

APPEAL TESTIMONY

RE DECISION APPROVING ZONE CHANGE

LOOKING GLASS SCHOOL FILE Z 11-3

The following testimony by appellant, who is the representative of the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, responds to the "AGENDA ITEM SUMMARY," dated August 24, 2011¹, which contains the first part of the staff report regarding the appeal of the above captioned application (referred to herein as "Staff Report 1").

PRELIMINARIES

A. Settled issues

We note Staff Report 1 does not contest either of the following settled issues, which were presented on pages 1 and 2 of the August 16, 2011 Appeal Statement.

1. Policy 1 under the "Land Use Element" section of the **1987 Westside Neighborhood Plan (WNP)** is a mandatory approval criterion.
2. A zone change can be approved with conditions, including a condition that excludes certain uses permitted under the C-2 Community Commercial Zone.

B. Clarifications

We note Staff Report 1 does not contest any of the following clarifications, which were presented on pages 2 through 5 of the Appeal Statement.

1. WNP policies are part of the comprehensive plan.
2. The JWN arguments regarding applicable WNP policies are not dependent on each other.
3. The JWN arguments referencing commercial uses allowed in the R-2 and S-JW zones are supportive of the proper application of Policy 1 under the "Land Use" section.

¹ This date is incorrect. At the point when Staff Report 1 was made available, the appeal hearing was scheduled for August 31, 2011.

Unfortunately, staff has also incorrectly stated a pivotal JWN position expressed in our submitted testimony and Appeal Statement. Staff's mischaracterization may confuse the issue and needs to be set straight.

4. The meaning of "general commercial uses" was, and is, found in the Metro Plan.

Staff incorrectly stated:

"Under this assignment of error, the appellant asserts that the City is prohibited from relying on its current, acknowledged land use code to determine the meaning of "neighborhood and general commercial uses" as those terms are used in the refinement plan policy. Appellant asserts that, instead, the City must determine which specific commercial uses were contemplated by the drafters of the refinement plan at the time they wrote the policy." Staff Report 1 at 4. (Emphasis Added.)

Under the second assignment of error appellant clearly states:

"The Hearings Official relied on the following erroneous findings:

A. The Hearings Official failed to apply the proper interpretation of "general commercial uses" by incorrectly relying on an assumption that this term means exactly those uses allowed by the version of the C-2 Zone in effect at the time of any application, rather than relying on the applicable description found within the comprehensive plan text.

At the very least, the multiple uses of "C-2 Community Commercial" indicate the WNP authors and City Councilors were not so focused on the existing C-2 code as the Hearings Official believes, or they would have been more likely not to use two different terms for the C-2 zone on the same page.

Second, as explained in the following section, the Hearings Official relied on the wrong version of Eugene Code in supporting his argument. He also presented no evidence that any of the parties involved in the writing, revision and approval of this policy were as intent as the Hearings Official believes on locking the policy then and forever to the definition of C-2 in the land use code.

The more obvious way to read this policy is that if the authors and City Council intended to lock the policy to C-2 (and C-1), they would have simply said so.

If the WNP policy referred to "C-2" or "the General Commercial District" there would be no need to look further, but that's not the case here. Statutory

construction requires looking at the immediate contexts first, when the text itself isn't sufficient. The WNP itself doesn't clarify the term, and thus the next place to look is other elements of the comprehensive plan, and here we find what we need. There is an obvious correspondence between "general commercial uses" term in the WNP and the "general [commercial] activities" term found in the 1982 Metro Plan at page II-E-4. (Emphasis added.)

Thus, at least the first step in interpreting this comprehensive plan policy is quite simple and direct: The policy designates the encompassed area for "Neighborhood Commercial Facilities" and "Community Commercial Centers," as described in the Metro Plan.

But this only strengthens the argument for interpreting the WNP policy based on the Metro Plan categories, since land use code must conform to the comprehensive plan and not vice-versa. Thus, it makes more sense to see the WNP policy and the Metro Plan category descriptions as the combined definition of what is allowable in the "Chambers Street Commercial Area"; and where a use permitted in C-2 is not a use within the "Community Commercial Centers" category, that use cannot be allowed."

In view of the fact that one of appellant's pivotal arguments is that the meaning of "general commercial uses" *was, and is*, found in the Metro Plan, it's somewhat remarkable that, staff has described appellant's argument in such a twisted way.

PLANNING COMMISSION DECISION

The Planning Commission can affirm the Hearings Official decision, modify the decision or reverse the decision.

Appellant believes the lawful and appropriate action by the Planning Commission is to modify the decision to prevent uses that would be inconsistent with comprehensive plan policies, as explained in our Appeal Statement.

Appellant does not seek denial of the zone change, nor is the JWN opposed to Looking Glass operating a school on the site.

Since the ability of the City to approve a zone change with a condition now seems settled, the path is open for an outcome that is lawful and satisfactory to Looking Glass and the JWN.

On page 4 of Staff Report 1, staff states that applying an /SR (Site Review) overlay zone to the approval of the C-2 Zone would be “one possible solution, consistent with City practice in various other C-2 zones that abut residential areas. *** the overlay zoning could be established to address ‘future development considerations’ consistent with EC 9.8860(2). The /SR overlay would enable review to address impacts from future commercial uses that might occur on the subject property, including compatibility with “residential character” in the surrounding area ***” (Emphasis added.)

*While we believe this isn’t the only (or necessarily best) form of condition that could be applied to make the approval of a C-2 Zone consistent with comprehensive plan policies, we agree that a zone change to C-2/SR could satisfy approval criteria EC 9.8865(1) and (2) and statutory requirements – if and only if the Site Review approval process would be triggered by a change in use, as well as other conditions enumerated in EC 9.8430 **Applicability**.*

Appellant does not believe, however, that an /SR overlay would be an adequate condition if the Site Review approval process were triggered only by the conditions in EC 9.8430 (1) (a) and (b).

For a condition to be an acceptable means of satisfying mandatory approval criteria there must be sufficient evidence that the condition will fully address conflicts with the approval criteria.

We note that appellant indicated in our original testimony of July 20, 2011, that the Hearings Official had the option to approve a zone change with an /SR overlay in this way (page 11, footnote 16):

“It should be noted that the Hearings Official does not necessarily need to impose a condition that excludes certain use by means of a “land use and trip cap.” The Hearings Official is free to use any other lawful means to impose as a condition of approval the exclusions that are listed in the JWN’s proposed condition.

If the Hearings Official so desires, one alternative may be to apply the /SR Site Review overlay, and require site review approval under EC 9.8440 Site Review Approval Criteria-General in order to specify excluded uses.” (Emphasis added.)

As we demonstrate in our original testimony, our Appeal Statement, and this testimony, we also believe the zone change can be approved with a condition that explicitly prohibits the uses enumerated in our testimony.

REBUTTAL TO STAFF REPORT 1

In this section, we provide a complete copy of the "Appeal Issues and Staff Response" contained in the Staff Report 1. We respond to each item therein, with references to our original testimony and Appeal Statement.

Staff Report Page 2

APPEAL ISSUES AND STAFF RESPONSE

Staff's preliminary responses to the assignments of error are provided below, to be followed by a memorandum from the City Attorney's Office at the public hearing to supplement this initial staff report. For additional information on the subject request, please refer to the attached appeal form and written statement as well as the full record of materials provided under separate cover which includes the Hearings Official's decision, public testimony and application materials.

As conveyed in the e-mail from appellant to the Planning Commission on August 24, 2011, ORS 197.763 (4) (b) and EC 9.7670 require the complete staff report to be available at least seven days prior to the appeal hearing. Staff Report 1 appears to comprise only part of the staff report, with the remainder to be provided at a future date by the City Attorney's Office.

Appellant requests the August 31, 2011 hearing be rescheduled or continued so that appellant may exercise our right to review the entirety of the staff report at least seven days prior to our final opportunity to testify directly to Planning Commissioners at a public hearing.

If this is not done, we hereby raise this issue for the purposes of a subsequent appeal to the Land Use Board of Appeals.

First Assignment of Error

The appellant asserts that the decision erred by finding that the application met the approval criterion at EC 9.8865(2), with respect to Policy 1 under the "Land Use Element" section of the applicable Westside Neighborhood Plan (WNP). This criterion requires consistency with adopted refinement plans and the cited policy states: "Prevent erosion of the neighborhood's residential character." The appellant asserts that the Hearings Official erred by not finding six of the uses permitted in the City's C-2 zone (enumerated in the appellant's written statement) to be erosive to the neighborhood's residential character and therefore inconsistent with the cited policy.

Under this assignment of error, the appellant provides extensive argument with regard to WNP Policy 1 and the meaning and impact of the term "residential character" in this context. The appellant specifically argues that the Hearings Official erred by failing to apply the proper definition of "residential character" at EC 9.0500 in his decision.

It is not clear that the Hearings Official overlooked the EC 9.0500 definition of "residential character." Appellant did not say the Hearings Official "overlooked" the EC 9.0500 definition, and it's immaterial whether or not the Hearings Official did overlook the EC 9.0500 definition. As the Appeal Statement states on pages 6 and 7:

"In his decision, the Hearings Official did not mention the definition of "residential character" found at EC 9.0500, nor did he provide any justification for ignoring it in favor of the earlier LUBA decision. It appears the Hearings Official may not have recognized that the LUBA decision was made at a time when the "residential character" definition did not yet exist in Eugene Code."

What's important is that Hearings Official made absolutely clear that he relied on the LUBA definition, which was an error. On page 7 of the Appeal Decision, the Hearings Official states:

"In relation to Policy 1, I am fortunate with this application that I am not obligated to review this policy without any assistance. The Land Use Board of Appeals reviewed this policy in the past, and its review provides direction for me here. LUBA's prior treatment of Policy 1 leads to the conclusion that the intent of the policy, read in context, is to retain the neighborhood's residentially zoned areas and allow infill with uses consistent with the residential area's residential designation."

While the Hearings Official's decision did not include a specific reference to the

Staff Report Page 3

definition at EC 9.0500, opposing JWN testimony which addressed this issue was referenced on page 2 of the decision (page 35 of the record) as part of the documents specifically considered by the Hearings Official (see Hearing Exhibit B and additional JWN testimony provided on July 20, 2011).

Again, the fact that the Hearings Official read the JWN testimony has no bearing on the assignment of error.

For reference, the Hearing Official addresses opposing testimony with respect to the relevant approval criterion and WNP Policy 1, on pages 4-9 of the decision. He specifically addresses Policy 1 and the question of possible erosion of residential character at the bottom of page 4, in his decision:

The subject property is located within the WNP's sub-area designated for commercial uses and that plan's text refers to commercial uses being appropriate for this sub-area within the larger neighborhood. Continued use of the subject property, which carries a commercial designation under the WNP, will not erode the neighborhood's residential character. To the contrary, continued commercial use of the subject property will maintain the status of the property as commercial, and maintain this property's relationship with the rest of the neighborhood as contemplated by the WNP. Maintaining the status quo as contemplated by the WNP does not

cause erosion.

This, of course, is only one of the places where the Hearings Official addressed "Policy 1" (under the WNP Land Use Element), and the Appeal Statement describes other errors that staff doesn't respond to, as noted at the end of this assignment of error.

However, the above conclusion depends on an obviously false assumption that a zone change from GO to C-2 maintains the "status quo" and thus couldn't possibly cause any increase or change in impacts. The relevant "status" of the subject property, and the focus of this entire appeal, is that the proposed C-2 zoning allows several uses that are not allowed by the current GO zoning; and these uses, if permitted, could have a substantially more deleterious "relationship with the rest of the neighborhood."

The Hearings Official's argument is pure "hand-waving" with no basis in fact.

The appeal suggests that additional evidence, including e-mail between the appellant and one of the Planning Commissioners, will be submitted to further address this issue. Staff cautions the Planning Commission that this zone change appeal is restricted to the record of evidence established before the Hearings Official, and its consideration must be based on whether he erred based on the evidence before him. In other words, the Planning Commission may only consider the evidence that was placed before, and not rejected by the Hearings Official in the course of his proceedings.

It will be unnecessary for us to submit e-mails between Paul Conte and Commissioner Hledik substantiating the intent of EC 9.0500 because, fortunately Commissioner Hledik remains on the Planning Commission and can verify appellant's points.

Staff, of course, would be aware of communication between Alissa Hansen and the Planning Commission and City Council that also confirms appellant's position. We leave it to staff to determine whether to acknowledge that communication or continue to keep it out of the record.

The appellant's related challenge to the Hearings Official's apparent reliance on a 2008 LUBA decision that interpreted the meaning of "residential character" in the context of a residential partition, instead of the more recently adopted definition of the term in EC 9.0500, will be further addressed in the City Attorney's memorandum to follow.

The appeal raises additional legal issues regarding collateral attack and de facto amendment of the Eugene Code. These will also be addressed in the City Attorney's memo.

Appellant cannot respond to parts of the staff report that are yet to be made available.

With respect to the appellant's proposed interpretation of the approval criterion and related policy in this instance, it could lead to an impossible task with respect to future zone change applications, by requiring a level of nuanced analysis of development characteristics and impacts that is not based on enough specifics or substantial evidence to effectively respond.

Staff sets up a "straw man" that is irrelevant to the proper interpretation and application of comprehensive plan policies, including "Policy 1." If, as appellant contends, some uses are unavoidably erosive of the neighborhood's residential character, then they cannot be allowed just because staff claims it would be an "impossible task" to evaluate these uses for consistency with comprehensive plan policies.

The task before the applicant and the City in this case is quite tractable – evaluate whether six specific uses are consistent with "Policy 1." Appellant has provided a reasonable basis for determining that these uses are not consistent with "Policy 1." Applicant and City must respond in a substantive way to appellant's case; and, we further direct the Commissioners attention to the following requirements for this approval process:

9.7085 Quasi-Judicial Hearings- Burden of Proof. The burden of proof is upon the applicant. A decision to resolve the issues presented shall be based upon reliable, probative and substantial evidence in the record.

Comments on the remainder of this paragraph in the Staff Report 1, below, speak to this point further.

Keep in mind that no specific use is or can be approved for the subject property by the applicant's proposed zone change, and consistent with long-standing City practice based on applicable law, unless there is a specific application for development that is proposed concurrent with the zone change, the particular impacts of a given use and the extent of development to accommodate that use on the site cannot be accurately or properly addressed at this stage -- except perhaps, with regard to statutory requirements under the Transportation Planning Rule (TPR), to address *hypothetical* worst-case traffic impacts under a proposed zone.

Staff's comment that "no specific use is or can be approved for the subject property by the applicant's proposed zone change" is grossly misleading. The zone change establishes both "permitted" uses, which are allowed outright, and "conditional uses," which must be approved through a conditional use permit process. As discussed in our testimony, requiring parties that may be adversely affected by a "permitted" use to monitor and appeal a use at the time of permitting places an exceptional and unjustified burden on those parties.

Staff references "long-standing City practice based on applicable law," but does not identify the "applicable law." Appellants are prepared to respond when and if staff

presents specific legal arguments for their position, but we aren't able or required to respond further to mere "hand-waving" of this sort.

We note that staff appears to view TPR analysis "worst case" analysis for a proposed zone change as a manageable task in the absence of a specific proposed use, and yet a corresponding analysis of uses' potential impacts on adjacent residential areas is "impossible." We also note that when a TPR analysis indicates some specific use(s) otherwise permitted by a zone would be impermissible due to traffic impacts, staff has acknowledged that a "trip cap and land use limitation" can be a condition imposed on a zone change. Such "caps" can, in fact, prohibit one or more specific uses that would otherwise be allowed under the zone.

Staff has provided no explanation why the established TPR analysis and "trip cap and land use limitation" practices are practical and legal, but the appellant's argument that an analysis of potential impacts and a zone approval condition that limits certain uses presents an "impossible" hurdle.

In theory, appellant's approach would appear to obligate the City to evaluate every possible use under a proposed zone without sufficiently specific policy language, applicable development standards or substantial evidence in the record to properly direct such an evaluation as part of

Staff Report Page 4

a zone change -- such as an actual development plan, or possibly further refinement planning, to address the relationship of the "Chambers Street Commercial Area" in this case, to its surroundings. This approach would represent a drastic departure from long-standing and well reasoned City practice.

This paragraph just presents the same "impossible task" argument of the previous paragraph. We note several points (again): The "Policy 1" language is clear and relies on a specific definition at EC 9.0500. It was the Hearings Official's responsibility to apply this policy, but he erred by relying on the wrong definition of "residential character." That falls more at staff's feet than appellant's.

The responsibility for "substantial evidence" is the applicant's. The fact that they ignored "Policy 1" altogether (as did staff) is not appellant's responsibility.

In the event that the Planning Commission finds that the Hearings Official erred, to address the concerns expressed by JWN about neighborhood impacts, one possible solution, consistent with City practice in various other C-2 zones that abut residential areas, would be to apply the /SR Site Review overlay zone to the site, as a modification to the approval. While not expressly required by adopted policy under the WNP, in response to opposing testimony as part of the appeal, the overlay zoning could be established to address "future development considerations" consistent with EC 9.8860(2). The /SR overlay would enable review to address impacts from future commercial uses that might

occur on the subject property, including compatibility with "residential character" in the surrounding area, being properly based on individualized, specific evidence and adopted policy and code requirements for an actual use and development proposal.

See the discussion under the "Planning Commission Decision" section, above.

If the Planning Commission ultimately agrees that the Hearings Official properly evaluated the relevant policy and approval criteria based upon all the available evidence and testimony, then the zone change may be approved without condition or application of any overlay zoning as a modification. Similarly, the appellant's sub-assignments of error may be rendered essentially moot by such a determination, eliminating the need for further analysis or findings.

Reaching the end of staff's response to the First Assignment of Error, we note that staff did not address the following points in any way:

- If appellant is correct that the proper definition of "residential character" is found at EC 9.0500, the Hearings Official neglected entirely to evaluate how the correctly interpreted "Policy 1" should be applied to the six C-2 uses enumerated by appellant.

Staff presented only the "impossible task" as their sole argument; however, staff never presented any theory as to why this complaint eliminates the need for evaluating the six uses' consistency with "Policy 1."

- Staff appears to have completely ignored appellant's argument (under section B of the First Assignment of Error) that the Hearings Official improperly rendered "Policy 1" under the "Land Use Element" section irrelevant by assuming that all C-2 uses were intended by the WNP to be inherently consistent with "Policy 1."

As we demonstrate in that section, this error created an impermissible conflict with the ORS 174.010 requirement that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Second Assignment of Error

The appellant asserts that the decision also erred by finding that the application met the approval criteria at EC 9.8865(1) and (2), with respect to Policy 1 under the "Chambers Street Commercial Area" section of the WNP. The cited policy states: "This area shall be recognized as appropriate for neighborhood and general commercial uses." Specifically, the appellant asserts that the Hearings Official erred by not finding that two particular uses permitted in the City's C-2 zone (Club and Lodge of State or National Organization; and, Correctional Facility, excluding Residential Treatment Center) are not true "general commercial uses" and are, therefore, inconsistent with the cited policy.

Under this assignment of error, the appellant asserts that the City is prohibited from relying on its current, acknowledged land use code to determine the meaning of "neighborhood and general

commercial uses" as those terms are used in the refinement plan policy. Appellant asserts that, instead, the City must determine which specific commercial uses were contemplated by the drafters of the refinement plan at the time they wrote the policy. As an initial matter, it is not clear that the drafters intended to limit the subject area to a specific list of uses rather than a more general description to be implemented and updated over time through the City's land use code. Specification of allowed uses has always been a function of the City's land use code. Further, the appellant's proposed approach to distinguish between the terms "general commercial" and "community commercial" related to the C-2 zone, would have the City venture onto entirely new ground in local policy interpretation that runs afoul of long-standing practice to maintain a clear relationship and consistency between the City's land use code and refinement plan language that pre-existed code changes.

As explained in item 4 under the "Clarifications" section, above, staff grossly misrepresents appellant's position.

Appellant's position is that the meaning of "general commercial uses" *was, and is*, found in the Metro Plan.

In our Second Assignment of Error, we first demonstrate how the Hearings Official's reliance on a weak textual correspondence doesn't hold up under thorough examination. Staff fails to counter this critique in any way. We then make an extensive case for our position; again, which staff fails to rebut, choosing instead to attack a "straw man" in the above paragraph.

Staff also again misunderstands the relationship of the comprehensive plan and local zoning ordinances. Staff doesn't seem to understand that even "acknowledged" zoning code doesn't trump the comprehensive plan.

Staff also reprises a version of the "impossible task" and "long-standing practice" arguments without adding anything in terms of actual legal foundations that would counter appellant's case.

The final statement in this paragraph that the City has "long-standing practice to maintain a clear relationship and consistency between the City's land use code and refinement plan language that pre-existed code changes" may describe the City's aspirations, but it has no bearing on what is actually in the code. In this case, perhaps despite a different aspiration, two of the uses allowed under the C-2 zone are not consistent with Policy 1 under the WNP "Chambers Street Commercial Area" section.

Staff Report Page 5

Appellant also points out a discrepancy with respect to the dates of WNP adoption and adoption of correlating commercial code provisions referenced by the Hearings Official. However, the date discrepancy appears to raise no substantive issue that is relevant in this zone change approval.

Staff provides no evidence at all to support their conclusion that this “discrepancy appears to raise no substantive issue that is relevant in this zone change approval.”

In fact, there are differences in the C-2 zone code between the 1984 version heavily relied upon by the Hearings Official and the version two years later, which was contemporaneous with the final stages of the process that created and adopted the WNP.

As staff correctly points out on page 1 of Staff report 1:

Further, the Planning Commission must limit its consideration to the evidentiary record established before the Hearings Official; the Planning Commission may not accept new evidence.

Unfortunately, the only version of past code that’s part of the evidence in the record is completely irrelevant because it was *two years earlier* than the period the WNP was actually being developed and adopted. The Planning Commission cannot rely on staff’s claim, devoid of any supporting evidence, that this error “raise[s] no substantive” issue.

Staff makes no attempt to respond to the more serious error; however, which is that the Hearings Official should not have based his decision on code from 1984 or 1986, in any case. What’s ironic is that the arguments staff make against their twisted version of appellant’s position (as discussed above) actually applies to the approach taken by the Hearings Official, who stated on page 5 of the Decision:

*“*** the terms [“neighborhood commercial “and “general commercial”] are clear references to the C-1 and C-2 zoning districts in use in 1985 when the WNP was adopted.”*

In addition, appellant re-asserts arguments related to legal principles of statutory construction and proper local policy analysis, which will be further addressed in a separate memo from the City Attorney.

Appellant cannot respond to parts of the staff report that are yet to be made available.

At its core, the appeal seems to hang on a theory of refinement plan interpretation that would override a clear commercial designation identified in the Metro Plan and the "Chambers Street Commercial Area" of the WNP, which under any other circumstance would allow C-2 zoning where there is no express language that clearly prohibits it.

This isn't a very clear summary of appellant's position. Appellant's theory is pretty simple: This zone change must be consistent with two refinement plan policies that limit uses that conflict with those policies.

Neither applicant, nor the Hearings Official nor staff have yet provided any evidence or analysis that actually evaluates the uses against the proper interpretation of these two policies.

The threshold questions are simply:

- Could one or more of the enumerated uses erode the neighborhood's residential character?
- Are one or more of the enumerated uses not true "general commercial uses," as intended by the respective WNP policy?

Whether or not these questions might arise in "any other circumstance" is irrelevant.

Again, if the Planning Commission agrees that the Hearings Official properly evaluated the relevant policy and approval criteria based upon all the available evidence and testimony, then the zone change may be approved without condition or modification. Similarly, the appellant's sub-assignments of error may be rendered essentially moot by such a determination, eliminating the need for further analysis or findings.

Reaching the end of staff's response to the Second Assignment of Error, we note that staff did not address the following points in any way:

- Staff did not respond at all to the documented weaknesses and inconsistencies in the Hearings Official's reliance on textual similarities, as appellant thoroughly described in the Appeal Statement.
- Staff did not identify any errors in appellant's numerous facts supporting appellant's interpretation of "general commercial use" and instead relied solely on their "impossible task" and "long-standing practice" arguments.

Third Assignment of Error

The appellant finally asserts that by approving future development consistent with the City's C-2 zone, the decision erred by allowing more intensive development than the comprehensive plan allows, which the Oregon Supreme Court determined in a case known as *Baker vs. City of Milwaukie*, is impermissible. The appellant apparently quotes a portion of this court decision with emphasis on the statement that: "zoning decisions of a city must be in accord with that plan and a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail" The appellant then incorporates evidence and arguments made under prior assignments of error, acknowledging that while the substantive arguments are the same, the legal foundation is based on statutory requirements and not local land use code.

To the extent that the appellant makes legal argument with respect to interpretation of the cited decision in *Baker vs. City of Milwaukie*, and its application to this case, staff defers to the City Attorney's response which is forthcoming.

Appellant cannot respond to parts of the staff report that are yet to be made available.

Initially, staff re-emphasize that no specific use or development is or can be approved for the subject property by the proposed zone change in this instance; the particular impacts of a given use and the extent of development to accommodate that use on the site cannot be accurately or properly addressed at this stage.

See prior discussion on approval of uses and the "impossible task" argument.

Furthermore, the appellant has provided no compelling or substantial evidence in the record to demonstrate that certain uses are in fact more intense (and such evidence would seem impossible to provide without a specific development plan to evaluate).

Staff apparently misunderstands what *Baker* meant by the following statement:

"a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail."

In *Baker*, the issue was number of dwellings allowed – the zoning ordinance allowed more than the plan. But obviously, there can be a development with, for example ten dwellings, that is a *less* intensive use (in ordinary parlance) of a parcel than a development with nine much larger dwellings.

In *Baker*, "a more intensive use than that prescribed in the plan" means "a use that the plan doesn't allow" (i.e., "prescribes").

Appellant contends the comprehensive plan does not allow seven enumerated uses that are allowed under the C-2 zone. That's sufficient to fall within the scope of *Baker*.

Staff misunderstands *Baker* to impose some highly subjective “intensity” characteristic of particular uses, but that isn’t the case. Thus, the issue doesn’t hinge on the “intensity” of, for example, a correctional facility, but rather whether or not a correctional facility is consistent with the two applicable WNP policies and therefore allowed by the comprehensive plan on the subject parcel.

Staff also reminds the Planning Commission that the codified C-2 use list was found to be consistent with the comprehensive plan and has been adopted by City Council and stands as acknowledged regulation. On this point, the Hearings Official notes the following: "If a particular C-2 use is arguably contrary to [WNP] Policy 1 or Chambers Policy 1, that argument should have been made at the time the City Council amended to the C-2 use list. As an acknowledged zoning code provision, the C-2 use list complies with the Metro Plan, and I am without authority to decide otherwise." With respect to any “as-applied” challenge that might arise from this

Staff Report Page 6

appeal, that challenge will be addressed by legal counsel in context with relevant statutes and case law.

Staff again relies on a misunderstanding of the relationship between the comprehensive plan and the local zoning ordinance, as established in *Baker*. The code cannot trump the plan in this case, despite having been acknowledged. We cover this issue thoroughly in the Appeal Statement.

As to what the City Attorney’s Office may have to say on these issues, we can only repeat that appellant cannot respond to parts of the staff report that are yet to be made available.

RECOMMENDATION

Based on the available information, staff concludes that the Hearings Official's decision was not in error or otherwise inconsistent with the applicable approval criteria from EC 9.8865.

We respectfully disagree, for the reasons put forth in our testimony, Appeal Statement and herein.

As noted above, staff has provided very little of substance or legal merit in response to appellant’s Appeal Statement, and staff has entirely neglected to address a number of major issues.

As noted above, a supplemental memo from the City Attorney will also be provided to address legal arguments raised in the appeal.

Appellant cannot respond to parts of the staff report that are yet to be made available.

Staff's initial recommendation is to affirm the Hearing Official's decision, with the possibility depending on Planning Commission's deliberations, of modifying the decision to apply the /SR, Site Review overlay zone and provide additional or revised findings as necessary to address any remaining legal issues.

See the discussion under the "Planning Commission Decision" section, above.

In the event that the Planning Commission finds the Hearings Official erred in approving the request and chooses to reverse the decision, the Planning Commission is required to provide specific findings of fact as to why the decision was in error. The Planning Commission cannot reverse the decision without such findings.

CONCLUSION

We believe that staff's having not identified any significant error in the Appeal Statement further supports appellant's position that the approval of this zone change must be modified to add a condition limiting the uses identified above or the zone change must be denied.

Respectfully submitted this 25th day of August 2011.

FOR JEFFERSON WESTSIDE NEIGHBORS



Paul Conte
JWN Chair

Contact information

1461 W. 10th Ave., Eugene, OR 97402
Chair@jwneugene.org
541.344.2552