

# Jefferson Westside Neighbors

A City-Chartered Neighborhood Association

www.jwneugene.org

July 20, 2011

Hearings Official  
City of Eugene

RE: Looking Glass School Zone Change (Z 11-3)

As representative of the **Jefferson Westside Neighbors** (JWN) Executive Board, I've discussed the above named zone change application further with Mr. Craig Opperman, Looking Glass CEO, and with Mr. Larry Reed, applicant's representative. I understand that Looking Glass has withdrawn their support for a condition – to which both Mr. Opperman and Mr. Reed had previously agreed – that would exclude certain C-2 uses.

On behalf of the JWN, I'm submitting the following testimony which supersedes my written and oral testimony submitted at the July 13, 2011 public hearing.

The testimony demonstrates that this application must either be denied or approved with a condition excluding the following C-2 uses found in Eugene Code Table 9.2160 Commercial Zone Land Uses and Permit Requirements:

- Club and Lodge of State or National Organization
- Manufacturing (except as allowed under the C-1 zone)
- Correctional Facility, excluding Residential Treatment Center
- Drug Treatment Clinic – Non-residential
- Plasma Center
- Recreational Vehicles and Heavy Truck, Sales/Rental/Service
- Manufactured Dwelling Sales/Service/Repair

As explained below, without a condition that excludes certain uses allowed under the C-2 Community Commercial Zone, the zone change will not be consistent with all applicable, mandatory land use approval criteria; and therefore the application must be denied.

There are two areas in which approval of the zone change without adequate conditions would fail to meet approval criteria:

1. One or more allowed C-2 uses would conflict with Policy 1 under the “Land Use Element” section of the 1987 Westside Neighborhood Plan (WNP), which is the applicable refinement plan, in that these use(s) would allow erosion of the neighborhood's residential character.
2. One or more allowed C-2 uses would conflict with Policy 1 under the “Chambers Street Commercial Area” subsection of the WNP, in that these use(s) are not actual “general commercial uses,” as intended by this plan policy.

## **I. THE THRESHOLD REQUIREMENTS**

As demonstrated in the following sections, approval of this zone change requires that both the following thresholds be met:

1. Approval of this zone change must not allow one or more uses that could allow erosion of the neighborhood's residential character.
2. Approval of this zone change must not allow one or more uses that are not actual "general commercial uses," as intended by the respective WNP policy.

Approval of the zone change with the condition proposed by the JWN meets both thresholds.

Approval of the zone change without excluding any C-2 uses, as applicant requests, would fail to meet both thresholds.

## **II. BACKGROUND**

### **A. Prior application approvals did not establish legal precedents on the issues raised**

While prior zone changes to GO and C-2 have been approved in the "Chambers Street Commercial Area," to our knowledge the specific issues raised by the JWN regarding WNP policies have never been directly addressed by the Land Use Board of Appeals (LUBA) or the courts. Thus, prior local decisions have not established binding precedents on the issues raised herein, and the JWN contends some or all of these past approvals may have been based on errors that should not be repeated.

In particular, there is no legal weight arising from uses that the existing GO zoning allows. As explained under section III.F, the City cannot lawfully permit any use that conflicts with the comprehensive plan, regardless of what the zone may allow.

### **B. Staff report omits relevant information about the area surrounding the subject lot.**

On page 2 of their July 2011 "ZONE CHANGE STAFF REPORT," staff described the surrounding area incompletely.

As shown on the map on page 7 of applicant's Exhibit F-2 Affidavit of Mailing, the areas immediately to the north and northeast that are encompassed within 500 feet of the subject lot include numerous single-family, detached homes. These must be considered in addition to the apartments mentioned in the staff report when considering the implications of Policy 1 under the "Land Use Element" of the WNP.

In addition, a large, predominantly single-family, residential area constituting the WNP "Central Residential Area" extends to the north and east beyond the 500 foot arc shown on applicant's map.

In addition, the eastern edge of the "Chambers Street Commercial Area" directly abuts approximately fifteen residentially-designated and/or zoned lots for approximately 2,000 feet of common property line. These lots are divided about equally between single-family, detached homes and small apartment buildings.

Thus, the interpretation of Policy 1 under the "Land Use Element" of the WNP must consider the complete picture of the existing development pattern and not rely solely on the staff report.

### III. LEGAL FOUNDATIONS

#### A. Zone change approval requires consistency with Metro Plan and Westside Neighborhood Plan policies.

EC 9.8865 (1) requires a zone change to be consistent with applicable Metro Plan policies.

EC 9.8865 (2) requires a zone change to be consistent with applicable refinement plans, in this case with the WNP.

The JWN argument hinges on the Metro Plan Diagram designation of the lot as “Commercial” and on the following two WNP policies:

1. Policy 1 under the “Land Use Element” section (referred to below as “LUE-1”)   
*“Prevent erosion of the neighborhood’s residential character.”*   
(See WNP 3-1, and EC 9.9680(1)(a).)
2. Policy 1 under the “Chambers Street Commercial Area” section (referred to below as “CSCA-1”)   
*“This area shall be recognized as appropriate for neighborhood and general commercial uses.”*   
(See WNP 3-11.)

The approval of this zone change without adequate conditions would be inconsistent with the Metro Plan designation and the two cited policies and hence would fail to meet EC 9.8865 (1) and (2).

As explained in sections III.B and III.F, approval of the zone change without adequate conditions would also conflict with the overarching requirement in State land use law that the City cannot allow uses that conflict with the comprehensive plan, regardless of what uses a zoning district permits.

#### B. Westside Neighborhood Plan policies are part of the comprehensive plan

The City of Eugene’s comprehensive plan is made up of a number of documents. Two of those documents are the *Eugene-Springfield Metropolitan Area General Plan* (Metro Plan) and the *1987 Westside Neighborhood Plan* (WNP).<sup>1</sup>

The WNP is a site-specific refinement plan. Thus, the adoption of the WNP was a “Type II” amendment to the Metro Plan and Plan Diagram.<sup>2</sup> (See 2004 Metro Plan at IV-2.)

---

<sup>1</sup> LUBA made a comparable statement in reference to another one of Eugene’s refinement plans: “The City of Eugene’s comprehensive plan is made up of a number of documents. Two of those documents are the Metro Plan and the West University Refinement Plan.” *Home Builders Association of Lane County v. City of Eugene* LUBA Nos. 2008-148 and 2008-149, pg. 18-19.

<sup>2</sup> Footnote 1 on page 15 of the application stating “the Metro Plan diagram was not amended to incorporate the Westside Neighborhood Plan Chambers Street Commercial designation until the Spring of 2004” isn’t quite accurate. As explained above, the diagram was amended by adoption of the WNP. Staff, however, apparently neglected to update the printed version of the Metro Plan Diagram at that time. In 2004, Council adopted a direct amendment to the Metro Plan Diagram to ensure the diagram correctly reflected the designation.

The oversight in 1987 led to some confusion in the “Pioneer Youth Corps” zone change (Z 04-5) included with applicant’s supplemental exhibits. Nevertheless, in the report prepared for that application, staff stated: “The land use designation and text of the Westside Neighborhood Plan were intended as further refinement of the Metro Plan and provides [sic] the necessary support for the application of GO zoning.” (See the page 5 of the Z 04-5 staff report.) Thus, staff is on record as confirming the WNP policies are part of the comprehensive plan.

The respective roles of the WNP policies and land use diagram were explicitly stated in Eugene Ordinance 19444 adopting the WNP<sup>3</sup>:

*Section 1. Based on the above findings which are incorporated herein, the goals and policies set forth in the Westside Neighborhood Plan are hereby adopted as a refinement of the Eugene-Springfield Metropolitan Area General Plan for the area of the Westside Quality Project.*

\*\*\*

*Section 3. The land use diagram included in the Westside Neighborhood Plan is hereby adopted as a refinement of the Eugene-Springfield Metropolitan Area General Plan diagram and the explanatory text discussing each segment of the diagram is recognized as clarifying and providing further explanation of the intent of the Metro Plan diagram.*

Accordingly, WNP policies are effectively comprehensive plan policies and have the same force of law as other comprehensive plan policies that are set out in the actual text of the Metro Plan document.<sup>4</sup>

### **C. Westside Neighborhood Plan policies LUE-1 and CSCA-1 are mandatory approval criteria**

Applicant and staff agree that WNP Policy 1 under the “Chambers Street Commercial Area” section (i.e., policy CSCA-1) is a mandatory approval criterion.

In their July 2011 Report, staff stated “No other policies appear to be applicable to this proposal as mandatory approval criteria,” thus ignoring policy LUE-1. At the July 13, 2011 public hearing, staff backed away from this definitive claim and answered in response to the Hearing Official’s question: “Is this an approval criterion?”

*“That’s a good question. I’d leave that to your interpretation as to whether or not it’s a mandatory approval criterion. It is pretty strong language.”<sup>5</sup>*

The remainder of this section addresses the Hearings Official’s question more thoroughly.

EC 9.8865 (2) states a mandatory approval criterion:

*The proposed zone change is consistent with applicable adopted refinement plans. In the event of inconsistencies between these plans and the Metro Plan, the Metro Plan controls.*

The LUE-1 policy is an adopted refinement plan policy, and occurs in a set of five policies under the “POLICIES/IMPLEMENTATION STRATEGIES” section of the WNP’s third chapter, following a one-paragraph “INTRODUCTION” section.<sup>6</sup> (See WNP 3-1.)

---

<sup>3</sup> In contrast to the plan policies and diagram, the WNP “Implementation Strategies” were not adopted by City Council and have no force of law, as do the policies. From Ordinance 19444:

*Section 2. The implementation strategies set forth in the Westside Neighborhood Plan are hereby recognized as potential means of reaching or implementing adopted policies but they are not adopted by the City Council.*

<sup>4</sup> In cases where there’s a conflict between the text of a refinement plan and text within the Metro Plan document, the text within the Metro Plan document prevails, unless the refinement plan is explicitly adopted as an amendment that supersedes the text in the Metro Plan document. In this case, no such conflicts arise.

<sup>5</sup> City planner, Gabe Flock, at approximately 33:18 in the City’s audio recording of the hearing.

<sup>6</sup> The LUE-1 policy was also adopted into Eugene Code at EC 9.9680(1)(a).

We also note that the five policies in this section address both residential and commercial topics.

The introduction states:

*This element \*\*\* contains policies and implementation strategies addressing the entire neighborhood, and a land use diagram that includes policies directed towards specific subareas \*\*\*.*

The “POLICIES/IMPLEMENTATION STRATEGIES” section is followed by the “LAND USE DIAGRAM” section (WNP 3-3), which contains a subsection that presents the discussion and policies related exclusively to the “Chambers Street Commercial Area.”

Thus, the LUE-1 policy is unambiguously applicable to the “entire neighborhood.”

The referenced policy states:

*Prevent erosion of the neighborhood's residential character.*

In interpreting the law, the City must take care “not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010.

Whereas the introductory text cited above makes clear the scope of the policy is the entire neighborhood, there is no language in the policy, or elsewhere in the WNP, that limits the scope of this policy to particular geographic areas, uses, development types or land use actions.<sup>7</sup> Thus, the policy applies to the proposed zone change on the subject lot.

This policy is prescriptive. There are no qualifiers, such as “strive to” or “encourage.” The City must “prevent” erosion of the neighborhood’s residential character. In fact, this policy is particularly and unambiguously strong in that it does not use such language as “minimize”, “mitigate”, or other more subjective terms. “Prevent” means “to keep from happening.” (*Merriam-Webster* on-line dictionary.)

Thus, the City is required to keep erosion of the neighborhood’s residential character from happening, including by denying a zone change application that could allow such erosion.<sup>8</sup>

“Erosion” is “diminishment or destruction by degrees.” (*Id.*) And so the policy can be rephrased:

*Prevent diminishment or destruction of the neighborhood's residential character by degrees.*

This is a higher standard than just preventing the ultimate destruction of the neighborhood’s residential character. The policy requires the City to keep any degree of diminishment or

---

<sup>7</sup> During the July 13, 2011 public hearing, staff advised the Hearings Official to look to the “Implementation Strategies” listed under this policy; but “Where statutes are clear in their terms, there is no need to, rather it is improper to, proceed with the application of rules of statutory construction.” *State v. Hiller*, 22 Or App 57, 537 P2d 571 (1975); *Schoning and Schoning*, 106 Or App 399, 807 P2d 820 (1991). We noted earlier that the Implementation Strategies were explicitly not adopted by City Council.

If staff is intending to imply “ambiguity” in the meaning of the policy, thinking that might establish an occasion for the deference required in ORS 197.829, we point out that “ambiguity” is a term of art when it is applied to the interpretation of statutes and ordinances; it refers to the existence of more than one reasonable construction of the language that was actually enacted or adopted. See, e.g., *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or.App. 425, 431, 60 P.3d 557 (2002) (“[W]e are constrained by the wording actually enacted and may not insert wording that the legislature has omitted.”). In this case, staff has identified no language in the policy that, when reasonably construed, supports an interpretation that this policy is not a mandatory approval criterion.

Also: “We believe that an essential prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document that is adopted by the governing body and contains an express or implicit interpretation of the local provision at issue that is adequate for review.” *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003). In this instance, the City has thus far produced nothing “adequate for review” on this issue.

<sup>8</sup> We note applicant and staff included Policy 2 under the Chambers Street Commercial Area subsection as a mandatory approval criterion, even though that policy merely urges that “expansion of commercial uses outside of this area be discouraged.” By comparison, Policy 1 under the Land Use Element uses much stronger language.

destruction from happening, lest a series of successive actions, each allowing some degree of diminishment or destruction, cumulatively result in significant diminishment or destruction “by degrees.”

The final element in the policy identifies what must be kept from any diminishment – the neighborhood’s “residential character,” which is explicitly defined in EC 9.0500:

*A combination of qualities and features that gives identity to a particular area where the predominant use is housing and that distinguishes the area from other areas.*

The definition includes “qualities,” as well as “features.” Qualities include such elements as sense of safety, quietude, visual appeal, “walkability,” cleanliness, air quality, and so forth. While the WNP policy doesn’t enumerate the specific qualities that must be kept from suffering any degree of diminishment, the policy requires the City to identify those qualities relevant to the WNP residential areas and determine whether or not a particular action, such as approval of a zone change, would diminish any of those qualities to any degree.

It can be seen from the definition that the qualities and features that are to be protected by this policy are those of an “area where the predominant use is housing.” In other words, the scope of what the policy *protects* is limited to residential areas. However, this does not in any way narrow the scope of what the policy *restricts*. As explained above, the policy’s restriction clearly applies to the entire neighborhood, including the subject lot.

Although the policy is already quite clear and economical in its original language, an expanded version of what this policy requires can be stated as:

*Prevent any degree of diminishment or destruction of any of the qualities that give identity to the WNP’s residential areas.*

Although this is a high standard, it nevertheless is clear, and the zone change cannot be approved unless there is an assessment and sufficient evidence to meet the burden of proof that approval of the zone change would satisfy this criterion.

Having established that both WNP policies LUE-1 and CSCA-1 are mandatory approval criteria, we next expand upon the manner in which these two criteria restrict proposed zone changes to the subject lot.

#### **D. Westside Neighborhood Plan policy LUE-1 restricts uses based on the potential impacts of the uses**

Policy 1 under the “Land Use Element” section adds an additional restriction on development in the entire area encompassed by the WNP, including the subject property. This restriction is that development must not be allowed to cause erosion of the neighborhood’s residential character. Applying this restriction to the proposed zone change is considered more fully in section IV, below.

#### **E. The Metro Plan Diagram’s designation and Westside Neighborhood Plan policy CSCA-1 restrict uses based on the nature of the uses and the activities these uses comprise.**

The Metro Plan Diagram designates this area as “Commercial,” which includes only two categories – “Major Retail Centers” and “Community Commercial Centers.” (See Metro Plan at II-G-4.)

Policy 1 under the “Chambers Street Commercial Area” section refines this designation in three ways:

1. By specifically expanding the designation to include “neighborhood \*\*\* commercial uses”
2. By applying the specific term “general commercial uses” to clarify the permitted uses within the Metro Plan designation’s “Community Commercial Centers” category.
3. By omitting the “Major Retail Centers” category.<sup>9</sup>

“Commercial uses” comprise “commercial activities,” and a very broad definition of “commercial activity” is:

*The exchange of goods or services for money or in kind, and activities conducted for the purpose of facilitating such exchanges.”<sup>10</sup>*

“Neighborhood commercial uses” identified in the CSCA-1 policy are described in the Metro Plan under “Neighborhood Commercial Facilities” (*Id.*):

*Oriented to the day-to-day needs of the neighborhood served, these facilities are usually centered on a supermarket as the principal tenant. They are also characterized by convenience goods outlets (small grocery, variety, and hardware stores); personal services (medical and dental offices, barber shops); laundromats; dry cleaners (not plants); and taverns and small restaurants. The determination of the appropriateness of specific sites and uses or additional standards is left to the local jurisdiction.*

There is minimal question, and the JWN does not contest, that the C-1 Neighborhood Commercial Zone corresponds to, and implements the Metro Plan “Neighborhood Commercial Facilities” category of uses. Furthermore, we do not contest that all uses listed in the “C-1” column of Table 9.2160 are reasonably considered to normally comprise actual “commercial activity.”<sup>11</sup>

---

<sup>9</sup> In any case, the “Major Retail Centers” description could not apply in the small area of the “Chambers Street Commercial Area.”

<sup>10</sup> See “commerce” and “commercial” in BusinessDictionary.com. See also “Commercial Activity [Endangered Species]” under definitions.uslegal.com. Also, from Webster-Dictionary.org (legal):

**COMMERCE**, trade, contracts. The exchange of commodities for commodities; considered in a legal point of view, it consists in the various agreements which have for their object to facilitate the exchange of the products of the earth or industry of man, with an intent to realize a profit. Pard. Dr. Coin. n. 1. In a narrower sense, commerce signifies any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration; if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter.

Note also: “words of common usage typically should be given their plain, natural, and ordinary meaning.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 818 P2d 1270 (1991)

<sup>11</sup> There may be some question whether such C-1 uses as Pump Station or Telecommunication Tower are “commercial uses”; however, we do not contest that these uses may reasonably fall within the scope of “activities conducted for the purpose of facilitating such exchanges.” It would be an untenable stretch, however, to consider (e.g.) correctional facilities similarly.

“General commercial uses” identified in the CSCA-1 policy are described in the Metro Plan within the description of “Community Commercial Centers” (*Id.*):<sup>12</sup>

*This category includes more commercial activities than neighborhood commercial but less than major retail centers. Such areas usually develop around a small department store and supermarket. The development occupies at least five acres and normally not more than 40 acres. This category contains such general activities as retail stores; personal services; financial, insurance, and real estate offices; private recreational facilities, such as movie theaters; and tourist-related facilities, such as motels. When this category is shown next to medium- or high-density residential, the two can be integrated into a single overall complex, local regulations permitting.*

*Existing strip commercial is in the Community Commercial Centers plan designation when it is of sufficient size to be of more than local significance. Development and location standards for (additional) strip commercial, as well as neighborhood commercial uses, are discussed below.*

The WNP policy reference to “general commercial uses” is almost identical to the language found in the above description where example uses are enumerated:

*This category contains such general [commercial] activities as retail stores; personal services; financial, insurance, and real estate offices; private recreational facilities, such as movie theaters; and tourist-related facilities, such as motels.*

Thus, although the text of the CSCA-1 policy – which as explained in section III.B, is a comprehensive plan policy – doesn’t provide examples to aid in its interpretation, the policy uses the term “general commercial uses” for which another document in the comprehensive plan, i.e., the Metro Plan, *does* provide such examples.

The Metro Plan description also provides another clear distinction of the “Community Commercial Centers”:

*This category includes more commercial activities than neighborhood commercial but less [sic] than major retail centers.*

Accordingly, the City must first look within the comprehensive plan to interpret which uses are allowed by the CSCA-1 policy, rather than simply assuming (as applicant and staff have) that the uses allowed by C-2 were what the policy was intended to allow.<sup>13</sup>

As explained in section III.F, below, a zone cannot lawfully allow uses which the comprehensive plan prohibits.

Thus, the C-2 Community Commercial Zone, despite its name, does not define the uses allowed by the Metro Plan designation or the WNP policy CSCA-1.

In fact, there is a problem with the C-2 zone in that it allows uses that conflict with the CSCA-1 policy.

Specifically the following two uses allowed by C-2 are not commercial activities at all, much

---

<sup>12</sup> Note that while the Metro Plan description of “Community Commercial Centers” does not include explicit language, as found under “Neighborhood Commercial Facilities,” that provides the local jurisdiction discretion to determine appropriate uses, a limited degree of discretion can be assumed for both categories – but only within reasonable bounds of the a category’s purpose and description. For example, a local jurisdiction would not have the latitude to allow “pulp mill” as a use under a zone implementing the “Neighborhood Commercial Facilities” category.

<sup>13</sup> “at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes.” *PGE v. Bureau of Labor and Industries*, 317 Or 611

less of the same nature as the general commercial activities enumerated in the Metro Plan:

- Club and Lodge of State or National Organization
- Correctional Facility, excluding Residential Treatment Center

Under EC 9.0500, Eugene Code defines a correctional facility as follows:

*A facility designed for the short and/or long term confinement of persons held in lawful custody, involving the treatment of offenders through penal, parole and probation programs. Correctional facilities are staffed 24 hours a day and may include related uses such as legal and medical access, (courtrooms or clinics), counseling and rehabilitative services, recreation activities, and administrative offices.*

Quite clearly, the operators of a correctional facility are not engaged in commercial activity (at least not lawfully).

And, although members of a club or lodge of a state or national organization participate voluntarily, they're not engaged in commercial activity any more than the inmates of a correctional facility.

Even if these two uses could somehow be construed as comprising "commercial activity," in neither case do the activities conceivably belong in the same category as "retail stores; personal services; financial, insurance, and real estate offices; private recreational facilities, such as movie theaters; and tourist-related facilities, such as motels" which are the examples used to clarify "general" commercial activities in the Metro Plan.<sup>14</sup>

Consequently, allowing either of these uses in the Chambers Street Commercial Area would conflict with Policy 1 under the "Chambers Street Commercial Area" section of the WNP, thereby failing to meet the approval criteria at EC 9.8865 (1) and (2).

Accordingly, both these uses must be excluded as a condition of approval of this zone change, or the zone change must be denied.

We note briefly, that neither applicant nor staff provided any evidence or analysis supporting a finding that these two C-2 uses are actual "general commercial uses." As discussed under section IV, failing to conduct such an evaluation is sufficient reason to deny the application. Nevertheless, we've gone the extra mile in this section to provide substantial evidence supporting a contrary finding.

As further evidence that Eugene's zoning code cannot be considered the definitive interpretation of comprehensive plan "commercial" categories, we point out another inconsistency in the code. The Metro Plan states that the "Community Commercial Centers" category contains "less" commercial activities than the "Major Retail Centers" category. In other words, the former category allows less intensive commercial activity and/or allows fewer uses.

However, in Table EC 9.2160, the C-2 zone – which staff claims enumerates allowable uses under the "Community Commercial Centers" category – contains thirteen uses that are not allowed under the C-3 Major Commercial Zone – which, applying staff's reasoning, presumably enumerates allowable uses under the "Major Retail Centers" category. *There isn't a single use allowed under C-3 that isn't also allowed under C-2.* Obviously, the C-2 zone allows more uses

---

<sup>14</sup> For completeness, we note that neither use is allowed under the C-1 zone and therefore neither is allowed as "neighborhood commercial uses," either.

and more intense commercial activity than the C-3 zone – exactly the opposite of the relationship the Metro Plan defines for the Community Commercial Centers” and “Major Retail Centers” categories.

What this demonstrates is that the C-2 zone comprises a much broader category of uses than encompassed by the “Community Commercial Centers” category, and applicant’s and staff’s assumption otherwise is both flawed in the particular uses raised in this testimony, as well as in general regarding commercial zones’ correspondence to the comprehensive plan’s commercial designations.

Relevant to this application, the following three uses are allowed under C-2, but not C-3, which at least raises questions about whether any of them comprise “general” commercial activities allowed by policy CSCA-1:

- Plasma Center
- Recreational Vehicles and Heavy Truck, Sales/Rental/Service
- Manufactured Dwelling Sales/Service/Repair

In light of this fact, applicant has the burden to provide evidence and an analysis convincingly demonstrating these uses actually fit in the Metro Plan’s “Community Commercial Centers” category. Thus far, these questions have not been addressed at all, nor has the apparent inconsistency in the uses allowed by the C-2 and C-3 zones, which strikes at the very foundation of applicant’s and staff’s justifications.

#### **F. Code provisions less restrictive than the comprehensive plan must fail**

As stated earlier, applicant and staff completely ignored policy LUE-1.

However, in applying policy CSCA-1 to this application, applicant and staff appear to rely almost entirely on a simple, but incorrect, argument that the City adopted the C-2 zone to implement the Metro Plan “Community Commercial Centers” category, and as a consequence any use the City chooses to add under C-2 is automatically allowable for the subject lot.<sup>15</sup>

This theory would mean a jurisdiction could adopt local zoning code districts that permitted uses that are not permitted by the comprehensive plan.

The Oregon Supreme Court in *Baker v. City of Milwaukie* (21 OR 500 (1975)) concluded differently:

*In summary, we conclude that a comprehensive plan is the controlling land use planning instrument for a city. Upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. We further hold that the 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. [Emphasis added.]*

Since WNP policies are comprehensive plan policies, the *Baker* decision requires that approval of this zone change to C-2 must be in accord with the WNP policies referenced above (LUE-1 and CSCA-1) and that no use can be allowed by the zone change, where that use is not permitted by the LUE-1 and CSCA-1 policies, regardless of what uses the C-2 zone allows.

In other words, the City cannot approve a rezoning to C-2, if any use allowed by that approval is

---

<sup>15</sup> At pages 13-14 of the application, applicant argues circularly that Looking Glass wants to have a school as an allowed use on the subject lot and therefore C-2 is “the zone most appropriate to implement the Metro Plan Commercial land use designation. Apparently it didn’t occur to the applicant that perhaps the Metro Plan and WNP land use designation didn’t intend to allow schools. In any case, there is nothing in the applicant’s comments that address conflicts between C-2 uses *other than schools* and the Metro Plan designation and WNP policies.

“more intensive” than allowed by the two WNP policies.

The *Portland Comprehensive Plan Goals and Policies document* (See Intro-4 in Attachment A.) explains this well:

*The Plan Map is not the same as the Zoning Map, in either a legal sense or in its effect. The Plan Map is an official description of where and to what level future zoning should be permitted. It shows a pattern for future development which will accomplish the purposes of the Goals and Policies. In a landmark decision, the Oregon Supreme Court, in Baker vs. the City of Milwaukie, established that zoning must comply with the limits set by a comprehensive plan. Thus, the land use designations of a comprehensive plan are "superior" to a zoning map. In other words, the Zoning Map cannot allow land uses which are more intensive than those allowed by the Comprehensive Plan Map. [Emphasis added.]*

As a consequence of *Baker*, neither the applicant nor the City can rely on an argument that solely because the City asserts the C-2 Community Commercial Zone is the closest corresponding zone to “general commercial uses” – all C-2 uses are automatically allowed.

Instead, approval requires sufficient evidence to establish that all C-2 uses that would be allowed by approving the zone change are both actual “general commercial uses” (as required by the CSCA-1 policy) and would not allow erosion of the neighborhood’s residential character (as required by the LUE-1 policy).

The JWN believes the proposed condition would be sufficient to ensure consistency with the two WNP policies.<sup>16</sup>

In contrast to the JWN’s position, staff appears to assert the Hearings Official cannot approve a zone change with a condition that limits future uses to other than those established for the requested zone.<sup>17</sup> The Type III Application Procedures beginning at EC 9.7300 do not, however, state any such limitation on the Hearings Official’s authority:

***9.7330 Decision.** Unless the applicant agrees to a longer time period, within 15 days following the close of the record, the hearings official or historic review board shall approve, approve with conditions, or deny a Type III application. The decision shall be based upon and be accompanied by findings that explain the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based upon the criteria, standards and facts set forth. [Emphasis added.]*

Staff did not cite any legal basis or theory for why the Hearings Official cannot impose this type of condition.<sup>18</sup>

---

<sup>16</sup> 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.

<sup>17</sup> In their testimony to date, applicant has not addressed this point.

<sup>18</sup> Obviously, the Hearings Official can impose a condition only when such a condition is necessary to satisfy the mandatory approval criteria, which is the case in this instance. To accept staff’s broad theory prohibiting conditions that exclude certain use, however, and still comply with the decision in *Baker*, the City would potentially have to adopt into code a plethora of “one-off” zones to avoid conflicts with site-specific comprehensive plan policies (including refinement plan policies) – an onerous and unnecessary burden.

The only rationale staff has offered for this conclusion consisted of the following two comments at the July 13, 2011 public hearing:<sup>19</sup>

*“To my knowledge it’s not regular practice to customize the use list. I’m not clear on the [sic], in this case, where the policy authority or the code criteria authority, for that matter TPR, would enable that.”*

*“We believe it’s outside the authority in this case.”*

Neither statement provides anything other than relating staff’s prior experience and current assumption.<sup>20</sup>

In response to staff’s uncertainty regarding the authority to impose a condition excluding some C-2 uses, we point to EC 9.7330, EC 9.8865 (1) and (2), 9.9680(1)(a), the Metro Plan commercial designation, and WNP policies LUE-1 and CSCA-1 as providing an adequate basis to impose a condition limiting uses.

If the Hearings Official were to accept staff’s contention that no condition limiting uses can be imposed, then the Hearings Official would be left with no alternative but to determine whether there’s sufficient evidence in the record to justify a finding that all uses allowed by C-2 are both actual “general commercial” uses and that none of the uses would allow erosion of the neighborhood’s residential character. Under this scenario, if there were not adequate evidence to this effect, the application would have to be denied. We assert, however, that the Hearings Official has the latitude, and the obligation, to impose an appropriate condition on uses when such a condition is necessitated by the comprehensive plan and Eugene Code approval criteria.

### **G. Could the determination be deferred?**

It may seem that a determination regarding a particular use could be deferred until such use is proposed, for example, on a building permit application. However, Eugene’s building permit process does not ordinarily check back to refinement plans to ensure uses are consistent with policies. Instead, the building permit approval process assumes that whatever zone and conditions were approved as part of a land use process determine what uses are allowed.

This doesn’t mean that a vigilant interested party would be precluded from appealing a building permit approval to the Land Use Board of Appeals (LUBA).<sup>21</sup> However, relying on this approach creates an unacceptable degree of uncertainty for the property owner as to future use, as well as an onerous burden on third parties who may be affected by the use of the property.<sup>22</sup>

---

<sup>19</sup> City planner, Gabe Flock, at approximately 30:02 and 37:06 in the City’s audio recording of the hearing.

<sup>20</sup> Staff appeared to be narrowly focused on whether uses could be excluded as part of a “land use and trip” cap. As mentioned earlier, the Hearings Official is free to choose whatever form of condition is most appropriate to the requirement.

<sup>21</sup> LUBA has ruled that building permit approval processes that require “policy or legal judgment” are “land use decisions.” See ORS 197.015(10)(a) and (b). See LUBA Nos. 91-035 and 91-036.

<sup>22</sup> City staff appear to be unaware of another implication of their position. Given that there are two comprehensive plan policies that relate to uses on the subject property, the approval process for future building permit (and perhaps other) applications that affect a lot’s use are “land use decisions” that require notice and a hearing and can be appealed to LUBA. Thus, unless a determination is made at the time the zone change is approved as to which C-2 uses are consistent with WNP policies (i.e., LUE-1 and CSCA-1), the City will have to follow the required process for a land use decision in every future case where the use of the site would be affected.

All of this can be avoided by addressing the issue as part of this decision. As the JWN has recommended, the appropriate resolution is to approve the zone change with the proposed condition.

#### IV. APPLYING WESTSIDE NEIGHBORHOOD PLAN “LAND USE ELEMENT” POLICY 1

The prior sections established the legal foundation for the threshold requirements in this approval decision.

Section III.E demonstrated that at least two (and possibly as many as five) allowed under the C-2 zone are not consistent with Policy 1 under the “Chambers Street Commercial Area” section.

This section demonstrates that a condition that excludes certain C-2 uses is necessary to satisfy “Land Use Element” Policy 1. The relevant threshold requirement in this regard is:

*Approval of this zone change must not allow one or more uses that could allow erosion of the neighborhood’s residential character.*

The JWN does not contest that all C-1 uses and most C-2 uses meet the threshold test.<sup>23</sup>

The following C-2 uses; however, would allow erosion of the neighborhood character and must be excluded on that basis:<sup>24</sup>

1. Manufacturing (except as allowed under the C-1 zone)
2. Recreational Vehicles and Heavy Truck, Sales/Rental/Service
3. Manufactured Dwelling Sales/Service/Repair
4. Correctional Facility, excluding Residential Treatment Center
5. Drug Treatment Clinic – Non-residential
6. Plasma Center

Before explaining how approval of the above C-2 uses would not meet the threshold, we reemphasize that the burden of proof rests on the *applicant*, not the JWN.

By approving the zone change with a condition excluding the above uses, the applicant would be relieved of the responsibility to meet that burden for these uses.

As applicant now contends that no C-2 uses need to be excluded, the applicant retains the burden of proof to demonstrate that the zone should be approved without excluding any C-2 uses.

Applicant, however, completely ignored policy LUE-1 and made no attempt to evaluate the threshold requirement. Neither applicant nor staff has presented any evidence nor conducted any analysis to support a conclusion that the threshold would be met by approving the zone change while allowing all C-2 uses.

The absence of any supporting evidence or analysis is sufficient to require the Hearings Official to deny the application because applicant has not done anything to meet their burden of proof.

Given the lack of any evidence or argument in the record to support applicant’s position, staff has relied on *petitio principia*, whereby the assertion is used to provide the proof. However, this flawed logical argument would not withstand higher review – “there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered.” *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002).”<sup>25</sup>

<sup>23</sup> However, should the Hearings Official find that some of the C-1 and C-2 uses not included in the proposed condition do not meet the threshold test, then we respectfully request the Hearings Official to add such uses to the condition’s exclusion list, and still approve the application.

<sup>24</sup> Note that none of the uses in this list are allowed in C-1.

<sup>25</sup> While this decision addressed findings for a *legislative* action, the standard applies to quasi-judicial actions equally, if not more strongly.

As best we can determine, staff's rationale appears to rely wholly on the argument that the subarea policy (CSCA-1) allowing "general commercial uses" a) allows all uses under C-2 Community Commercial Zone; and b) the CSCA-1 subarea policy supersedes any constraints that would arise from the overarching LUE-1 policy to prevent erosion of the neighborhood's residential character. Therefore, all C-2 uses are allowed, regardless of whether they may allow erosion of the neighborhood's residential character.

In section III.E, we demonstrated that at least two (and possibly as many as five) C-2 uses were not allowed under the CSCA-1 policy, and those two (or more) uses thus excluded because of CSCA-1 would not require further examination under LUE-1. However, we still consider them below.

The second apparent premise is neither warranted by the WNP language, nor the plan's organization, in which the "POLICIES/IMPLEMENTATION STRATEGIES" section covers the entire WNP area and individual subsections of the "LAND USE DIAGRAM" section that follows deal with specific subareas, adding further policies, not subtracting from the broader policies. (See section III.C, above.)

The premise that policy CSCA-1 would "override" policy LUE-1 is also absurd on its face: Why would the WNP authors and City Council approve a pair of policies that said – according to such an interpretation – "Prevent erosion of the neighborhood's residential character; except it is permissible for any 'neighborhood or general commercial use' in the Chambers Street Commercial Area to cause such erosion"?

As a member of the Planning Team that wrote the WNP, I can state unequivocally that we never entertained such a nonsensical intent for these policies.

The simple and direct way to treat these two policies is that any constraints they impose are *additive* – the policies together allow only those "neighborhood and general commercial uses" in the Chambers Street Commercial Area that would not allow erosion of the neighborhood's residential character.

In summary, the LUE-1 policy is very clear and direct, and the threshold to approve this zone change without excluding any C-2 uses is that there's sufficient evidence to conclude that none of the uses allowed in C-2 could allow erosion of the neighborhood's residential character.

Meeting such a threshold requires adequate analysis of the C-1 and C-2 uses, at least those that on the face of it may allow erosion of the neighborhood's residential character. Neither applicant nor staff presented any analysis, however.

We turn now to consider several uses we believe would allow erosion of the neighborhood's residential character, although it is not the JWN's burden to prove that would be the case.

Reiterating, WNP "Land Use Element" Policy 1 (i.e., LUE-1) states:

*Prevent erosion of the neighborhood's residential character.*

Reiterating, Eugene Code defines "residential character" at EC 9.0500 as:

*A combination of qualities and features that gives identity to a particular area where the predominant use is housing and that distinguishes the area from other areas.*

As explained under section III.C, the LUE-1 policy can be restated as follows:

*Prevent any degree of diminishment or destruction of any of the qualities that give identity to the WNP's residential areas.*

As a reference point, with one exception, none of the six uses enumerated above are allowed in the S-JW Jefferson Westside Special Area Zone or the R-2 Medium-Density Residential Zone. The S-JW zone covers most of the area to the north and east, including residential lots that directly abut lots in the Chambers Street Commercial Area north of W. 11th Ave. The R-2 zone covers several houses and numerous apartments across W. 12th Ave. and immediately to the east of the subject parcel.

The exception case is that Correctional Facilities are conditionally allowed in the R-2 zone (but not in the S-JW zone.)

Both the S-JW and R-2 zones allow many commercial uses, and so without deeper examination, a reasonable initial presumption is that those commercial uses not allowed in the R-2 and S-JW zone are prohibited because they're inherently not compatible with those zoning districts.<sup>26</sup> If this wasn't the intent of City Council, then applicant needs to provide a superior explanation, which they have not done.

More specifically, the first three C-2 uses in the above list could diminish to at least some degree the following qualities of the surrounding WNP residential areas:

- Loud noise from equipment operations and trucks and tow vehicles could degrade ambient sound levels in the yards and interiors of nearby residences, which generally benefit from the characteristic low sound level arising from commercial activities and other residences in this area.
- Movement of large vehicles and manufactured homes onto W. 12th Ave., as will be required by access management restrictions,<sup>27</sup> could reduce the safety and attractiveness to pedestrians and bicyclists of the street and sidewalks, thus diminishing the "walkability" and bikeability" for which this neighborhood is noted.
- The potential light from high-intensity lights used to illuminate exterior operations could degrade the ambient light levels in the yards and interiors of nearby residences, which generally benefit from the characteristic low light levels arising from commercial activities and other residences in this area.

The last three C-2 uses in the above list could diminish to at least some degree the following qualities of the surrounding WNP residential areas:

- Behavior of jail visitors, drug clinic clients, plasma donors and their associates passing through or idling in the alleys and sidewalks could degrade safety of residents and residents' peaceful enjoyment of the neighborhood.
- The potential light from high-intensity lights used to illuminate exterior areas around buildings in order to provide enhanced security around a jail or drug clinic could degrade the ambient light levels in the yards and interiors of nearby residences, which generally benefit from the characteristic low light levels arising from commercial activities and

---

<sup>26</sup> "Where legislature or administrative agency uses particular term in one provision, but omits term from related provision, term is considered not to apply to related provision." Perlenfein and Perlenfein, 316 Or 16, 848 P2d 604 (1993) In other words, City Council had some intention in leaving only certain commercial uses out of the cited residential zones. The unsuitability of the excluded uses when proximal to residences is the most obvious reason.

<sup>27</sup> Due to "the likely closure of the access from Chambers Street" identified on page 5 of the staff report.

other residences in this area.

If allowed, all the above uses on the subject site could diminish to some degree the appeal of residing near the subject lot, thus reducing property value and owners' equity, as well as making these residences less attractive to home buyers and renters.

Particularly along the edges where a close-in residential area abuts a commercial area, it's critical to prevent the erosion of the residential character by allowing commercial uses which are considered undesirable by prospective owners or renters. In areas where adjacent non-residential uses degrade the quality of life in a residential area, it is common for the maintenance of housing to decline significantly. The JWN has for many years had to struggle to prevent such "erosion from the edges."

Before allowing uses such as a heavy truck servicing operation or a correctional facility on this site, applicant must meet a high standard of proof that such operations would not erode the qualities of the surrounding neighborhood to any significant degree. In this instance, the required proof is totally lacking in the application and staff report.

Consequently, allowing any of the above listed uses on the subject lot would conflict with Policy 1 under the "Land Use Elements" section of the WNP, thereby failing to meet the approval criteria at EC 9.8865 (1) and (2).

Accordingly, all these uses must be excluded as a condition of approval of this zone change, or the zone change must be denied.

## **V. SUMMARY**

For the aforementioned reasons, this application must either be denied or approved with a condition excluding the following C-2 uses found in Eugene Code Table 9.2160 Commercial Zone Land Uses and Permit Requirements:

- Club and Lodge of State or National Organization
- Manufacturing (except as allowed under the C-1 zone)
- Correctional Facility, excluding Residential Treatment Center
- Drug Treatment Clinic – Non-residential
- Plasma Center
- Recreational Vehicles and Heavy Truck, Sales/Rental/Service
- Manufactured Dwelling Sales/Service/Repair

Submitted on July 20, 2011 by:

---

Paul Conte, Chair  
On behalf of **Jefferson Westside Neighbors**  
1461 W. 10th Ave.  
Chair@jwneugene.org  
541.344.2552

### **2011-2012 Executive Board**

Paul Conte, Chair; Stephen Heider, Vice Chair

Kirsten Kelso, Treasurer; Emma Stocker, Secretary; Sue Cummings; Tiffany Petry; Angie Towle

*2010 Eugene Neighborhood of the Year* ♦ *2011 National Neighborhood of the Year Finalist*