

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

FILE PT 06-43

November 1, 2006

INTRODUCTION

This testimony is filed on behalf of the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, in appeal of the Planning Director's decision to approve the above captioned application for a partition tentative plan. Paul Conte and Rene Kane, JWN Co-chairs, are the duly elected representatives of the neighborhood association.

This testimony supplements our previously submitted testimony and primarily addresses the oral and written testimony of applicants and City staff at the October 25, 2006 appeal hearing.

Appellants contacted the City to see if a recording or transcript were available. We were contacted at approximately 1:00 p.m. on November 1, 2006 (the day testimony was due) and advised there was a recording, but no transcript.

We have accordingly worked from our own audio recording, which is included as a CD under [Attachment A](#) [Windows Media Audio file], attached hereto and incorporated herein by reference.

As neighborhood association co-chairs, as well as appellants in this case, we e-mailed the Planning staff requesting clarification for us and the Hearings Official of several points raised by staff at the appeal hearing. Staff declined to provide any clarifications. (See [Attachment B](#), attached hereto and incorporated herein by reference.)

We understand applicants will have a one week period beginning November 2, 2006 to submit rebuttal arguments, and that applicants are not allowed to submit additional evidence during that period. Given that one of the issues in this appeal is appellants' contention that the Planning Director improperly allowed applicants to submit additional evidence without adequate opportunity for public review and comment, we respectfully request the Hearings Official to carefully scrutinize any submission by applicants during the rebuttal period and to disallow any evidence that has not been submitted in prior testimony.

We appreciate the Hearings Official's clearly expressed intent to give all testimony careful consideration.

ARGUMENT

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

A. Applicants supplemental submissions included additional evidence that applicants relied upon.

At the October 25, 2006 Appeal Hearing, applicants admit:

“In that letter we did state additional facts, um, that we should allow, that we felt should allow for a lesser dedication, paving width, though we addressed, um, though we addressed facts that would allow for that, um, in our initial proposal in a manner sufficient for the director to find in our favor.”¹

We have previously identified additional purported facts included in applicants’ two supplements to their application², including:

- a. Replacement of the calculation for how Parcel 2 complies with minimum lot width standard.³
- b. Entirely new introduction of code sections from EC 9.2751 and EC 9.5500, as well as claimed facts about the number of properties abutting the alley, as evidence that applicants should not be required to have a 20 foot right-of-way on W. 12th Alley or to pave W. 12th Alley to 12 feet wide.⁴
- c. Entirely new introduction of claimed facts about the surrounding neighborhood and “current marketing trends,” and entirely new introduction of selected Metro Plan Findings and Policies, as evidence the proposal complies with the Westside Neighborhood Plan adopted policy at EC 9.6880(1)(a), a criterion that applicants had not mentioned at all in their original application.⁵

That these examples are evidence, not argument, is demonstrated by observing that several of the purported facts are wrong.

- The August 2, 2006 submittal inserts the following two “facts”:

“The midpoints of the side property lines of Parcel 1 are 80.3 feet on the west side and 80.1 feet on the east side.”⁶

The first fact is plainly wrong: The midpoint of Parcel 1’s side property lines on the west is approximately 109.9 feet.⁷

¹ Appeal Hearing Recording at 17:50.

² Appeal Testimony: page 2-3; and August 24, 2006 Testimony Supplement (provided as Attachment D of Appeal Testimony): pages 1-4.

³ Record at III-114.

⁴ Record at III-110 to III-113.

⁵ Record at III-113 to III-114.

⁶ Record at III-114.

⁷ It was appellants who first made staff aware that both they and applicants were incorrectly calculating the midpoints of Parcel 1.

This erroneous fact was shown as being based on an incorrect calculation in Mr. Conte's August 24, 2006 Testimony Supplement⁸ that the Planning Director excluded from the record.

- The August 8, 2006 submittal inserts the following "facts":

"EC 9.2750 provides that the minimum density in an R-2 zone is 10 units per acre Due to the density requirements for the applicable zoning district, the application has to be for the creation of multi-family housing. Any other proposal would be summarily denied for failing to meet applicable density standards."⁹

"... The applicant is required by the density requirements to propose multiple family housing and that housing is required by code to take access from the alley."¹⁰

Mr. Conte's August 24, 2006 Testimony Supplement – again, *excluded* by the Planning Director – also demonstrated these "facts" were wrong because applicants had overlooked provisions of EC 9.2751(1)(a) that exempt the development site from minimum density standards.

The applicants also clearly relied upon new evidence in attempting to show their proposal was consistent with EC 9.6880(1)(a).

Whether or not the Planning Director based any of his decisions in full or in part on the facts that were introduced in the applicants' two supplements, the applicants themselves clearly "relied upon" the evidence they submitted.

B. 14 days for public review required.

EC 9.7210(2)(d) requires a 14 day period for the public to review "all evidence relied upon by the applicant."

This cannot reasonably be interpreted as allowing applicants to submit, in the final two days of the public comment period, new evidence upon which applicants rely and simply expect the public to discover that new evidence has been submitted and respond before the end of the comment period.

The Planning Director had two reasonable alternatives available when he received the applicants' submittals: Reject applicants' additional evidence, or notify the public and extend the comment period. He erred in doing neither.

C. Staff and applicants' arguments in support of decision.

Staff and/or applicants have offered several arguments in support of the Planning Director's decision. We deal with them here.

⁸ August 24 Testimony Supplement at 2.

⁹ Record at III-110.

¹⁰ Record at III-111.

i. Original proposal not changed significantly.

Staff states: "As such, applicant's submittal did not change the original proposal so significantly to be considered a new application subject to new completeness review and public notice."¹¹ Applicants make a similar claim.¹²

A proposal change isn't the relevant threshold. EC 9.7210(2)(d) requires a 14 day period for the public to review "all evidence relied upon by the applicant."

ii. Director did not rely on additional evidence.

Applicants argue: There were sufficient facts in their original application to warrant the Planning Director's decision, and there is no evidence that the Director relied on or required any information submitted in that letter in reaching a decision.¹³

Again, whether or not their original application was adequate,¹⁴ or whether the Planning Director did or didn't rely on the additional evidence isn't the relevant threshold. The public is entitled to 14 days to review and comment on "all evidence relied upon by the applicant."

We note, however, that the Planning Director incorporates in his Decision (at 10) the primary argument applicants use to show consistency with EC 9.6880(1)(a), namely that the partition will not result in the demolition of the existing house.¹⁵

iii. No code provision requires Planning Director to reject comments submitted by applicants.

Applicants argue: "Nowhere in the sited [sic] provisions is there a requirement that the Director reject comments submitted by the applicant during the comment period nor is there any such limitation in the Code."¹⁶

Appellants nowhere suggest comments or pure argument by applicants are not allowed during the public comment period. The issue is how the Planning Director

¹¹ Record at III-2.

¹² Applicant's October 25, 2006 testimony at 5.

¹³ Appeal Hearing Recording at 17:00.

¹⁴ Applicants obviously didn't believe their original application was adequate at the time or they would have had no reason to submit two supplements with new evidence.

¹⁵ There are additional indications the Planning Director may have been influenced by the supplemental submissions. The decision regarding alley right-of-way and paving (Decision at 5 and 6) relies heavily on the "constitutional requirement" inserted for the first time by the applicants in their August 8, 2006 supplement (Record at III-112). Prior to the applicants' supplemental submission, Mr. Conte had contacted the Public Works Division and was expressly told that Public Works Division intended to require applicants to pave the entire alley and post "one-way" signage. When the Decision was issued, this requirement had been dropped because of "constitutional requirements."

As another example, the frequently mentioned multi-family standard for alley access first arose in the applicants' August 8 supplement.

¹⁶ Applicants' October 25, 2006 Hearing Testimony at 3.

should have handled applicants' attempt to submit additional evidence during the public comment period.

EC 9.7210(2)(d) requires a 14 day period for the public to review "all evidence relied upon by the applicant." The Planning Director had two reasonable alternatives available: Reject applicants' additional evidence *or* notify the public and extend the comment period. He erred in doing neither.

The error was in *accepting* additional evidence and *not* providing the required public notice and 14-day review period for the additional evidence.

C. Decision should be reversed.

Since a remand is not one of the alternatives available to the Hearings Official, the appropriate remedy for this error is to reverse the Planning Director's decision. This is warranted for three reasons:

- a. Opponents, including appellants and other parties, were denied the opportunity to submit evidence that may have persuaded the Planning Director to reach a different decision.

The legal process for a Planning Director decision is intended to provide opponents a fair and reasonable opportunity to persuade the Planning Director of their case. To do that effectively, opponents must know all the evidence relied upon by the applicants, and the EC 9.7210(2)(d) notification requirements provide the law's guarantee of this opportunity.

The original decision in this type of land use process occurs in a much different context and with different rules, even, than during the appeal phase. Significant staff resources are brought to bear in analyzing the evidence and arguments presented by applicants and opponents, and this is the point at which the applicants and opponents have the greatest opportunity to affect the outcome. Once the decision is made, appellants have a much steeper hill to climb because they must establish error on the part of the Planning Director, not just persuade him or her of the merits of their position.

Appellants demonstrated how important they felt it was to respond to the applicants' new evidence prior to the Planning Director making his decision by submitting supplemental testimony as soon as appellants discovered (by their own actions) that applicants had submitted additional evidence. And yet appellants' timely evidence and argument were totally excluded from consideration during the decision process, prejudicing appellants' chances of prevailing in the Planning Director's decision.

- b. Opponents, including appellants and other parties, were denied the opportunity to establish an adequate basis for appeal related to any of the new evidence that was submitted.

EC 9.7220(2)(e) requires the public notice of a proposed lot partition to include:

"A statement that issues that may provide the basis for an appeal to the Land Use Board of Appeals must be raised in writing with sufficient specificity to enable the decision maker to respond to the issue."

An opponent cannot reasonably raise an issue about evidence they are unaware of. If the Hearings Official were to affirm the current decision, and appellants were to appeal to LUBA, applicants could potentially argue that issues raised by appellants related to evidence in applicants' supplemental submittal (e.g., multiple-family standards, "constitutional requirements", etc.) were not "raised in writing with sufficient specificity" in appellants' testimony *during the public comment period*.¹⁷

- c. Allowing the decision to stand establishes a precedent that there is no consequence to applicants withholding evidence until the public comment period is about to expire.

With no option to remand the decision, the Hearings Official is left with the choice of permitting applicants to submit new evidence that will not get proper public notice and scrutiny or to disallow such actions. There is no in-between choice, and the decision in this case will potentially determine both how these and other applicants and the Planning Director choose to act in future cases and what consequences result. The Hearings Official cannot permit this type of abuse of the process to be repeated with no consequences, as is likely if this error doesn't result in reversal.

Of the three parties involved: Applicants, Planning Director, and appellants, *only* the appellants are without any responsibility in this error. And yet, thus far, *only* the appellants have been injured by the error. It would be grossly unfair to place even more of the costs of this error on appellants.

C. Applicants' arguments to affirm regardless of error.

Staff presented no argument that the Planning Director's decision should be affirmed even if the Hearings Official finds he erred in not providing adequate public notice and review.

Applicants present several arguments to that effect, which we address here.

i. The appeal process provides a sufficient opportunity for appellants to respond to applicants' last-minute submission.

To accept this rationale as a justification for affirming the decision – *even though the Planning Director erred* – the Hearings Official would have to essentially establish a whole new set of rules that apply to future Planning Director decisions, whereby applicants would be allowed to submit new evidence up to a few minutes before the end of the public comment period, and opponents who desired to respond would have to bear the expense and effort of mounting an appeal. Even then, appellants

¹⁷ The Court of Appeals ruling in *Miles*, which is cited in the *McKeown* LUBA decision (at 6) addresses a different procedural issue, but is indicative of the weight the Court places on "first exhaust[ing] local administrative remedies" before an appeal can be successfully raised. Applicants or the City might well attempt to apply this principle to the present case should it be appealed to LUBA or the Court of Appeals. Such a possibility adds significant weight to our argument for reversal as the appropriate remedy.

might have their appeal denied for failing to raise an appeal issue during the public comment period.

This is simply an untenable outcome, and applicants' casual dismissal of the specific rules that apply to different stages of the decision and appeal process cannot be given weight.

ii. Applicants did nothing wrong and shouldn't be penalized by reversing the decision.

It may be unfortunate for applicants if the decision is reversed, but it was the applicants themselves who took action to submit additional evidence two days before the end of the public comment period. The applicants' representatives who submitted these supplements are professional planning consultants and attorneys¹⁸ and cannot claim to be naïve about land use processes and the legal distinction between facts and evidence versus comment and argument.

If upon learning of opponents' concerns, applicants felt they hadn't presented their strongest case, they could have availed themselves of the same remedy they suggest is appropriate for appellants: Simply appeal the Planning Director's decision should he deny the partition.

Appellants bear no responsibility for applicants' decision to submit additional evidence, nor for the Planning Director's error. In fact appellants did the responsible thing by submitting timely testimony once they learned of applicants' supplements, rather than trying to lay a legal "trap" based on the applicants' submissions.

While a remand might be a preferable alternative, that choice is not open to the Hearings Official; and it would be grossly unfair to make the appellants alone bear the burden of the applicants' misjudgment and the Planning Director's error.

II. PROPOSED FOUR-PLEX (APPEAL ITEM 4)

A. Applicants' affirm they specifically intend the use of Parcel 1 to be for a four-plex.

In response to the Hearings Official's observation:¹⁹

"But the application did include a proposed use for both parcels: For one dwelling to remain and then proposed a four-plex, or identified the anticipated use of the second parcel for a four-plex."

Applicants' representative, Mr. Mueller acknowledged the application identified the anticipated use of the second parcel for a four-plex:²⁰

"Our position is that we informed the Director of our intended plans for the rear parcel as a courtesy and also for, for the purposes of identifying the uses that

¹⁸ Robert Stevens of MetroPlanning signed the August 2, 2006 supplement and Karl Mueller signed the August 8, 2006 supplement.

¹⁹ Appeal Hearing Recording at 22:42

²⁰ Appeal Hearing Recording at 23:01.

would take place on the alley, but not as any specific development in the future in the context of this decision and not, um, not specifically proposing a four-plex.”²¹

Mr. Mueller acknowledges precisely the point that appellants made in their Opposition Testimony, and which the Planning Director ignored:

Thus, the request is for a land use action in which a four-plex development is an integral element. The request must be considered in a constructive legal manner to establish a density and usage that is based on four units on this proposed alley access lot. The Planning Director must therefore base all decisions in which the stated use of Parcel 1 is relevant – particularly access, stormwater, and consistency with adopted refinement plan policies – on the proposed four-plex development. These decisions include, but are not limited to compliance with EC 9.8215(1)(b), (c), (g), and (k) and EC 9. 8215(2).²²

Appellants have never asserted that the Planning Director must evaluate building features of a yet-to-be-designed four-plex structure. We specifically identified density and usage as elements that *are* determinable from the specific assertion by applicants that the lot is “being designed as a fourplex lot.”²³

With applicants’ admission, it appears settled that, where relevant, a four-plex must be considered as the *minimal* usage that will occur on Parcel 1.

B. Planning Director ignored four-plex in his decisions.

Yet as we’ve identified in our Appeal Statement and Appeal Testimony, the Planning Director ignored the concrete impacts that *any* four-plex and its required on-site parking will necessarily have on access (including alley right-of-way and paving), storm water drainage, and consistency with adopted refinement plan policies. In their October Memorandum, staff confirms that the Planning Director treated the four-plex as irrelevant:

Thus, staff concludes that Planning Director correctly considered the four-plex as something the applicant intends to apply for and construct following partition approval but that is neither proposed as part of the partition tentative plan application nor relevant in the context of EC 9.8215(1)(a), (b), (c), (k), and EC 9.8215(2).²⁴

Appellants contend a the four-plex *is* relevant to these criteria; and, for example, we identified the four-plex as a critical feature of the proposal that conflicts with the Westside Neighborhood Plan policy at EC 9.6880(1)(a).²⁵ The Planning Director, however, did not mention the four-plex or address appellants’ extensive evidence that

²¹ When Mr. Mueller testified applicants weren’t “proposing a four-plex,” he may have forgotten the application itself says on page 2: “The applicant is proposing to construct a four-plex.”

²² Record at III-42

²³ Application at 3.

²⁴ Record at III-4

²⁵ Record beginning at III-60

a four-plex and required parking, accessible only from the alley, would conflict with the referenced Westside Neighborhood Plan policy.

The issue here isn't just whether the proposed partition and development violate applicable refinement plan policies.²⁶ The issue is whether approval criterion EC 9.8215(k) mandates full consideration of those applicable policies and the substantial evidence presented by opponents establishing the specific elements of the area's "residential character." The Planning Director should have thoroughly evaluated the specific impacts of a four-plex at the site of Parcel 1 before rendering his decision.

In their Memorandum, staff relies on circular logic to justify the Planning Director's failure to consider the four-plex in his decisions on these criteria. As cited above, staff's response to the fourth appeal issue was that the Planning Director had determined the four-plex was "irrelevant" to criterion EC 9.8215(k). And then in response to appeal item 15, staff says:

The four-plex is addressed in staff's response to the fourth appeal issue.²⁷

Staff has not demonstrated that the Planning Director actually determined the four-plex was irrelevant to EC 9.8215(k); staff has simply confirmed the Planning Director *ignored* the four-plex in determining compliance with this and other criteria.

C. Staff and applicants' remedy – proposing a condition to not approve the four-plex – is meaningless.

As a way to justify ignoring the four-plex, staff and applicants propose a condition that the four-plex not be approved as part of the partition approval. Staff knows full well that the Planning Director's decision cannot be construed as approving a specific four-plex structure. Such a condition is unnecessary and serves no purpose other than to attempt to eliminate, *post facto*, an explicitly proposed feature of applicants' proposal from appropriate consideration in evaluating compliance with approval criteria. In any case, adding such a condition would not remedy the Planning Director's error.

D. Relevance of McKeown decision.

In the *McKeown* decision the Land Use Board of Appeals dealt with two issues related to proposed features contained in a lot partition application.

The first issue was what the legal threshold is for a "feature explicitly included in an application." The LUBA findings may be moot in the present case because applicants' have acknowledged appellants' contention with respect to the proposed usage of Parcel 1 for a four-plex. In any case, we briefly provide our analysis of how the relevant *McKeown* findings might apply to this case.

In simple terms, LUBA found that a *proposed* feature (a driveway in this case) *drawn on a submitted diagram* meets the legal threshold of a "feature explicitly included in an application."²⁸

²⁶ See discussion of *McKeown* at D, below.

²⁷ Record at III-10.

Appellants in this case see no reason the written word would have any less legal weight than a diagram. Thus, when applicants state they are “proposing to construct a four-plex”, that there are “four proposed units”, and “that [partition] proposal is for the creation of a four-plex”, these written declarations satisfy the legal threshold as fully as a diagram.

The second point *McKeown* affirmed was that the City must determine whether an explicitly included feature complies with applicable standards.²⁹ The decision found:

“[3] The issue under the first assignment of error is not whether in the abstract it is wise to consider at the tentative partition plan stage whether existing features violate applicable standards or whether proposed features can be constructed. The issue is whether EC 9.8215(1) mandates consideration of those applicable development standards if the tentative partition plan includes development features that will be constructed or retained after the partition is approved.”³⁰
[Emphasis added]

In the present case, the LUBA finding simply says the Planning Director cannot ignore the four-plex that applicants have made abundantly clear will be constructed if the lot is partitioned.

Note that appellants contend the “applicable standards” in which the four-plex and its impacts must be considered are³¹:

- EC 9.8215(1)(a), specifically the frontage and minimum lot width standards in EC 9.2000 through 9.3915³²

²⁸ In sustaining the *McKeown* appellants’ first assignment of error (at 4), LUBA *rejected* the City’s argument that current and proposed development should be considered *only* during some later process that would occur *after* the partition was approved:

“Other development standards that do not relate to the division of the land itself but rather to how that divided land is developed, now or in the future, continue to be applicable, but their applicability relates to the development and not the land division.”

The City has nevertheless presented essentially the same argument in the present case:

“Furthermore, future development on the proposed lots will be subject to review and approval as part of the building permit process, in accordance with applicable land use code, building code, and other applicable standards.” (Record at III-4.)

Applying the *McKeown* decision, the Hearings Official should again reject this argument.

²⁹ *McKeown* at 4.

³⁰ *McKeown* at 10. Note also the finding in sustaining appellants’ fifth assignment of error:

“... we agree that the city erred in concluding that it need not address those questions before approving the proposed tentative partition plan.” (Also at 10.)

³¹ Record at III-16.

³² In the case of frontage and minimum lot width standards, it is the proposed *location* of the residential dwellings on the rear, or “flag,” portion of Parcel 1 that is relevant to the need for the “pole” portion of Parcel 1 to provide street access and therefore an

- EC 9.8215(1)(b), specifically alley right-of-way and paving standards in EC 9.8215 and special setback standards in EC 9.6750
- EC 9.8215(1)(c), specifically storm water drainage standards in EC 9.6510
- EC 9.8215(1)(k) , specifically the adopted Westside Neighborhood Plan policies in EC 9.9680
- EC 9.8215(2), specifically those non-conforming situations that arise out of noncompliance with the first three criteria listed above.

This application of *McKeown* to the present lot partition doesn't assign the Planning Director the impossible task of determining whether a future four-plex would meet all development or building permit standards that ultimately would come to bear. Rather, appellants contend the Planning Director must consider relevant impacts that *any* four-plex will have when determining whether the current application complies with applicable standards (as listed above).

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

Applicants contend appellants are not correct that the current configuration allows 7 dwelling units, all of which could take access from the street or alley³³ because EC 9.5500(11)(c) would require alley access for all six additional units.

However, staff stated at the Appeal Hearing:

“The multi-family standards which require these multi-family developments, such as would potentially be the case, to take access to the alley. That standard is available for adjustment through further land use application and consideration of those approval criteria . So it's not necessarily an absolute that upon development that it's a certainty that all of those units would take alley access.”³⁴

Appellants have reviewed the relevant adjustment criteria at EC 9.8030(8)(e). Although the criteria are not very clearly written, appellants acknowledge these provisions may permit an adjustment to allow street access from a multi-family development on a parcel that also has alley access.³⁵

Consequently, with such an adjustment, some or all of the additional six additional units that might potentially be built on the current parcel could take access from the street, as appellants state.

important factor in how lot frontage and minimum lot width standards should be applied.

In oral testimony, applicants' representative reconfirmed this point: “The eventual infill development will be in the rear of the subject property. (Appeal Hearing Recording at 44:52.)

³³ Applicants October 25, 2006 testimony at 6.

³⁴ Appeal Hearing Recording at 1:42:03.

³⁵ Accordingly, we wish to correct Mr. Sherlock's statement during the appeal hearing (at 59:00) that appellants acknowledge multi-family units with frontage on an alley shall take access from the alley.

Applicants therefore have not established any error in this element of appellants' argument with respect to Appeal Item 5.

IV. MAXIMUM DENSITY (APPEAL ITEM 7)

In their October 25, 2006 testimony (at 7), applicants contend:

“In the context of a land division, the only density evaluation required is whether the parcels are of a size and dimension that will facilitate development that would meet applicable density requirements.”

Appellants have shown that the act of dividing the existing parcel into the two proposed parcels will create a situation where development in the Metro Plan *High-Density* range is allowed on both new lots³⁶, a result that conflicts with the applicable *Medium-Density* Metro Plan designation. We note that no such conflict arises with the existing parcel.

Using applicants' own phrasing, therefore: The parcels are of a size and dimension that will facilitate development that will conflict with applicable density requirements.

The Planning Director incorrectly approved the partition despite this conflict, and the decision should be reversed.

Appellants also contend that the change in the allowable range of development, from medium-density to high-density – brought about solely by the partition, conflicts with the Westside Neighborhood Plan, as addressed elsewhere in our current and previous testimony.

V. ALLEY ACCESS & FRONTAGE (APPEAL ITEMS 8 AND 9)

A. Applicants misconstrue appellants' statements.

Under number 8 in applicants' October 25, 2006 testimony (at 7), applicants claim:

“Opposition testimony establishes that there is no prohibition on alley access parcels”

Appellants' testimony has made abundantly clear:

- a. Eugene City Council prohibited alley access lots and that prohibition is still in effect; and
- b. The land use code has no *direct* prohibition against “alley access” lots; and
- c. The code prohibits alley access lots through one or more of the lot frontage, minimum lot width, and street connectivity standards.

Applicants have thus far presented no evidence or argument against any of these three facts.

³⁶ Record at III-17 to III-18.

B. Applicants assert lot frontage is the sole standard that implements prohibition against alley access lots.

By their own statements, applicants appear to subscribe to the theory presented in the Planning Director's Decision that the lot frontage standard is the sole standard that implements the prohibition against alley access lots. In their October 25, 2006 testimony (at 7), applicants state:

"The prohibition on "alley access" parcels is not a blanket prohibition on taking access to a parcel from an alley³⁷ but rather a prohibition on a certain kind of lot, namely a lot or parcel having its only frontage on an alley."

And then again (at 8):

"The Director's interpretation of the Land Use Code upholds the prohibition on alley access parcels as defined by the code by requiring frontage on a public street"

As appellants have stated before, for this theory to hold up, a lot's (street) frontage must assure an adequate access corridor from the street to the rear part of Parcel 1 where applicants assert they intend to build a four-plex.

C. Applicants (and Planning Director) rely on an erroneous definition of "frontage".

In their October 25, 2006 testimony, applicants present and rely on the following definition (at 8):

"Frontage is the horizontal distance where the lot or parcel abuts a public street."

This is not the definition of "Lot frontage" in the code. That definition is:

EC 9.0500 Lot Frontage. That portion of a single lot abutting the street."

Applicants have followed in the Planning Director's footsteps and tripped over the same point by incorrectly using the definition of front lot line for lot frontage:

EC 9.0500 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 confirmed their use of the wrong definition in their oral testimony at the 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."³⁸ 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

³⁷ Appellants have never contended there was a prohibition against taking access to a parcel from an alley, as Mr. Mueller claimed in his oral testimony (Appeal Hearing Recording at 32:56). This is merely a "straw man" applicants seek to substitute for opponents' actual arguments.

³⁸ Appeal Hearing Recording at 1:37:00

the street. And I think we would direct your attention to the definition of front lot line in conjunction with that.”³⁹

As appellants pointed out in our Appeal Testimony (at 13), a lot comprises an *area*, and a “portion of” an area is also an area, *not* a line. Thus, frontage is an area of the lot; and according to the theory advanced by both applicants and the Planning Director, the frontage area must provide an adequate access corridor to the rear of Parcel 1.

Further testimony submitted by Eugene City Councilor Bonny Bettman explicitly contradicts applicants’ and staff’s claim that a 20 foot front lot line implements Council’s prohibition against alley access lots, and Councilor Bettman explicitly states that the frontage and/or minimum lot width standards for an R-2 lot “are intended to provide at least a 20 foot wide access corridor from the street to the main portion of the lot where development will occur.”⁴⁰ ([Attachment C](#), attached hereto and incorporated herein by reference.)

D. Applicants (and Planning Director) present no alternative standard for the minimum width of Parcel 1’s access corridor.

Despite their acknowledgement that the land use code implements Council’s prohibition against alley access lots, neither the applicants, nor the Planning Director, nor staff have yet to identify a standard that establishes an adequate access corridor for actual street access.

Further, despite repeated opportunities, neither applicants nor staff have made any attempt to identify how the code prevents a lot with an arbitrarily shallow strip of “frontage” connected by an arbitrarily narrow “pole” to the main part of the lot.

Staff had no answer when first confronted with this question on July 31, 2006.⁴¹ and still had no answer at the appeal hearing.

In oral testimony, applicants’ attorney, Mr. Liam Sherlock, posed the questions for staff:

“As the lot dives down into its narrow pole, they’ve shrunk it down to 13.9 feet. But why couldn’t it be 10 feet? Why couldn’t it be 3 inches?”⁴²

As mentioned above, the Hearings Official asked staff for an explanation of the narrowing to 13.9 feet, and staff had no explanation other than to point to the 20 foot front lot line standard, which has no bearing on the narrowing of the frontage to 13.9 feet (or less⁴³).

³⁹ Appeal Hearing Recording at 1:38:30.

⁴⁰ Councilor Betty Taylor, who had also provided earlier testimony on Council’s intent, was out of town and unavailable for additional testimony.

⁴¹ Record at III-50.

⁴² Appeal Hearing Recording at 1:10:30.

⁴³ Such as to 11.9 feet, as applicants and staff assert would be acceptable. See Section IX, below.

With this question left unanswered, and no standard offered that the Hearings Official can bring to bear in this case or that a Planning Director can bring to bear in a similar lot partition application in the future, only one conclusion is possible: That the Planning Director's approach will allow parcels such as that in [Attachment D](#) (attached hereto and incorporated herein by reference).⁴⁴

In contrast, appellants have presented a straightforward approach to applying the applicants' and Planning Director's own theory that:

- Arises directly out of the code's language; and
- Is consistent with the way other sections of the code treat flag-shaped lot configurations; and
- Effectively implements City Council's prohibition against alley access lots; and
- Doesn't allow for patently nonsensical outcomes; and
- Presents no unreasonable burden on property owners wishing to partition their lots.

The correct approach to the frontage standard is simple:

Lot frontage extends from the street to the main part of the lot where development is planned and must be at least 20 feet wide for that entire extent.

D. R-2 flag lot standards.

We note here that Mr. Flock may have left an incorrect impression with the following statement he made at the appeal hearing:

"It's also important to clarify for the Hearings Official [that] the code provisions at 9.2775 are specifically applicable in the R-1 zone. There's no such corresponding provision for R-2 with regard to the minimum 15 foot pole width. They're just simply not applicable in the case of an R-2 parcel."⁴⁵

⁴⁴ Appellants do not contend that there will be requests to create new lots as extreme as that shown in Attachment D. Attachment D shows the allowable *range* of frontage depth and "pole" width. However, given what appellants know about the 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 some absentee owners would exploit the Planning Director's approach to create new lots with this type of "pole."

Applicants and staff have also introduced an irrelevant argument by claiming the lot that actually results from this partition, i.e., Parcel 1, is "reasonable" enough in their eyes. They contend there's an adequate building site and actual access from the alley is sufficient. Such informal assessments have no legal bearing. Appellants could present our own subjective reasons Parcel 1 is *not* "reasonable." However, appellants have based our case on the applicable criteria, and applicants and staff should observe a similar discipline.

⁴⁵ Appeal Hearing Recording at 1:42:46

Appellants were unsure whether or not Mr. Flock was suggesting there were no R-2 flag lot standards, but we want to assure the Hearings Official there are – The Table 9.2760 entry for Frontage Minimum – Residential Flag Lot – 1 lot specifies “15 feet” in the “R-2” column.

Appellants were also unsure whether Mr. Flock was suggesting that an R-2 flag lot’s “pole” has no minimum width requirement, i.e., could narrow down to an arbitrary width, conceivably even an inch.⁴⁶

While appellants understand that flag lot standards don’t apply directly to Parcel 1, we believe they do provide a “reasonableness” test for how the frontage standard should apply to the “pole” portion of Parcel 1.

And, contrary to staff’s statement, the code *does* require a minimum 15 foot pole width for an R-2 flag lot, albeit based on Table 9.2760 and the EC 9.0500 definition of “Flag Lot,” rather than necessarily via provisions of EC 9.2775.

As just stated, Table 9.2760 requires the frontage of an R-2 flag lot be 15 feet, and the definition of flag lot specifically states the frontage provides the access corridor, i.e., the frontage extends the entire length of the pole and must be 15 feet:

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.

Although staff has again declined to explain their rationale when it comes to the minimum width for the access corridor of flag-shaped lots, there are only two possibilities in the case of R-2 flag lots:

- a. Staff believes R-2 flag lots have a minimum 15 foot pole width; in which case appellants argue for consistent interpretation of the frontage standard for a flag-shaped lot, such as Parcel 1, where the “pole” also serves as the access corridor; or
- b. Staff believes R-2 flag lots do not have a minimum 15 foot pole width based on the frontage requirement, which is at least consistent with staff’s interpretation of the frontage for a pole-shaped lot, such as Parcel 1.

While a staff interpretation that R-2 flag lots have no minimum pole width would be consistent with their findings on Parcel 1, it would also highlight how untenable their approach is because it would mean that you could create a legal flag lot, with *no* alley access and a pole too narrow to even walk across, much less drive a car. In other words, interpretation (b) would allow land-locked flag-lots to be created.

⁴⁶ To clarify staff’s comments for appellants and the Hearings Official, we e-mailed Mr. Flock on October 24 (two days after the hearing) and asked for an explanation. Mr. Flock replied on October 27 that he “respectfully decline[d] to provide further clarification of my statements at the appeal hearing at this time.”

We immediately e-mailed Ms. Shawna Adams requesting clarification of these points; and she likewise declined. See Attachment B.

We contend that this absurd outcome is an instructive parallel to the way staff's interpretation of frontage for flag-shaped lots, such as Parcel 1, allows lots with only alley access to be created, an equally untenable outcome of the Planning Director's flawed approach.

E. Multi-family development standards.

i. Multi-family development standards do not trump approval criteria.

While it's helpful to consider Council's thinking with respect to alley access and multi-family standards, as we do in the following section, the essential legal point in this case is:

EC 9.5500(11)(c) Alley Access has no bearing on, and does not negate or override, the approval criteria in EC 9.8215(1)(a), specifically lot frontage and minimum lot width. Nor does EC 9.5500(11)(c) negate or override Council's prohibition against creating new alley access lots.

The code provides no basis for reading EC 9.5500(11)(c) into the approval criteria, and City Councillor Bonny Bettman has explicitly testified that Council had no such intention. (See [Attachment C](#).)

ii. Council intent regarding multi-family development standards and alley access.

The Hearings Official asked about Council's reasons for requiring multi-family developments that have alley access to use alley access exclusively.

Planning staff opined this requirement was to preserve a more desirable streetscape, e.g., by reducing curb cuts, etc.

But this answer doesn't address the underlying question: What explains the conflict applicants and staff have tried to suggest exists between Council's requiring new lots to have street access and prohibiting use of that access for multi-family development when the new lot also has alley access?

As we'll explain, we believe there's no inherent conflict in Council's actions. Whatever conflict applicants and staff are trying to conjure up is caused solely by proposing a lot that doesn't meet frontage and/or minimum lot width standards and which Council would not intend be permitted.

First note that Council *did* allow alley access lots in new subdivisions with more than ten lots, and this provision covers many wholly new development situations.

One can read Council work session minutes (and talk to Councilors, as we have done) to better understand the concerns Councilors were trying to address when they prohibited alley access lots. Councilors were focused on the problem of partitioning street-to-alley lots in established "grid-patterned" neighborhoods (such as the Westside neighborhood).

As the Council deliberated the Land Use Code Update in 2000, they were concerned these types of lots were being partitioned to create a small front lot with the existing house and a vacant rear lot with only alley access. The new "alley access" lots were

then being developed with multi-unit apartments that weren't covered by adequate density or design standards.

Council saw that as maximum density limits had been dramatically increased in the R-2 (and other) zones⁴⁷, the traditional pattern of "granny cottage" infill in the rear of R-2 lots was being supplanted by badly-designed, multi-unit apartments and on-site parking that were having serious negative impacts on surrounding residents.

Council was concerned with excessively intense and inappropriate alley-access development, and sought to hold further development in check until density and development standards could be more fully thought through. This is clear both from reading the minutes and from the condition Councilors included in their motion:

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.

Council took a simple approach by prohibiting alley access lots (and flag lots, unless the lot was at least 13,500 square feet). Council was aware that a typical street-to-alley lot in the established grid-pattern neighborhoods was around 50 to 60 feet wide and 9,000 square feet more or less, and that houses were situated close to one another along the fronts of adjacent lots. Thus, with their prohibition, very few flag lots would be possible due to the 13,500 square foot lot size requirement; and because of the proximity among houses, there would be few situations where an unoccupied 20 foot wide section running from the street to the rear of the lot could be carved out of an existing lot.

Essentially, Council believed preventing new alley access and flag lots would stabilize the established lot and development pattern until new development strategies were implemented. And thus, their prohibition would effectively prevent the type of multi-unit, alley access development that concerned them. Councilors plainly and simply never contemplated, nor desired, that *new* lots would be created with such "gerrymandered" configurations as Parcel 1.

And thus, when Council considered standards for multi-family development, they focused mainly on vacant *existing* lots and lots in wholly new developments.

If you read the entirety of EC 9.5500 Multiple-Family Standard ([Attachment E](#), attached hereto and incorporated herein by reference), you see there is a strong emphasis on the buildings having street presence.

⁴⁷ The maximum number of dwellings allowed on a typical R-2 lot in the Jefferson and Westside neighborhoods more than *tripled* between 1982 and 2002. For much of the period when the Westside neighborhood was being built out, the R-2 zone was a "Two Family Residential" zone, allowing small duplexes, "granny cottages," second-story and over-garage flats, etc.

The resulting code in EC 9.5500 clearly doesn't anticipate new flag-shaped lots with poles that narrow below even the required flag lot pole width of 15 feet and that have multi-family development with all buildings *off* the street, behind an existing house.⁴⁸

So, there was no inherent conflict in how Council approached the problem of inappropriate alley development by prohibiting creation of new alley access lots and their adoption of standards for multi-family development.

The only basis for applicants and staff suggesting a conflict is that they propose a lot that Council never intended to be approved. Applying the frontage and/or minimum lot width standard(s) appropriately avoids these spurious issues altogether.

Thus, considered both in legal terms and in the context of Council's intent, multi-family standards present no reason for the Hearings Official to do other than require that Parcel 1 comply with clear and objective standards that assure street access.

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

Appellants contend that either alone or in combination, lot frontage, minimum lot width, and street connectivity standards implement Council's prohibition against alley access.

⁴⁸ Note in particular the following standard and consider how it would apply to Parcel 1:

EC 9.5500(4) Minimum and Maximum Building Setbacks

(b) Street Frontage

... On development sites with less than 100 feet of public or private street frontage, at least 40% of the site width shall be occupied by a building(s) placed within 10 feet of the minimum front yard setback line.

The R-2 minimum front yard setback is 10 feet, so if Parcel 1 were to be developed with three or more units, then there would have to be buildings within 20 feet of the street for at least 40% of the site width. To comply with the 5 foot interior setbacks, a building would have to be 10 feet wide or less in front part of the pole and 2.9 feet or less in the constrained part of the pole, due to the 10 foot setback requirement from the existing house.

"Site width" isn't defined anywhere in Chapter 9 of Eugene Code, but certainly for Parcel 1, "site width" must be either "lot width" or the width of the "flag" portion of the lot, since the primary development "site" is the rear portion of the lot. Thus, 40% of site width would be at least 20 feet, encompassing the entire width of the "pole" part of Parcel 1. Apparently, neither Council, nor the Planning staff that wrote the EC 9.5500 code, anticipated situations such as Parcel 1 presents.

Note that the EC 9.5500(4) setback requirements can be adjusted based on criteria in EC 9.8030(2), but the situation described here doesn't meet the EC 9.8030(2) criteria, so no adjustments would be permitted.

However, as appellants have established in prior testimony, the Planning Director relied *solely* on lot frontage as the standard that implements Council’s prohibition against alley access.⁴⁹ Staff affirmed this in their October 16 Memorandum.⁵⁰ And applicants concur in their October 25 testimony.⁵¹

Prior to the October 25, 2006 appeal hearing, the Planning Director and staff have rejected appellants contention that the minimum lot width standard also plays a role in assuring an adequate access corridor for a rectilinear, flag-shaped lot (such as Parcel 1) by requiring an adequate width of the “pole” part of the lot.

In oral testimony at the appeal hearing; however, staff for the first time acknowledged appellants’ point. Mr. Flock stated:

“And we believe that the frontage requirements work in conjunction with minimum lot widths to ensure adequate access, as well as a reasonable building area for the parcel.”⁵²

Staff did not expand on how minimum lot widths play a role in ensuring adequate access; and appellants have amply demonstrated the Planning Director’s interpretation of minimum lot width requirements fails to accomplish this objective.

Staff argues that “lot width” can be measured in only one way – as described in the EC 9.0500 definition. And, further that the Table 9.2760 standard can be applied in only one way: Require this *single* “lot width” measurement to be at least 20 feet, even when this produces nonsensical results.⁵³

Appellants contend, however, that the “minimum lot width” requirement must be applied sensibly, based on context, just as staff has stated they do for other provisions of the code that establish “*average* lot width” requirements.⁵⁴ With a rectilinear lot, such as Parcel 1, the sensible way to apply “minimum lot width” is to require there be no width less than 20 feet.⁵⁵ And *only* applied this way, can staff’s newly introduced

⁴⁹ See October 25, 2006 Appeal Testimony at 11.

⁵⁰ Record III-7.

⁵¹ See Section IV.B, above.

⁵² Appeal Hearing Recording at 1:38:45

⁵³ Ms. Adams also stated: “We were asked to speculate as well, if I recall correctly, how lot width measured in a certain way serves any purpose relative to the partition; and I can only speculate, but what I would speculate is that the standards are there to ensure that there’s going to be a dimension somewhere on site that provides 20 feet to ensure that there’s a buildable area. (Appeal Hearing Recording at 1:39:16.)

It is quite possible, however, to have a perfectly rectilinear lot that is *nowhere* wider than 15 feet (or even less) that still has a 20 foot “lot width” as staff measures it. Whatever the intent of “lot width” calculation that staff used, it doesn’t accomplish what Ms. Adams speculated.

⁵⁴ See discussion at Record III-52.

⁵⁵ In *McKeown*, LUBA addressed problems that arose with an earlier version of Eugene’s “lot width” calculation that was apparently no more satisfactory than the current calculation. LUBA rejected petitioners’ claim on this point, but did so

theory – that frontage (which staff interprets as *front lot line*) and minimum lot width together ensure adequate access – be viable.

We repeat, however, that both paths – relying on frontage alone or relying on frontage and minimum lot width together – lead to the same result: Parcel 1’s access corridor must be 20 feet wide from the street to the main part of the lot.

VII. STREET WIDTH (APPEAL ITEM 11)

A. Planning Director ignored four-plex.

As we stated in our Appeal Statement⁵⁶, the Planning Director failed to require applicants to provide adequate right-of-way and paving for W. 12th Alley, including consideration of the proposed four-plex and consequent alley traffic. We further establish in Section II, above, that the four-plex is an explicit feature of the proposal and the impacts of such usage on the alley must be considered in evaluating compliance with EC 9.6870.

B. Required right-of-way and paving are commensurate with explicit feature of proposal

We reiterate that staff and applicants have misconstrued the requirements of *Dolan*. In this situation, the four-plex is an explicit feature of the proposal, and though the Planning Director may not know the height of the future structure or its paint color, he knows there will be (at least) four additional households using W. 12th Alley for their sole access. Based on data presented in oral testimony by Lane County Planning Commissioner Jozef Zdzienicki,⁵⁷ and acknowledged by Mr. Mueller, a projected 40 additional trips in the alley will result.

C. Testimony presents evidence of inadequate alley width and paving.

Additional written testimony submitted by Aiemee Code⁵⁸, Charles R. Snyder, and Suzanne B. Whaley⁵⁹ documents traffic conflicts in W. 12th Alley that arise from *existing* development. Adding 40 trips a day will significantly increase those conflicts, and there is no legal justification for the Planning Director entirely ignoring these impacts in his evaluation of compliance with EC 9.6870.⁶⁰

expressly because the City’s lot width calculation was “no stranger” than the result produced by petitioners’ interpretation.

We contend that our approach in this case avoids that problem by addressing the standard at the right level – Describing how “minimum lot width” should be applied, rather than how a single “lot width” dimension should be calculated. Our interpretation produces sensible results; whereas the City’s results are unquestionably still “strange.”

⁵⁶ Record at III-7 to III-9.

⁵⁷ Appeal Hearing Recording at 1:23:19.

⁵⁸ Attachment I in October 25 Appeal Testimony.

⁵⁹ Attachment K in October 25 Appeal Testimony.

⁶⁰ As pointed out in appellants’ October 25, 2006 Appeal Testimony (at 19), the Planning Director is inconsistent in the way he acknowledges that the four-plex’s

D. Dolan standard met.

We reiterate the point made more extensively in our Appeal Testimony (at 17) that the *Dolan* requirement for nexus and proportionality are clearly met by the proposed and allowed development. Staff's comparison of hypotheticals, on the other hand, isn't a proper reading of *Dolan*, especially when the four-plex is an explicit feature of the proposal.

E. EC 9.6505(3)(b) encompasses entire length of alley

Applicants suggest the EC 9.6505(3)(b) requirement:

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.

should be narrowly interpreted to encompass just the portion of W. 12th alley that is adjacent to Parcel 1.

In plain English, "adjacent" in this sentence qualifies which streets or alleys must be paved, and W. 12th Alley is an alley that is "adjacent to the development site."⁶¹ Therefore, it is the *entire* alley that is subject to EC 9.6505(3)(b) and must be paved.

VIII. STORM WATER DRAINAGE (APPEAL ITEM 12)

We note three further points here.

A. Planning Director did not reference "existing maintenance records" in his Decision.

In their October 16, 2006 Memorandum (at 9), staff claims:

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

Applicants repeat this claim in their October 25, 2006 testimony (at 11):

"Public Works based their decision on existing maintenance records."

We can find no reference to "existing maintenance records" in the Planning Director's decision or in the Public Works referral comments, dated August 23, 2006. The entirety of the Public Works staff comments regarding storm water drainage is presented here:

impact requires a special setback, but turns around and says the lack of any impacts justifies ignoring the right-of-way and paving requirements.

⁶¹ 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.

9.6510 – Stormwater Drainage

“Public storm drainage is available in West 13th Avenue. The applicant’s proposal to direct stormwater runoff towards weepholes in the curb West 13th Avenue is acceptable; however storm drainage flowing from Parcel 1 across Parcel 2 must be located within a private storm drainage easement. As a condition of approval, the applicant shall create on the final plat, a private easement across Parcel 2 for the benefit of Parcel 1 to enable storm drainage disposal from Parcel 1.”

Thus, there is no evidence in the record that all or any of the documentation required by EC 9.6510 was submitted.

B. Testimony presents evidence of inadequate storm sewer capacity.

The need for adequate analysis and documentation isn’t a mere formality. Written testimony by John and Pam Sheridan provided first-hand accounts of flooding on Parcel 1 and the adjacent alley, as well as overflowing storm sewers.⁶² This evidence requires thorough analysis and presentation of the data and analysis upon which the Planning Director relied, neither of which were present in the Decision

C. Planning Director ignored four-plex.

As we stated in our Appeal Statement⁶³, the Planning Director failed to require applicants to submit adequate documentation, including consideration of the proposed four-plex and required parking. We further establish in Section II, above, that the four-plex is an explicit feature of the proposal and the impacts of such usage on storm water must be considered in evaluating compliance with EC 9.6510.

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

We only note here that applicants assert in their Appeal Testimony (at 11) that they “could adjust the lot line” to comply with fire separation standards.

As explained in our October 25 Appeal Testimony (at 21), such a lot line adjustment would reduce Parcel 1’s “pole” to 11.9 feet wide along the greater portion of its extent.

Applicants’ contention that 11.9 feet is as acceptable as their proposed 13.9 feet for the pole width simply adds further evidence that their approach would allow an arbitrarily narrow “pole” such as that illustrated in [Attachment D](#).

⁶² October 25 Appeal Testimony, Attachment L.

⁶³ Record at III-22.

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

In response to a question from Charles Snyder, the Hearings Official succinctly summed up the appropriate perspective on this issue:

“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.”⁶⁴

Protection of the neighborhood character is required, not only by EC 9.9680(1)(a), but also by Metro Plan Policy A.25:

A.25 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.

At the Appeal Hearing, Planning staff presented no new evidence or arguments on this issue.

A. Preserving the existing house.

Applicants’ representative re-iterated that not demolishing the existing house that would remain on Parcel 2 complies with EC 9.9680(2). Appellants would agree with this point *only* if a condition were imposed that assured the single-family, detached dwelling could not be subsequently demolished or converted to a duplex or triplex. Since applicants rely entirely on their assertion that leaving the existing, single-family, detached dwelling in place is necessary and sufficient to comply with EC 9.9680(2)⁶⁵, they must be required to preserve that status if the partition is approved.

B. Protecting the neighborhood character.

i. Planning Director failed to address compliance with EC 9.9680(1)(a).

We restate the Planning Director’s principle finding to highlight the complete absence of *any* consideration of the actual meaning of the applicable standard:

“Given the existing R-2 zoning, which allows for a net density of 28 units per acres, and multi-family standards applicable to residential developments with 3 or more units, and given that the proposed configuration allows for a buildable area on Parcel 1 with minimal impact to the existing residence and yard on Parcel 2, the act

⁶⁴ Appeal Hearing Recording at 1:34:26

⁶⁵ In their October 25 testimony (at 12), applicants also assert: “... the existing home will provide an element of screening from 13th Ave. [sic]”

The implication is that retaining a single-family, detached home on the front lot will make what happens in the rear acceptable because it can’t be fully viewed from the street.

Appellants reject this justification. However, applicants so depend on this one fact that they must be compelled to retain the *status quo ante* if the partition is approved.

of dividing the subject property into two parcels does not significantly impact the nature of development that can occur on the subject site, and therefore does not pose a significant impact on neighborhood character in the context of the above criterion.”⁶⁶

In their Memorandum, staff present little more than a restatement of the Planning Director’s justification for not evaluating whether the proposal complies with the Westside Neighborhood Plan, and we have dealt with those comments in our October 25 Appeal Testimony.

Appellants, however, have provided ample evidence, including impacts of the proposed four-plex, as well as the effective change in allowable development intensity from the current medium-density range to the high-density range just by virtue of the land division itself.

As we explain in Section II, above, and as LUBA made clear in *McKeown*, the Planning Director was required to actually evaluate whether the proposal complies with the Westside Neighborhood Plan and cannot simply waive consideration because he claims, in conflict with the evidence, there will be no significant impacts. The Planning Director may ultimately not have agreed with opponents, but as LUBA said in *McKeown*, that is not the issue.

ii. Preserving house on Parcel 2 is not relevant to Parcel 1 compliance.

The only concrete evidence either applicants or staff have presented for compliance with EC 9.9680(1)(a) is that the existing house on Parcel 2 will remain.⁶⁷

⁶⁶ Decision at 10.

⁶⁷ Appellants also throw in comments that the proposal will increase density and provide infill in support of their claim the proposal complies with EC 9.9680. But it is precisely the location, type, and intensity of the proposed infill development that appellants contend *conflicts* with EC 9.9680(1)(a).

As noted in Opposition Testimony (Record at III-61), one of the appellants was an author of the Westside Neighborhood Plan and has first-hand knowledge of the deliberations and decisions of that body. Based on that knowledge, appellants can confidently say that the concept of “infill” was generally considered to be low-intensity, modest-scale, compatibly-designed additional dwellings, such as “granny cottages” and second-story or over-garage apartments. A four-plex and parking on the alley, adjacent to several neighboring properties’ back yards would have unquestionably been considered grossly incompatible.

Also, for historical context, the JWN recently researched the R-2 zoning standards and found that in the mid-1980s, when the Westside Neighborhood Plan was being developed, a lot the size of Parcel 1 would have allowed only two dwelling units. Thus, when the authors wrote, and City Council approved, language stating the Central Residential Area is intended for “medium density,” they had much less development intensity in mind than current R-2 standards allow. The adopted refinement plan policies should be treated as “refining” or constraining, in this case, the maximum density allowed by the zoning district.

This obviously doesn't address in any way the potential and proposed development on Parcel 1, and is simply not relevant to the main issues related to EC 9.9680(1)(a).

iii. Planning Director must evaluate concrete elements of the neighborhood character.

Appellants have presented extensive documentation – developed in 2005 during an ODOT-funded Planning Division project – that includes over 40 specific elements of neighborhood character and numerous specific examples of incompatible development that are applicable to the area surrounding the subject property.⁶⁸ These are the kinds of objective facts the Planning Director should have considered in his decision.

Appellants recognize that determining “neighborhood character” and “compatibility” is a challenging task. However, that is no excuse to completely forgo the legal requirement to evaluate the proposal's compliance with adopted policies requiring protection of the neighborhood character. Such a rationale would render the heart of many adopted refinement plan policies meaningless.

The Planning Director failed to even make an attempt at evaluating the proposal's compliance, and that omission requires reversing his decision.

CONCLUSION

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

Respectfully submitted this 1st day of November, 2006.

Paul Conte
Co-Chair, Jefferson Westside Neighbors

Rene Kane
Co-Chair, Jefferson Westside Neighbors

⁶⁸ Record at III-60 to III-65 and III-96 to III-106.

ATTACHMENTS

- A. [CD with audio recording of October 25, 2006 Appeal Hearing](#)
- B. [November 1, 2006 e-mail from Shawna Adams](#)
- C. [Testimony of Eugene City Councilor Bonny Bettman](#)
- D. [Diagram of type of lot allowed by Planning Director's decision](#)
- E. [EC 9.5500 Multiple-Family Development Standards](#)