does not identify which map is referred to. The only map appellants found in the application packet that identified streets and parcels in the vicinity of the subject parcel, and that included at least the entire block surrounding the subject parcel, was the “Vicinity Map of Land Use” included in the “Area Study” submitted as an addendum.

This map, however, does not come close to including all street and alley segments, and all parcels, within one quarter mile of the boundaries of the subject property.

The Planning Director appears to have relied on applicant’s “Area Study,” including the “Vicinity Map of Land Use,” for the explicitly required local street connection study:

The Area Study clearly shows how the existing streets and alleys between West 12th and 13th Avenues and between Jackson and Adams serve the existing lots in this block and makes it clear that the existing street and alley system is adequate.<sup>56</sup>

In addition to the Area Study not covering an adequate surrounding area, however, applicant’s own “Explanation of Purpose and Content of Area Study” contradicts the Planning Director by nowhere referring directly or indirectly to EC 9.6815(2)(g)(1) or addressing the requirements in subsections

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<sup>55</sup> Application at 8.

<sup>56</sup> Decision at 6-7.

(a) and (b) under that section. Instead, the explanation states that the aerial map and alley study are directed at supporting applicant's claims regarding alley width and paving and applicant's request for an exemption under EC 9.6815(2)(g)(2)(b).

Furthermore, the cover page of the "Area Study" submitted with the application and the "Vicinity Map of Land Use" were both date-stamped April 23, 2007 by the Planning Division. Thus the "Area Study" and the included map in the *completed* application (which the Planning Director evaluated) are the exact same versions that were submitted with applicant's *initial* version of the PT 07-19 application on April 23, 2007. In the initial version of the application, *applicant did not request an exception based on, nor made any reference to, EC 9.6815(2)(g)(1)*. Thus, the "Area Study" was clearly never intended by applicant to serve as the local connection study required by EC 9.6815(2)(g)(1).

Applicant's only attempt to identify the undeveloped or partially developed properties within a quarter mile is provided on page 12 of the application:

"There is very little undeveloped or partially developed property within ¼ mile of the development site."<sup>57</sup>

"Very little" is unsupported by any quantitative evidence and is not an adequate identification of the undeveloped or partially developed properties. Nowhere else in the application does applicant provide any inventory of undeveloped or partially developed parcels within one quarter mile of the subject property. Thus, applicant has not provided sufficient evidence to support applicant's claim of compliance with EC 9.6815(2)(g)(1)(b).

Not only does applicant's "analysis" fall short of applicant's burden of proof, the absence of the necessary data on which to base an analysis falls far short of the clear intent of EC 9.6815(2)(g)(1) that the applicant provide a credible local street connection study, even if that requires some expense on the part of the applicant. The Planning Director erred by reaching a conclusion to grant an exception without sufficient data or adequate analysis, and therefore an exception cannot be granted.

The Planning Director's finding that: "applicant's written statement clearly shows how each purpose and intent statement at EC 9.6815(1) is met by the existing street and alley system" ignores the fact that W. 12th Alley does not fully meet the purpose and intent statement at EC 9.6815(1).

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<sup>57</sup> Application at 12.

The use of a substandard alley for the only possible connection to Parcel 1 does *not* meet the intent of at least the following EC 9.6815(1) items:

- (a) Streets are designed to efficiently and safely accommodate emergency fire and medical service vehicles.

The condition of W. 12th Alley is severely deteriorated and cannot safely accommodate emergency fire and medical service vehicles. Applicant even admits that “Fire response vehicles require a minimum of 14 feet of [improved] surface,”<sup>58</sup> which W. 12th Alley does not provide.

- (c) The function of a local street is readily apparent to the user through its appearance and design in order to reduce non-local traffic on local residential streets.

The severely deteriorated condition of W. 12th Alley does not make its use as the primary access for Parcel 1 readily apparent.

- (j) Where appropriate, the street system and its infrastructure should be utilized as an opportunity to convey and treat storm water runoff.

The lack of storm drainage on W. 12th Alley clearly does not satisfy this requirement.

Thus applicant has not adequately demonstrated compliance with EC 9.6815(2)(g)(1)(a), and therefore an exception cannot be granted.

Applicant also cites EC 9.6815(2)(g)(2)(b) as their basis for an exemption, which requires that:

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

By the applicant’s own words, as described in section I.E, above, a connection to Parcel 1 is precluded by a building on the lot they propose to subdivide (which is not currently vacant), *not* by a building or development on an adjacent lot that is preexisting.

In *Paterson v. City of Bend*, 49 Or LUBA 160 (2004), LUBA faced an almost identical situation whereby the developer wanted to terminate a street within a subdivision as a cul-de-sac rather than connect the street to an arterial road

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<sup>58</sup> Application at 10.

in conformance with local and state connectivity standards. Analogous to the present case, the Bend code only allowed a cul-de-sac due under very limited conditions, including the interference of “existing development ... [but] only where that development is on ‘adjacent property.’” *Id.*

LUBA found, however, that the pre-existing house was located on the applicant’s own property, not on adjacent property, and therefore it failed to meet the criterion for an exception. LUBA remanded accordingly.

Here, applicant also proposes to create the very condition they cite as their justification for an exception. As in *Paterson*, applicant has available a practical means of complying with street connectivity requirements by moving the house they own a few feet west. Applicant’s argument for an exception to EC 9.6815(2)(b) is meritless and cannot be sanctioned.

The Planning Director’s findings mistakenly attribute the reason Parcel 1 cannot be connected to W. 13th Avenue as based on “surrounding development”<sup>59</sup> when the applicant’s own words and the partition plan diagram make clear it is the existing house on the subject property itself that is the reason Parcel 1 cannot be connected to W. 13th Avenue. (Nevertheless, the Planning Director’s finding that Parcel 1 warrants an exception under EC 9.6815(2)(g)(2)(b) reinforces that a connection from Parcel 1 to W. 13th Avenue is precluded “now and in the future.”)

The request for Parcel 1 in the current application is identical to the request in PT 06-43, and there have been no relevant changes to the conditions on the subject parcel or surrounding environment. Thus the facts in PT 06-43 are applicable to this case, and the Hearings Official’s decision for appellants in PT 06-43 applies equally well:

The director’s decision concedes that the street connection for proposed Parcel 1 would be unlikely to be approved for vehicular access, but concluded that the standard had nevertheless been met because proposed Parcel 1 can use the alley for vehicular access.

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Appellants argue that the planning director misapplied the standard to compare the impact of a theoretical development density on the entire property against the impact a proposed fourplex on an alley access. In addition, appellants argue that the planning director erred by not requiring that the applicant demonstrate that the proposed parcels will

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<sup>59</sup> Decision at 7.

take vehicular access from a street, as is required by EC 9.6815(2)(b). As appellants, note, the definition of street in EC 9.0500 specifically excludes alleys. Finally, opponents note that the alley is inadequate to handle the traffic generated by existing development on the block.

The Hearings Official agrees with opponents that the planning director erred by concluding that applicable street connectivity standards have been met. As the appellants note, the standards apply to the proposed parcel configuration and the development that will occur on those parcels if the application is approved. The applicant has provided evidence to show that the only vehicular access to Parcel 1 is via the alley--and the city's standards require a demonstration that the proposed development include "street connections in the direction of all existing or planned streets within ¼ mile of the development." As noted above, those standards may be waived or modified; however, no such modification has been granted.

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This basis for appeal is sustained. <sup>60</sup>

Despite applicant's and the Planning Director's unambiguous assertions that Parcel 1 cannot include a connection to W. 13th Avenue, the Planning Director makes what appears on page 6 of the decision to be an unsubstantiated attempt to suggest Parcel 1 provides some form of connection to W. 13th Avenue via the "pole" portion of the lot:

Accounting for the configuration and development potential of the proposed partition, direct vehicular access to W. 13th Avenue is potentially available to both parcels.<sup>61</sup>

The Planning Director, however, provided no evidence to contradict applicant's own assertions to the contrary, nor did the Planning Director cite any standard that establishes what requirements Parcel 1 has satisfied to provide "direct vehicular access." The Planning Director is simply making this up as it goes.

The Planning Director also suggests Parcel 1 has "direct access" via W. 12th Alley and then Adams or Jackson Streets:

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<sup>60</sup> PT 06-43 Appeal Decision at 10.

<sup>61</sup> Decision at 6.

Additionally, Parcel 1 has direct access available via the alley to the north, which connects to the streets to the east and the west.<sup>62</sup>

However, the second requirement of EC 9.6815(2)(b) would be virtually meaningless if “connection to any streets that abut” could be satisfied simply by some roundabout route via a grossly deficient alley, which the Planning Director contends does not need any improvements before approving this application. The only reasonable interpretation of a “connection” to a street that abuts Parcel 1 is a connection that provides direct access from the street to the property.

As noted in the quote above, the Hearings Official rejected the Planning Director’s identical claim in PT 06-43.

Even parsed at a word-by-word level, the Planning Director cannot simultaneously suggest in the findings that Parcel 1 *provides* a “connection” to W. 13th Avenue at the same time the Planning Director unequivocally finds that existing development *precludes* a “connection” now and in the future and therefore the lot partition qualifies for an exception. The term “connection” must mean the same thing when used in this section of code, and a “connection” to Parcel 1 cannot be both provided and precluded.

Finally, appellants assert that street connectivity must be viewed as a logical means by which the code implements Council’s prohibition against lots accessible only from an alley. Requiring a newly created parcel to have street connectivity is a direct and effective way to implement the prohibition. Appellants believe both frontage and street connectivity standards implement Council’s prohibition; but, if this is not the case, then at least one of them must be effective in that regard.

Stepping back to take a broader view of this partition request, a reasonable observer can see applicant wants to have it both ways in their attempt to circumvent Council’s prohibition against lots accessible only from an alley. On the one hand, applicant seeks to have Parcel 1 treated as meeting the minimum frontage requirement; while at the same time claiming the requirement to be connected to the street on which the lot abuts can’t be met because the “pole” is too narrow to provide access from the street to the main portion of the lot where dwellings will be built. And yet the *only* cause for the “pole” being too narrow is the location of the existing house on the original lot – a factor totally under the control of applicant.

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<sup>62</sup> Decision at 6.

Applicant and the Planning Director rely on a myopic evaluation of each of the criteria in EC 9.8215 in isolation, combined with requests for exceptions and strained interpretations of the code. The Hearings Official, however, should consider that zoning code, specifically the criteria in EC 9.8215, is meant to function as an integrated mechanism to assure a reasonable enforcement of Council's intentions in adopting this code.

With respect to EC 9.6815(2)(b) applicant admits Parcel 1 does not meet the criteria. The requirements have not been met for either of the two allowable exceptions, and therefore, the partition must be denied.

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EC 9.6815(2)(d) requires *secondary* access for fire and emergency medical vehicles.

Applicant states that adequate access "is provided by the existing street/alley network."<sup>63</sup> However, later in the application, applicant states "Fire response vehicles require a minimum of 14 feet of surface," which W. 12th Alley doesn't provide.<sup>64</sup>

Further since the *only*, and thus *primary*, vehicular access to Parcel 1 is via W. 12th Alley, the *secondary* access for fire and emergency medical vehicles must be via W. 13th Avenue. However, as established above, Parcel 1 cannot have connectivity to W. 13th Avenue, and thus, does not have access from W. 13th Avenue.

Furthermore, neither applicant nor the Planning Director addressed the obvious special problems inherent in attempting to reach the parcel via W. 13th Avenue during Fairgrounds events when traffic may be bumper-to-bumper and unmoving as vehicles attempt to enter the Fairgrounds through the entrance east of where Parcel 1 abuts W. 13th Avenue. For these reasons, Parcel 1 does *not* meet the criterion in EC 9.6815(2)(d).

Applicant has requested an exception to EC 9.6815(2)(d) based on EC 9.6815(2)(g)(1) or EC 9.6815(2)(g)(2)(b), which appellants have shown above isn't justified.

To again bring a dose of reality to this case, applicant has complete control over the existing house and could reasonably move it a few feet to provide a *safe* access corridor from W. 13th Avenue to future dwellings on the buildable

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<sup>63</sup> Application at 9.

<sup>64</sup> Application at 10.

portion of Parcel 1. However; applicant chooses to seek approval of an inadequate proposal that would jeopardize residents' safety in order to avoid the cost of sensible and legal development.

### **Appeal item 5. Parcel 1 does not meet street and alley standards**

The Planning Director erred in finding Parcel 1 meets the EC 9.6505(3) "Streets and Alleys" standards as required by the criteria in EC 9.8215(1)(c).

The Planning Director incorrectly interpreted the requirements for alley width and paving and misapplied the "constitutional requirement" clause.

The substandard condition of the alley applicant intends to use for sole access to Parcel 1 and the intended fourplex development, and the inadequate alley right-of-way (which was covered under Appeal Item 4) are two of the primary deficiencies in the applicant's proposal.

EC 9.6505(3)(b) requires:

The developer shall pave streets and alleys adjacent to the development site to the width specified in EC 9.6870 Street Width, unless such streets and alleys are already paved to that width, provided the City makes findings to demonstrate consistency with constitutional requirements.

Applicant argues that "the width specified in EC 9.6870 Street Width" is a) "vague"<sup>65</sup> and b) in any case, cannot be required because any requirement to pave the alley would be inconsistent with constitutional requirements.

In the first claim, applicant suggests the EC 9.6505(3)(b) requirement should be narrowly interpreted to encompass just the 66.9' portion of W. 12th alley that is immediately adjacent to Parcel 1.

In the second claim, applicant and the Planning Director argued in PT 06-43 that applicant cannot be required to improve the entire length of the alley beyond the 66.9 feet of alley abutting the subject property because such an exaction would not have a rational nexus, or be roughly proportionate, to the impacts from traffic generated by the proposed development under *Dolan v. City of Tigard*, 512 US 374 (1994) and its progeny.

This time around, the Planning Director found that no exaction is required because the applicant will comply with EC 9.6505(3) by providing the city with an irrevocable petition to improve a portion of the alley at some

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<sup>65</sup> Application at 22.

undetermined point in the future, The Planning Director's finding would unavoidably require the other property owners on the segment of W. 12th Alley between Adams and Jackson Streets to pay most of the cost of alley improvements.

In plain English, the term "adjacent" in EC 9.6505(3)(b) qualifies which streets or alleys must be paved, and W. 12th Alley is an alley that is "adjacent to the development site."<sup>66</sup> The entire section of alley between the streets the alley intersects is the only sensible interpretation for an alley that can be used only for one-way access due to its limited width. This follows from the fact that the whole length of the alley between these intersecting streets is required for one-way access to and from Parcel 1.

Therefore, it is the whole length of the alley between Adams and Jackson Streets that is subject to EC 9.6505(3)(b) and must be paved.

Appellants note that EC 9.6505(3)(b) does not require a particular right-of-way, and EC 9.6870 requires only a 12 foot wide pavement for one-way travel. Thus, the paving requirements are clear: The applicant has a choice: pave to a 20 foot width for two way travel or pave to a 12 foot width for one way travel. If applicant believes a 20 foot width is impossible, then applicant has the remaining option of paving to a 12 foot width.

The requirement to pave the alley is justified on a very obvious basis: The proposed development will use the alley for its primary access and that usage requires a safe and efficient means of vehicular access. It's therefore the responsibility of the applicant to pave the alley to the standards necessary for this access, and the standard requiring 12 foot wide paving for one-way travel is reasonable in that light.

Appellants further note that in this case, unlike in *Schultz v. City of Grants Pass*<sup>67</sup>, the record *does* include substantial evidence of the applicant's intent,

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<sup>66</sup> Note how the second clause's structure is consistent, describing that "such" streets and alleys – not "such sections" of streets and alleys – don't have to be paved if they already are adequately paved.

<sup>67</sup> On page 7 of the application, applicant quotes a pivotal element of the *Schultz* decision: "There is *absolutely nothing* in the record to connect the dedication of a substantial portion of the partitioners' land, for the purpose of widening streets, with the petitioners' limited application." But in the current case, there is *substantial evidence*, including applicant's own stated intentions for the "design" and further development of Parcel 1, that evidence connects the requirement for adequate right-of-way and paving with the application.

including applicant's statements that "Parcel 1 is being designed as a fourplex lot", "four proposed units that will be built on Parcel 1", and "Parcel 1, being designed for a multi-family development, will be accessed by the alley."<sup>68</sup> (See other supporting statements in section I.C, above.) Thus, not only would Parcel 1 allow five dwelling units, it is highly likely, based on applicant's own words, that at least four dwelling units *will be built*.

The question of constitutionality was settled in the appeal of the first application for the *identical* partition:

\*\*\* The planning director also concluded that connectivity standards have been met with respect to the alley, despite its substandard width and paving, because the proposed development would result in fewer vehicles using the alley for access than could potentially use the access if the property as it is currently configured. In addition, the planning director concluded that the city could not require that the developer improve the entire length of the alley to meet city standards, because such an exaction would exceed the constitutional limits for exactions set out in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 304 (1994), where the US Supreme Court held that a dedication of private property for public purposes could be upheld only if the exaction is roughly proportional in nature and scale to the impact the proposed development has on the public infrastructure. Accordingly, the planning director imposed a special development setback standard, that allows for full development of the alley at applicable standards at some future date.

Appellants argue that the planning director misapplied the standard to compare the impact of a theoretical development density on the entire property against the impact a proposed four-plex on an alley access. In addition, appellants argue that the planning director erred by not requiring that the applicant demonstrate that the proposed parcels will take vehicular access from a street, as is required by EC 9.6815(2)(b). As appellants note, the definition of street in EC 9.0500 specifically excludes alleys. Finally, opponents note that the alley is inadequate to handle the traffic generated by existing development on the block.

The Hearings Official agrees with opponents that the planning director erred by concluding that applicable street connectivity standards have

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<sup>68</sup> Note that while the EC 9.8215(1)(k) approval criteria limits "other applicable development standards" to "features explicitly included in the application," no such limitation applies to EC 9.8215(1)(c) criteria, and these criteria must be based on all evidence in the record.

been met. As the appellants note, the standards apply to the proposed parcel configuration and the development that will occur on those parcels if the application is approved. The applicant has provided evidence to show that the only vehicular access to Parcel 1 is via the alley--and the city's standards require a demonstration that the proposed development include "street connections in the direction of all existing or planned streets within ¼ mile of the development." As noted above, those standards may be waived or modified; however, no such modification has been granted.

In addition, to the extent the planning director concluded that exactions or development requirements could not be imposed because the proposed development is less dense than [sic] what could be proposed if the parcel remains in its current configuration, again that is the incorrect comparison. The question is whether city's exactions are roughly proportional to the impact of the proposed development. Here, there is no evidence as to the number of property owners on the street who use the alley for primary vehicular access, or evidence regarding the proportional effect of a four-plex on the alley use. In addition, while the applicant asserts that any city condition of approval that would require the applicant to fully improve the alley to city standards would necessarily be an unconstitutional taking because they own one of nine lots that face the alley and would generate no more than 4/9s of the potential traffic, that assertion appears to be based on the belief that the Dolan standard requires a close to 1:1 ratio between the cost of the improvement and the impact the development causes. As LUBA concluded in *McClure v. City of Springfield*, 37 Or LUBA 759 (2000), no such precise ratio is required.

This basis for appeal is sustained.<sup>69</sup>

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<sup>69</sup> Appellants submit that in the event the applicants argue *Dolan* does apply, it is a misplaced contention. *Dolan* is not relevant because the alley width improvement requirement is mandatory and by its terms applies to all proposed development. Thus, the application of EC 9.6505(3)(b) requires little, if any, discretion. See, *McClure v. City of Springfield*, 175 Or App 425 (2001), *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369 (2002), and *Dudek v. Umatilla County*, 187 Or App 504 (2003). These cases stand for the proposition that right of way improvements imposed pursuant to legislatively adopted criteria involving no significant discretion are not subject to the Dolan analysis. Moreover, even if Dolan does apply, the requested exaction has a rational nexus and is roughly proportionate to the impacts from the additional traffic that will be generated by the proposed four-plex based on the amount of traffic such a development will generate, especially when all that traffic will use the alley.

This decision was based on an identical Parcel 1, with the same set of circumstances, and the same substantial evidence of applicant's intent, that is present in this case.

Appellants also note that neither applicant nor the Planning Director provided *any* concrete evidence as to the cost of improvements they claim would be unconstitutional, and so even if such a claim *could* be argued, applicant has placed no evidence in the record to support such a claim. Absent substantial evidence, the Planning Directors should not have merely concluded that the cost would exceed a constitutionally permitted level.

Applicant has also requested an adjustment based on the criteria in EC 9.8030(19), which requires applicant to show that the development will not impact the alley at all. As demonstrated above, the permitted and intended development will impact the alley and thus the criteria for an adjustment has not been met.

The Planning Director's arguments boil down to the following:

1. Paving only the half the width of that portion of the alley immediately adjacent to Parcel 1 "would not significantly enhance the existing alley conditions; whereas full improvement of larger segment would"<sup>70</sup>
2. Paving an isolated portion of the alley would not meet the needs of the property owners along the alley.
3. Because the type and design of the alley will not be determined until a Local Improvement District (LID) is formed, it is not possible to make final determination of alley paving width.
4. Immediate improvement of the segment abutting the alley would not be proportional to the impact of the development

This analysis is flawed in a number of ways.

The first three points are essentially irrelevant to the requirements of EC 9.6505(3)(b).

On the first point, EC 9.6505(3)(b) requires paving the whole length of the alley between Adams and Jackson Streets for exactly the reason that paving only a segment of the alley wouldn't address the potential development on a new lot that is designed for a fourplex and that would allow five dwellings.

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<sup>70</sup> Decision at 8.

Further, the Planning Director's implicit conclusion that the applicant would be required to pave only halfway across the section of the alley that abuts Parcel 1 is absurd, and obviously would be of no value. The Planning Director has interpreted the EC 9.6505(3)(b) in the most constricted way, with no reasonable basis for such an interpretation. Even if EC 9.6505(3)(b) "shall pave \*\*\* alleys adjacent to the development site" were interpreted to require only the section abutting Parcel 1 to be paved, paving "the alley" means the whole width of the alley, not one side of it, which would be of not practical value. If the code had intended such an unusual meaning as the Planning Director applies, more specific language would certainly have been used.

In any case, EC 9.6505(3)(b) doesn't qualify the paving requirement by saying the paving must "enhance" alley conditions, and the Planning Director can't insert such a qualification into the code.

On the second point, there is nothing in the EC 9.6505(3)(b) that indicates the paving requirement is solely, or even primarily, to meet the needs of other property owners. The Planning Director seems to have overlooked that the primary purpose of the paving is to provide safe and efficient vehicular access for future residents of the intended development and emergency vehicles. Here again, the Planning Director can't insert such a qualification into the code, and this point is irrelevant to waiving the requirement.

Third, the EC 9.6505(3)(b) requirement is not contingent on forming an LID and EC 9.6505(3)(b) provides a very clear requirement as to how wide and to what standard the alley must be paved, as described above. Injection of an LID into this approval criterion is another red herring.

On the fourth, and only relevant point, the paving requirement is consistent with the constitutional requirement, as shown above.

As the PT 06-43 Appeal Decision also established, the Planning Director must evaluate the potential impact of Parcel 1 irrespective of the current potential for development without a partition. Parcel 1 is designed and intended for a fourplex and could be developed with five dwellings. Four or five dwellings on Parcel 1 would place a significant additional traffic load on a seriously degraded, substandard alley.

The requirement of EC 9.6505(3)(b) is very clear, straightforward, and eminently fair and reasonable: The party proposing the development should bear the cost of providing the necessary infrastructure, in this case, a safe and efficient alley for access by the development's residents and emergency vehicles.

In the January 14, 2008 Memorandum, staff contends that EC 9.8240(3)(b) allows substitution of an irrevocable petition for compliance. Appellants note that EC 9.8240(3)(b) is not part of the Tentative Lot Partition criteria, nor is this section referenced by Tentative Lot Partition criteria. Appellants, however, believe Appeal Item 5 would be adequately addressed if a condition were imposed that required applicant to pave W. 12th Alley between Adams and Jackson Streets to 12 feet, and to have the alley designated for one-way travel, prior to approval of any development of Parcel 1. The Planning Director's Condition #1<sup>71</sup> is *not* adequate because it does not require *applicant* to be fully responsible for seeing that the requirement in EC 9.6505(3)(b) is met.

The Planning Director's decision not only misinterprets the law, it rubs salt in the wounds of the other owners of lots that abut the alley. In the Planning Director's scenario, the other property owners are highly likely at some future date to be liable for tens of thousands of dollars to upgrade the alley because of this new development. One need look only to recent experience with LIDs in the West University area to understand how unfairly the Planning Director's decisions would impact property owner's whose only recourse is apparently to repeatedly appeal these egregious decisions.

As a final observation, if the Hearings Official decides to defer the determination of the exact width of the required paving until some later time, the Hearings Official must impose a condition that makes clear the *applicant* is responsible for paving at least the entire portion of the alley necessary for access to and from Parcel 1. To do otherwise would not only allow applicant to circumvent the clear approval criterion requiring the adjacent alley to be paved, such an outcome also would unfairly shift a tremendous financial burden on other property owners who are not party to this development request.

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<sup>71</sup> Decision at 15.

## **Appeal item 6. Parcel 1 does not meet storm water and pollution standards**

Appellants withdraw this appeal item.

## **Appeal item 7. Lot configuration conflicts with Westside Neighborhood Plan policies**

The Planning Director erred in finding the configuration of the proposed Parcels 1 and 2 complies with the EC 9.9680 Westside Neighborhood Policies as required by the criteria in EC 9.8215(1)(l).

The Planning Director failed to do an adequate evaluation of the role that lot configurations and access play in determining the residential character of the encompassing neighborhood and how approval of the proposed irregularly shaped lot with access only from an alley would affect the residential character of the neighborhood.

Policy in EC 9.9680(1)(a) is at the heart of this criterion and states:

Prevent erosion of the neighborhood's residential character. (Policy 1)

Note that the adopted policy is clear in its imperative: "Prevent", not "mitigate" or "reduce the likelihood of." And the policy does not qualify "erosion" with "significant" or "widespread" or any other limiting term – what must be prevented is *all* erosion.

In response to a question from Mr. Charles Snyder during the PT 06-43 appeal hearing, the Hearings Official succinctly summed up the appropriate perspective on this criterion:

"The Code criteria for compliance and consistency with the Westside Neighborhood Plan, which includes protection of the neighborhood character, is part of what I will be looking at."<sup>72</sup>

The burden then falls on applicant to provide a thorough, comprehensive analysis with substantial evidence to prove that approval of this application will not lead to the erosion of the neighborhood character.

The subject property exists in a specifically defined subarea of the Westside Neighborhood Plan, which is identified as the "Central Residential Area." This area is delineated on page 3-4 of the Westside Neighborhood Plan 1987, and is roughly bounded by W. 13th Avenue, Fillmore Street, lots on the east

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<sup>72</sup> PT 06-43 Appeal Hearing Recording at 1:34:26

side of Madison Street, and lots on the south side of W. 8th Avenue. The character of this subarea and impacts of approving the current application are what must be evaluated.

Applicant's only statement regarding the proposed irregular, alley-access-only lot (Parcel 1) that would be created by the requested partition is:

The land division itself shall have no effect on the residential character of the neighborhood.

This partition is wholly irrelevant to the established character of the neighborhood.<sup>73</sup>

This statement is no more than a vacant claim by applicant, and applicant provided no evidence or argument to support this claim.

The only two reasons the Planning Director lists for concluding "the proposed partition does not pose a significant adverse affect [sic] on neighborhood character" are:

- a) the parcel "is configured to facilitate preservation of the existing house," and
- b) "the act of dividing the parcel into two parcels does not significantly impact the nature of development that can occur on the subject site."<sup>74</sup>

The first reason does not address the impacts of approving the creation of the proposed Parcel 1 as an irregular, lot accessible only from the alley.

The second reason is both factually incorrect and also doesn't address the impacts of approving the creation of the proposed Parcel 1 as an irregular, lot accessible only from the alley.

Dividing the parcel will significantly impact the nature of development that can occur on the subject site. As established in Appeal Item 1, above, the current lot can be developed at a maximum of seven dwelling units for a potential density of 28.45 du/na, which is below the Metro Plan *Medium Density Range* maximum allowable density of 28.56 du/na and therefore complies with the Metro Plan.

After partitioning, the same area will allow eight units total for a potential density of 32.52 du/na – which is in the *High-Density Range* defined by the

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<sup>73</sup> Application at 36.

<sup>74</sup> Decision at 13.

Metro Plan. The net increase in number of allowable units and allowable density is 14.3 percent; which is a significant change. Note that this increase in allowable development from the *Medium Density Range* to the *High-Density Range* is a significant impact *regardless of how the dwelling units are accessed*.

Further, as established in section I.E and under Appeal Items 4 and 5, Parcel 1 will use W. 12th Alley for its *primary* access. Alleys in the Central Residential Area were designed for and have historically been used for *secondary* access, and the mature of this elemental infrastructure is an important element in the Central Residential Area's residential character. Neither applicant nor appellant has adequately addressed how the proposed lot configuration, which would require primary access from the alley is consistent with this element of the neighborhood character.

As explained under Appeal Item 4, applicant has available a reasonable option to move the existing house and provide safe and efficient access from W. 13th Avenue to dwelling unit(s) on the rear of the lot, thus avoiding this conflict with the Westside Neighborhood Plan policy.

Appellants also note that the impact of approving this partition must be evaluated for the potential cumulative effect that would result if the rationale in this decision were applied to the numerous similar interior street-to-alley lots in the Central Residential Area. Whereas, the impact of approving a single application may be limited, if multiple applications of the same type, with similar circumstances, were approved, the impact could be far greater. In other words, how many lot partitions of this sort and subsequent development as allowed and intended will it take to change the inherent character of this residential neighborhood?

The maintenance of the neighborhood character policy is not met if the cumulative effect of historical, current and projected high density development materially alters the stability of the land use pattern in the area. Thus, each partition request must not only be separately considered, no permit should be granted if, taken together with other potential pending and future partitions, the cumulative impact would likely subvert the neighborhood character.

Neither applicant nor Planning Director made any analysis of the impact of the potential change in the intensity of development that would be allowed by this partition in isolation, nor as a precedent that would create a *cumulative* impact if such partitions were allowed throughout the Central Residential Area.

Nor did applicant or Planning Director do any analysis of the impact of the potential change in the use of alleys from secondary access to primary access that would be allowed by this partition in isolation, nor as a precedent that would create a *cumulative* impact if such partitions were allowed throughout the Central Residential Area.

The Planning Director failed to require applicant to provide *any* evidence in support of applicant's claim, and the only justification staff provides for this lapse is:

Given the Planning Director's findings that the proposed configuration supports the neighborhood's residential character, and in the absence of a specific proposal for new development or a zone change that would markedly change the type and nature of development that can occur on the site as it is currently zoned, staff finds that additional analysis is not warranted.

Again, nothing in this statement by staff addresses the individual or cumulative increase in allowable dwelling units and density or the conversion of alleys to primary accessways.

This omission runs afoul of LUBA's ruling in *Reynolds v. Clackamas County*, 24 Or LUBA 14 (1992), where it found if a reasonable person would not conclude, based on the evidence cited in the record, that the proposed use will comply with an applicable approval standard, the local government's determination of compliance with that approval standard is not supported by substantial evidence.

Appellants note that in PT 06-43, staff tried a different approach to avoiding their responsibility to provide a legitimate analysis as to whether a 14.3 percent increase in allowable dwelling units and density – which would allow a change from medium- to high-density development in the Central Residential Area – would erode the character of the neighborhood. In PT 06-43, staff simply claimed, with no basis in evidence or law, that development of eight units on Parcels 1 and 2 “remains a remote possibility.”<sup>75</sup>

No matter how hard staff may wish the potential impact of increased development intensity allowed by the partition would go away, the change in allowable development intensity remains a stubborn, empirical fact that applicant and the Planning Director were required to address. Similarly for changing Westside alleys to provide primary access to numerous multi-family developments. With no evidence or analysis provided by either

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<sup>75</sup> PT 06-43 Record at 10.

applicant or the Planning Director, the application does not meet the burden of proof and must be denied.

Of at least equal importance, applicant and staff completely neglected to address the fact that the Westside neighborhood is a classic “grid-pattern” neighborhood almost entirely comprised of highly regular, rectangular lots. As originally platted, most interior lots had primary access from the street and secondary access from the alley. There are *no* lots in the Central Residential Area resembling Parcel 1 that have a “notched” flag-shape, with the buildable area in the rear and accessible only from an alley.

Planning staff are well aware that the street and lot configuration is a major determinant of the built and natural environments that ultimately develop in a neighborhood. For example, a fundamentally different neighborhood character arises from a “loops and lollipops” street pattern with curved front lot lines and non-rectangular lots than the neighborhood character that arises from a “grid-pattern”, such as exists in the Westside neighborhood.

Furthermore, as discussed under Appeal Item 9, below, the City of Eugene has adopted Metro Plan Policy A.1 which requires the City to “encourage *consolidation* of residentially zoned parcels.” By its adoption, the policy in EC 9.9680(1)(a) must be consistent with Metro Plan Policy A.1, and so *fragmentation* of residentially zoned parcels must be viewed as conflicting with preservation of the lot configuration that is a fundamental element of the Westside neighborhood character.

And yet, neither staff, nor applicant has made the slightest attempt to analyze what would happen if the highly irregular lot configuration proposed by this application were allowed throughout the Central Residential Area. Appellants note, neither applicant nor staff have even produced an inventory of Central Residential Area lot configurations to answer such pivotal questions as:

- a) How many lots have a front lot line of 20 feet or less?
- b) How many of these lots have a *narrower* segment between the street and the dwelling structure(s)?
- c) How many lots are flag-shaped?
- d) How many of the flag-shaped lots are accessible only from an alley?
- e) How many of the flag-shaped lots have a *narrower* segment between the street and the dwelling structure(s)?

Appellants note that among the 68 lots shown on applicant's "Vicinity Map of Land Use," there is only one lot with a front lot line of 20 feet, and this lot is perfectly rectangular, with no "notch". There are no flag-shaped lots shown. In other words, applicant's own evidence shows the proposed configuration is *unique* in the area applicant covered in applicant's "vicinity map," and thus, on the face of it, the proposed configuration of Parcel 1 warrants broader and deeper analysis.

Applicant and the Planning Director also both neglected to even determine how many rectangular, interior lots in the Central Residential Area could be partitioned into similar flag-shaped lots, with even more shallow frontage and narrower "pole" segments, and consequently being accessible only from an alley or having no access at all<sup>76</sup>. Thus, neither applicant nor the Planning Director has presented even the most basic quantitative data in supportive of applicant's claim that approval of this partition "shall have no effect on the residential character of the neighborhood."

Appellants assert the result of allowing similar, and even more extreme, lot partitions based the Planning Director's decision, would significantly change the built and natural environments, and would also reduce home ownership, due to the following factors, among others:

- a) loss of privacy and yard space on the resulting parcels
- b) adjacent properties' loss of privacy
- c) loss of arable surface area available to support large-scale vegetation
- d) impacts on adjacent properties from the increase in alley traffic
- e) impacts on on-street parking from lots with no street or alley access (i.e., by creating lots that have constricted "poles" and don't abut an alley)

The lot pattern would also change the social interaction that is promoted by the street-orientation and other physical relationships between houses that is the dominant pattern in the Westside neighborhood, and which arises from the street, alley, and lot configurations.

In support of these assertions, appellants herein state the direct testimony of Paul Conte, an appellant, who was on the Westside Planning Team that wrote the Westside Neighborhood Plan. It is Mr. Conte's testimony that allowing partitions such as those in the current application would conflict with the intent of Policy 1 in the Westside Neighborhood Plan.

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<sup>76</sup> By partitioning interior lots that don't abut an alley.

In further support of appellants' assertions, at the January 8, 2008 General Meeting, the Jefferson Westside Neighbors members unanimously approved a motion opposing the partition and stating:<sup>77</sup>

[A]pproving the creation of the proposed irregular, alley-access-only lot would allow numerous regular, rectangular, street-to-alley lots to be divided to create new alley-access-only lots with similar, or even more extreme, irregular configurations throughout the Westside neighborhood and that such development would erode the neighborhood's residential character, in conflict with the adopted Westside Neighborhood Plan policies.

As was established firmly in the denial of PT 06-43, applicant and the Planning Director cannot simply ignore the requirement to adequately demonstrate the proposed partition will not in any way erode the character of the neighborhood. They have patently not done that with respect to the impacts of the radical configuration of the proposed Parcel 1. Even if such an analysis might support applicant's claims, the fact that basic data wasn't gathered and no credible analysis was done as part of the application requires that the application be denied.

**Appeal item 8. Intended or potential development conflicts with Westside Neighborhood Plan policies**

The Planning Director erred in not evaluating whether the intended or potential development on Parcels 1 and 2 complies with the EC 9.9680 Westside Neighborhood Policies as required by the criteria in EC 9.8215(1)(l).

Parcel 1 would allow five dwelling units, as established under Appeal Item 1, above; and there is substantial, uncontested evidence that applicant intends to build a fourplex on Parcel 1, as established in section I.C, above.

In opposition to approval of this application, appellants submitted substantial evidence that the allowed and intended development conflicts with EC 9.9680(1)(a) which requires "Prevent erosion of the neighborhood's residential character."

Appellants acknowledge that applicant submitted evidence in support of applicant's assertion that allowable development would comply with EC

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<sup>77</sup> Attachment D.

9.9680 Westside Neighborhood Policies EC 9.9680(1)(a).<sup>78</sup> However, appellants nevertheless assert applicant has not met the burden of proof, as we explain further below.

Regardless of the relative merits of applicant's and opponents' arguments, the Planning Director should have done a thorough analysis of the evidence submitted by applicant and opponents as to whether four or five dwelling units added to a lot accessible only from the alley would comply with EC 9.9680 Westside Neighborhood Policies.

Instead, the Planning Director neglected to conduct such an analysis based on the erroneous conclusion that:

"the stated intentions for the previous application are not relevant to the subject partition application."<sup>79</sup>

Consequently, the Planning Director completely ignored applicant's own statement that applicant's plans for the new lots include "four proposed units that will be built on Parcel 1."

Although applicant removed this statement from the current application, the statement (and other evidence described in I.C, above) remain reliable, probative and substantial evidence in the record, and is therefore relevant. Accordingly, the Planning Director (and Hearings Official) must consider such evidence and testimony regarding the impact of that intended development when evaluating whether the proposed partition satisfies EC 9.8215(1)(l). See *Reynolds v. Clackamas County*, 24 Or LUBA 14 (1992).

Furthermore, as explained under section I.D, above, the building permit process does not evaluate any aspect of compliance with adopted refinement plan policies, and thus the Planning Director (and Hearings Official) must either evaluate the potential development allowed by the partition (i.e., five dwelling units on Parcel 1) or place a condition on approval that compliance with adopted refinement plan policies must be complied with as a condition of further development of the newly created parcels.

The Planning Director failed to conduct *any* analysis of the impacts of the intended or allowable development, and therefore the decision must be reversed or sufficient conditions imposed to assure such analysis and evaluation is done before approving further development.

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<sup>78</sup> Application at 36.

<sup>79</sup> Decision at 13.

Although the Planning Director cited no evidence, nor conducted any analysis, regarding whether the intended development is consistent with EC 9.9680(1)(a), applicant addresses this policy on page 36 of the application and in an accompanying "Area Study."

Appellants assert that, regardless of its particular merits, applicant's "Area Study" is inadequate to demonstrate consistency with EC 9.9680(1)(a) because it doesn't encompass the entire Central Residential Area, which is the defined subarea of the Westside Neighborhood Plan that encompasses the subject property and is the area that should be analyzed to assess neighborhood character and potential impacts.

Applicant's own data shows that even considering only the surrounding area, the intended fourplex, accessible only from an alley conflicts with the existing neighborhood character. According to applicant's data, there is not a single fourplex, and not even a single triplex, accessible only from an alley. And there is just one duplex on a lot accessible only from an alley.

Applicant's data also shows that the four existing fourplexes (on lots 7700, 7800, 8200, and 9700) are all on full-sized, perfectly rectangular lots that run their full width from the street to the alley, providing both street access and alley access. One of these lots is a corner lot that fronts on two streets and an alley providing even greater street access. The one existing sixplex (3900) is on a very large lot (about 1½ times the size of typical interior lots) that is perfectly rectangular, runs its full width from the street to the alley, and has both street and alley access.

Instead of supporting applicant's claims, this data strongly supports appellants' contention that a fourplex on an irregularly-shaped lot of reduced size, with access only from the alley, would be totally unique in the studied area; would be inconsistent with existing development; and would erode the character of the neighborhood.

Thus, all applicant has achieved with the evidence submitted is to bolster appellants' argument that approval of this application would conflict with EC 9.9680(1)(a).

Appellants note again that the Planning Director didn't even bother to make the basic tally just described to answer such simple questions as whether there is *any* existing development in the neighborhood that is comparable to the intended development. If the Planning Director cannot even answer such a fundamental question, the Planning Director cannot legitimately claim to have properly analyzed whether or not the intended development would erode the neighborhood character.

Furthermore, as established in I.F, above, City Council prohibited *all* lots accessible only from an alley precisely because of concerns development on such lots – *under current development standards* – would negatively impact the surrounding residential neighborhood.

Neither the Westside Planning Team, nor the JWN neighborhood association, nor appellants argue that all fourplexes would conflict with EC 9.9680(1)(a). On some sites with street access, a well-designed fourplex might be consistent with this policy. However, the nature and impact of a fourplex on Parcel 1 is grossly different than any existing development in the immediate area. Parcel 1 has a significantly smaller buildable area than other lots on which fourplexes exist, and Parcel 1 has access only from the alley, in contrast to both street and alley access like the other fourplex developments.

In PT 06-43, appellants presented substantial evidence and a more detailed argument for why the intended fourplex conflicts with EC 9.9680(1)(a)<sup>80</sup>, and that information is incorporated herein by reference. This evidence and argument, which were totally ignored by the Planning Director in the current decision, provide a preponderance of evidence that has not been countered by any of applicant's testimony.

Thus, applicant has failed to meet applicant's burden of proof, and the Planning Director has failed to conduct any legitimate evaluation, that the evidence supports a finding that this request complies with EC 9.8215(1)(l). Therefore, the application must be denied.

### **Appeal item 9. Lot configuration conflicts with Metro Plan policies**

The Planning Director erred in not evaluating whether the configuration of the proposed new lots complies with governing Metro Plan policies: A.1 (encourage consolidation of residentially zoned parcels), A.8 (require development to pay the cost of extending public services and infrastructure), and A.25 (increase the stability and quality of older residential neighborhoods).

The City of Eugene has adopted the Eugene-Springfield Metropolitan Plan as required by State law. The approval criteria defined in EC 9.8424(1) for Refinement Plan Amendments requires

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<sup>80</sup> PT 06-43 record at III-60 through III-65 and reference attachments. Also PT 06-43 October 25, 2006 Appeal Testimony, pages 19 through 21 and reference attachments.

Approval, or approval with modifications shall be based on compliance with the following criteria:

(1) The refinement plan amendment is consistent with all of the following:

- (a) Statewide planning goals.
- (b) Applicable provisions of the Metro Plan.
- (c) Remaining portions of the refinement plan.

Thus, by City Council's adoption of the Westside Neighborhood Plan, the plan's policies must inherently be interpreted as being consistent with applicable provisions of the Metro Plan. Metro Plan policies A.1 (encourage consolidation of residentially zoned parcels) and A.25 (increase the stability and quality of older residential neighborhoods) are clearly applicable to Westside Neighborhood Plan Policy 1, adopted in EC 9.9680(1)(a), which requires "Prevent erosion of the neighborhood's residential character."

Metro Plan Policy A.8 (require development to pay the cost of extending public services and infrastructure) is also applicable to EC 9.9680(1)(a) in that increasing the intensity of development, as would be allowed by the proposed partition, requires consideration of the immediate and cumulative impact on services and infrastructure, including alley use, storm water, water supply, and sewers.

Thus, the Planning Director erred in failing entirely to evaluate compliance with these three Metro Plan policies.

Metro Plan Policy A.1 states:

Encourage the consolidation of residentially zoned parcels to facilitate more options for development and redevelopment of such parcels.

Approval of the proposed partition would directly conflict with Policy A.1 by allowing extensive fragmentation of the subject parcel and similar parcels throughout Eugene. Applicant and staff have failed to address this issue at all.

Should the Hearings Official find that compliance with Policy A.1 is not explicitly required for this request, appellants also assert that this policy gives force to appellants' argument in Appeal Item 7, that the partition would erode the character of the neighborhood by increasing fragmentation of the fundamental lot pattern.

Metro Plan Policy A.8 states:

Require development to pay the cost, as determined by the local jurisdiction, of extending public services and infrastructure. The cities shall examine ways to provide subsidies or incentives for providing infrastructure that support affordable housing and/or higher density housing.

Approval of the proposed partition would directly conflict with Policy A.8 by allowing an increase in the intensity of development on the subject parcel, as established in Appeal Item 1, above, without assuring the developer will pay the costs of improving W. 12th Alley, as necessary to provide safe and efficient access to Parcel 1. Applicant and staff have failed to address this issue at all in the context of Policy A.8.

Should the Hearings Official find that compliance with Policy A.8 is not explicitly required for this request, appellants also assert this policy gives force to appellants' arguments in Appeal Items 4 and 5, above, that applicant is required to pave W. 12th Alley to the width required by City standards.

Metro Plan Policy A.25 states:

Conserve the metropolitan area's supply of existing affordable housing and increase the stability and quality of older residential neighborhoods, through measures such as revitalization; code enforcement; appropriate zoning; rehabilitation programs; relocation of existing structures; traffic calming; parking requirements; or public safety considerations. These actions should support planned densities in these areas.

Approval of the proposed partition would directly conflict with Policy A.25 by allowing an increase in the intensity of development on the subject parcel, as established in Appeal Item 1, above, which would decrease the stability and quality of the older residential neighborhood that is found in the Central Residential Area of Westside.

Furthermore, for the reasons described under Appeal Items 7 and 8, and incorporated herein by reference, the proposed partition and the intended and allowable development would decrease the stability and quality of the older residential neighborhood that is found in the Central Residential Area of Westside.

Applicant and staff have failed to address these issues at all in the context of Policy A.25.

Should the Hearings Official find that compliance with Policy A.25 is not explicitly required for this request, appellants also assert that this policy gives force to appellants' arguments in Appeal Items 7 and 8, above, that the lot configuration and intended and allowed development will erode the character of the neighborhood.

## CONCLUSION

This application is of great importance to not only the Jefferson Westside Neighbors, but also to residents of neighborhoods throughout the City.

The applicant has proposed a radical lot configuration that as far as has been determined exists *nowhere* else in the neighborhood, or perhaps even in Eugene. Approval of such a lot configuration based on the Planning Director's contorted code interpretations would blow huge holes in numerous neighborhoods underlying fabric.

The proposed Parcel 1 has the essential characteristics of a "flag lot" with a "pole" portion abutting the street and a "flag" portion behind a smaller lot with an existing dwelling, except that in this case, Parcel 1 has a "pole" that constricts to an even narrower width than is allowed for legal flag lots.

Further, the applicant concedes Parcel 1 has no street access, such as is required by the "pole" of a normal flag lot. And thus, Parcel 1 is nothing more than a lot accessible only by an alley, pretending to be a lot with street access. Yet there can be no question City Council prohibited such lots in order to help protect the degradation of neighborhoods by incompatible development.

But applicant, with the Planning Director's complicity, is attempting to distort the land use code to circumvent Council's clear intent. To do this, the applicant, with the Planning Director's aid, seeks to render the Frontage Minimum standard meaningless as a standard to assure street access and reasonably configured lots. Both applicant and the Planning Director blatantly attempt to substitute Front Lot Line for Lot Frontage, despite the clear distinction in the two definitions and the clear language identifying Lot Frontage as an area of a lot, not a line.

But that is not the only twisting of the code the applicant and Planning Director are trying to pull off. Both seek to allow a lot to be created that fails to meet clear standards for street connectivity without even providing the basic local street and alley data that's required for the exception they claim should be granted.

Their other attempt to avoid playing by the rules for street connectivity relies on a misrepresentation that the reason Parcel 1 cannot have a street connection is because of development on *adjacent* properties, when one look at the submitted plan drawing *and the applicant's own words* establishes that it's the existing house on *applicant's own property* that causes the constriction preventing street connectivity. The applicant simply doesn't want to pay to have the house moved so Parcel 1 could provide safe and legal street access.

Not satisfied with just getting approval for a lot that defies any sensibility, applicant seeks to avoid the cost of paving an alley that will be used for primary access and that is so broken down huge mud holes occur during the winter season. The Planning Director meanwhile is content to see the burden for the required alley improvements fall on other property owners who aren't party to the development.

There can also be no doubt about applicant's intent to build a fourplex on the lot if this application is approved. Applicant has repeatedly stated so in unambiguous terms, and confirmed these plans in the local newspaper as recently as the week of the appeal hearing. Yet applicant and the Planning Director attempt to dismiss this evidence by a misapplication of the code and by claiming the evaluation of the fourplex can be fully covered during the subsequent building permit process – a claim that surely both applicant's land use consultant and the Planning Director know is disingenuous.

Finally, the applicant claims the proposed lot configuration, as well as the intended development, is compatible with the established neighborhood. Yet applicant's own data shows this to be false. And the neighborhood association has *unanimously* – now twice – opposed this application.

The Planning Director's complicity in these ruses reflects a questionable commitment to a fair and even-handed approval process, as evidenced by findings that applicant had met the criteria for an exception to street connectivity and for compliance with the neighborhood refinement plan policies when applicant's map and data had not even included the required set of street and alley segments and parcels.

The JWN and co-appellants, however, rest our appeal on a solid legal foundation, not just the fact that this application and its approval are an insult to the community and an offense against a credible land use approval process. We have carefully presented a preponderance of evidence and solid legal arguments that establish the Planning Director's multiple errors.

For the foregoing reasons, the Planning Director's decision approving this partition must be reversed.

Respectfully submitted this 23rd day of January 2008.

**FOR JEFFERSON WESTSIDE NEIGHBORS**



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Rene Kane

**Chair**

**AS RESIDENTS**

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