

**DECISION OF THE HEARINGS OFFICIAL
FOR THE CITY OF EUGENE, OREGON**

ZONE CHANGE REQUEST

Application File Name: Meininger, Susannah (Z 06-22)

Subject Property/Location: Tax Lot 17000 of Assessor's Map 17-03-31-31. Located at 1418 and 1418 A Lawrence Street.

Applicant's Request: Zone change approval from R-1, Low Density Residential to R-2/SR Medium Density Residential with a Site Review overlay.

Relevant Dates: Application submitted on October 31, 2006; application deemed complete on April 27, 2007; public hearing held June 13, 2007; record closed June 27, 2007; hearings official decision issued July 12, 2007.

Property Owner/Applicant/ Representative: Susannah Meininger

Applicant's Representative(s): Karl Mueller, Metro Planning

Lead City Staff: Shawna Adams, Associate Planner, Eugene Planning Division

Site Characteristics and Background

The subject site includes approximately 9,148 square feet on the west side of Lawrence Street, between 14th and 15th Avenues. The site is developed with a primary dwelling and a secondary dwelling. The applicant has requested this zone change to allow her to develop the property at R-2 densities.

Application Referrals and Public Hearing Notice

Upon deeming this zone change application complete April 27, 2007, the Eugene Planning Division provided information concerning the application to other appropriate City departments, public agencies, service providers, and the affected neighborhood group, the Jefferson Westside Neighbors. Relevant referral comments are addressed in the findings.

The Eugene Planning Division also mailed and posted written notice of the public hearing on May 14, 2007 in accordance with the applicable code requirements at EC 9.7315. Numerous neighbors submitted written testimony opposing the application, arguing that development at R-2 densities is inconsistent with the single-family residential character of the neighborhood. At the hearing, the applicant testified and submitted written evidence on her own behalf. Karl Mueller also testified and presented evidence in support of the application, as did David Hinkley. Written testimony was submitted by Rene Kane and Paul Conte on behalf of the Jefferson Westside Neighbors (JWN); Rene Kane testified in opposition to application. In addition, Mary Wall, 1446 Lawrence Street, and Mark Baker, West University Neighbors, testified in opposition to the application.¹

¹ Because the opponents' raise many of the same issues, the hearings official does not attribute specific arguments to particular opponents. Rather, arguments by opponents are generally referred to as "opponents'" arguments.

Applicable Decisional Criteria, Findings of Fact and Conclusions of Law

A. Preliminary Matters:

1. Timely Submittals Into the Record

David Hinkley submitted written testimony via email at 5:09 p.m. on June 20, 2007, nine minutes after the close of business on the last day for submitting written testimony. Mr. Hinkley had sent the email to an incorrect email address at 4:52 p.m., realized his error, and resubmitted the message at 5:09 p.m. Parties wishing to submit testimony into the record must ensure that the evidence is filed in a timely manner. Because the city did not receive the email prior to the close of business on June 20, 2007, it was not timely filed and the hearings official does not consider the evidence and argument it may contain.

2. Applicable Approval Standards

The applicant submitted a zone change application on May 12, 2006. On June 6, 2006, city staff sent the applicant an incomplete notice, identifying information that needed to be submitted before the city could deem the application complete for the purposes of ORS 197.178.² The applicant failed to submit supplemental evidence with respect to the application, and on October 31, 2006, the applicant withdrew her application. On that same day, the applicant submitted a second zone change application for the property. The second application was, in opponents' words, "virtually identical" to the first application. On November 29, 2006, city staff sent the applicant an incomplete notice with respect to the present application, identifying the same deficiencies in the application. The applicant submitted evidence in response to the November 29, 2006 incomplete notice on April 24, 2007, and the city deemed the application complete on April 27, 2007.

Opponents argue that the applicant withdrew her May 12, 2006 application in order to take advantage of the "fixing of the goalposts" under ORS 197.178(3), because the applicant knew that the city was undertaking amendments to the Metro Plan and the Jefferson-Westside Neighborhood Refinement Plan that would preclude the application of the R-2 zoning to the property. If the "date of application" is October 31, 2006, as the applicant asserts, the proposed R-2 zoning designation may be permitted, provided the applicant demonstrates that the EC 9.8865 zone change criteria are satisfied. Opponents contend that the applicant failed to provide evidence within 180 days of the initial application (May 12, 2006), and thus, she may not avail herself of the standards in effect on May 12, 2006. Even if the October 31, 2006 submittal date is used, opponents argue that the applicant did not submit the necessary evidence within 180 days, and thus the applicant may not apply for a zone change under the October 31, 2006 standards. According to opponents, the applicant failed to address Metro Plan Residential Policy A.24 in her supplemental materials, rendering the application incomplete. Opponents assert that the

² ORS 197.178(1) requires that a city decision on a land use application be issued within 120 days of the date the application is deemed complete. An application is deemed complete, for the purposes of the statute if the city fails to notify the applicant within 30 days of the date the application is received, of deficiencies in the application, or if the city notifies the applicant of the deficiencies and the applicant provides some or all of the missing information or informs the city that no other additional information will be provided. ORS 197.178(2).

ORS 197.178(3)(a) provides in relevant part:

"If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted * * * approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

failure to provide evidence regarding *all* applicable plan policies means that the review standards in effect on the date the application was deemed complete apply (April 27, 2007), and not the review standards in place in 2006. If April 27, 2007 standards apply, the R-2 application could not be approved, because the city has amended its code to prohibit rezoning Jefferson/Far West Refinement Plan Area 15 properties to R-2.

In the absence of local code provisions that prohibit withdrawals of applications at the request of the applicant, withdrawal of an application prior to reaching a final decision results in the local government losing jurisdiction over the application. *Grabhorn v. Washington County*, 50 Or LUBA 344, 351 (2005), *affirmed* 203 Or App 639, ___ P3d ___ (2006), *Witzel v. Harney County*, 34 Or LUBA 43 (1998). Thus, the effect of the applicant's withdrawal of the May 12, 2006 application is merely that the city could not make any decision regarding it. The opponents do not cite to any city code provisions that preclude the applicant from submitting a zone change application on the same day she withdrew a substantially similar application from consideration. The only effect of the withdrawal and subsequent re-submittal of the zone change application is to establish October 31, 2006 as the tentative date of submission for the purposes of identifying the applicable review standards.

As for the opponents' arguments that the applicant did not submit the necessary evidence to deem the application complete prior to the end of the 180-day grace period, the record shows that the applicant submitted evidence in response to staff's notice on April 24, 2007, 175 days after the application was submitted, and the city deemed the application complete for the purposes of review on April 27, 2007, 178 days after the application was submitted. While the evidence submitted by the applicant may or may not be sufficient to demonstrate approval of the application, the evidence was sufficient for staff to deem the application complete for purposes of further review. The city's determination that the application was complete with that additional evidence is all that is needed to allow the applicant to satisfy the standards in place at the time the application was first submitted--October 31, 2007.

3. Future Uses of the Property

Opponents note that one of the applicant's major incentives to apply for the zone change is to allow her to partition the property and develop it with up to six units per acre. Opponents argue that potential uses that are allowed by the R-2 zoning and not allowed under the R-1 zoning must be considered when evaluating whether the proposed zone change is consistent with the Metro Plan and the Jefferson/Far West Refinement Plan.

This hearings official has concluded that where a partition site plan includes development proposals that may affect compliance with partition criteria, those proposals must be evaluated as part of the partition application itself. *See Auld/Johnson* (PT 06-43) (relying on *McKeown v. City of Eugene*, 49 Or LUBA 494 (2004) to conclude that EC 9.8215(1)(j) requires that an applicant demonstrate compliance with "all applicable development standards for features explicitly included in the application.") However, there is no similar requirement for zone changes. The applicable zone change approval criteria require a showing that the proposed zoning designation is "consistent" with applicable plan policies; it does not require a showing that all potential development scenarios be evaluated to determine whether they too are consistent with plan policies. Those consistency evaluations are addressed during the development processes, such as subdivisions, partitions and site review, where the impacts of a particular development are addressed.

The hearings officer concludes therefore that the applicant does not have to demonstrate that all potential R-2 development on the property is consistent with the Metro Plan and the Jefferson/Far West Refinement Plan.

4. Authority to Adopt Conditions of Approval for Zone Changes

Under prior versions of the EC, site review overlays were applied when particular development constraints or special features were identified on a parcel, and specific development criteria were adopted at the time the /SR designation was applied to address those particularized issues. Since the adoption of the land use code amendments in the early 2000s, the city's site review process has been codified into particular development overlays that apply development standards to address site constraints. *See e.g.*, the Water Resources Conservation (/WR) development standards that replaced the /SR overlay for many sites located along waterways and riparian areas. Opponents argue that the hearings official continues to have the authority under the current EC to adopt particularized development standards. Staff relies on a memo from the city attorney, where the city attorney opines that the prescriptive nature of the city's land use code precludes the application of site specific review criteria as part of a zone change which applies the /SR designation.

EC 9.7330 permits the hearings officer to approve, conditionally approve, or deny a Type III application, such as a zone change. If EC 9.7330, which sets out the Type III procedures, is considered in isolation, the code appears to allow the hearings official to adopt conditions of approval for zone changes. However, EC 9.7330 is not to be read in isolation. Different types of permits are evaluated through the Type III process, and each type of permit includes review standards, and indicates whether the decision maker may impose conditions to ensure that the applicable standards are satisfied. For example, EC 9.8095 permits the hearings official to impose conditions of approval on conditional use permits, which are evaluated through the Type III hearings process.

The hearings official has no such authority under EC 9.8865 to adopt specialized development standards as conditions of approval for a zone change. EC 9.8860(2) allows the hearings official to adopt overlays that are meant to address those specialized development consideration; the hearings officer may not adopt individualized conditions of approval. *See* EC 9.8860(2) ("Changes in zoning can include the designation of an overlay zone in addition to the base zone. * * * [O]verlay zones can be applied in response to adopted plan policies or where the use of the overlay zone is necessary to address future development constraints.") Here, the only possible overlay zone that can be applied to address the Metro Plan and Jefferson/Far West Refinement Plan policies regarding development in the area is the /SR zone, and only the /SR overlay standards set out in EC 9.4400 through 9.4410 can be used to evaluate the impacts of development.

B. Evaluation of Zone Change Criteria

Eugene Code (EC) 9.8865 provides that applications to amend the zoning map designation for property be considered in accordance with Type III procedures set out in EC 9.7300 through 9.7335. Those procedures require notice to nearby residents and property owners, and other interested parties. In addition, the application is subject to a public hearing to allow testimony and evidence to be presented that pertain to applicable decisional criteria. The application has been subject to notice and hearing in accordance with those provisions. The Hearings Official hereby adopts the following findings of fact and conclusions of law pertaining to the listed applicable decisional criteria:

9.8865(1) The proposed change is consistent with applicable provisions of the Metro Plan. The written text of the Metro Plan shall take precedence over the Metro Plan diagram where apparent conflicts or inconsistencies exist.

With regard to the Metro Plan land use diagram, the Metro Plan diagram adopted by Ordinance 20319 (April 2004) is the applicable diagram. That the land use diagram clearly designates the subject property for medium density residential use and the proposed R-2/SR zoning implements that designation. According to the text accompanying the land use diagram and Residential Policy A.9, medium density residential development is defined by densities of 10 to 20 units per gross acre, translating to 14.28 to 28.56 units per net acre. The proposed R-2 Medium Density Residential zoning is consistent with the designated use in that it will permit medium density residential use with a net density between approximately 14 and 28 units per acre (or up to six units total on the subject property.)

With respect to the remaining provisions of the Metro Plan text, the parties identify Residential Land Use and Housing Element policies A.2, A.3, A.10, A.12, A.13, A.14, A.16, A.17, A.18, A.22, A.23, and A.25, and Growth Management Policies as being potentially applicable. For the most part, these policies simply identify the means that the constituent entities are to promote a range of residential densities and housing options through implementing regulations (*See e.g., A.3 "Provide an adequate supply of buildable residential land within the UGB * * *"; A.4 "Use annexation, provision of adequate public facilities and services, rezoning, redevelopment, and infill to meet the 20-year projected housing demand"; A.9" Promote higher residential density inside the UGB that utilizes existing infrastructure, improves the efficiency of public services and facilities, and conserves rural resources."*)

However, two policies do potentially provide applicable approval standards. Policy A.13, page III-A-7 provides:

Increase overall residential density in the metropolitan area by creating more opportunities for effectively designed infill, redevelopment, and mixed use while considering impacts of increased residential density on historic, existing and future neighborhoods.

Policy A.25, page III-A-10 provides:

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.

The subject site is developed with a primary dwelling and a secondary dwelling. Under most circumstances, the R-1 zone allows for a maximum of one primary residence, and permits a secondary dwelling unit if one of the residences is owner-occupied and a number of other development standards are met. The R-2 zone does not distinguish between primary and secondary dwellings or limit ownership options. Additionally, the R-2 zone allows for a wider range of lot configurations and development consistent with planned densities. Opponents concede that the proposed R-2 designation allow increased density and a greater range of housing types and ownership options. In their view, that is the reason why the R-2 zoning will not preserve the stability of the neighborhood or retain the residential quality that exists. In response, staff asserts

that the proposed /SR overlay zone will assure that future development or redevelopment will address those policies during the development review process, noting that the intent of the /SR overlay is to maintain or to improve the character, integrity, and harmonious development within an area and to provide for a safe, stable, efficient and attractive on-site environment (EC 9.4400).

Opponents argue that the /SR process does little to protect the existing neighborhood character because as long as generic development standards are met, the city typically concludes that the more nuanced policy standards are met as well. In addition, the /SR criteria and does not apply at all to partitions. The opponents argue that the fallacy of assuming that the /SR overlay will adequately protect existing neighborhoods is apparent by viewing the multi-family development that has been approved in the northwest corner of Jefferson/Far West Area 15, near W. 13th and Jefferson Avenue.

The hearings official concludes that, on balance, the R-2/SR zoning designation implements Metro Plan policies that are intended to allow for a range of residential options and development types. In addition, the hearings official concludes that while the /SR overlay has its limitations, the application of the site review criteria to development on the site will adequately ensure that the development is consistent with the policies that require consideration of the stability and character of the existing neighborhood.

The hearings official concludes that the proposed zone change is consistent with the relevant provisions of the Metro Plan.

9.8865(2) 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.

As noted above, the applicable adopted refinement plan for the area is the Jefferson/Far West Refinement Plan. The refinement plan includes a land use diagram, which references sub-area maps with specific policies relating to each, as well as general policies that apply to the plan area.

The Jefferson/Far West Refinement Plan's land use diagram designates the subject property for "Low-Medium Density Residential" use (page 18). The diagram does not define "Low-Medium Density Residential"; however, the text on page 17 of the plan states, "...the intent of the Land Use Diagram designation is to indicate the type of future development that is to occur and to accept previously approved developments." Additionally, the diagram includes a reference to "subarea 15" (known by the parties as "Area 15") and the subject site is clearly included in the referenced map detail for Area 15 (page 27).³

The Area 15 Low-to Medium-Density Residential Area Policies (pages 27-28) provide that the low-medium density residential designation is to be implemented within Area 15 as follows:

This area shall be recognized as a low-to medium density residential area. The City shall explore methods of encouraging an increase in residential density yet maintaining the character of the area. Residential densities beyond ten units per acre shall be allowed, subject to an approved block plan or rezoning to R-2 in conjunction with site review.

³The Area 15 policies that accompany the detail are codified in Eugene Code section EC 9.9850(17) and, on January 30, 2007, the Eugene Hearings Official issued Findings and Decisions on appeal related to the applicability of this code section to land division and site review applications (City file CI 06-13).

The City shall encourage block planning, infilling, and shared housing, in this area. Access to housing units off of alleys shall be accommodated when not in conflict with other policies and goals. The City shall encourage the rehabilitation of existing housing stock through both public and private reinvestments.

Residential Policy 3: Encourage a mixture of housing densities and types to allow a diverse population group to live within the area.

General Policy 3: Use the Land Use Diagram and the accompanying text along with other policies in the Jefferson/Far West Refinement Plan and applicable City goals, policies, and plans to provide policy direction for public decisions made affecting the area.

The applicant and staff assert that the proposed R-2/SR designation is consistent with these policies, which recognize Area 15 as a low- to medium-density residential area and allow residential densities beyond ten units per acre through rezoning to R-2 in conjunction with site review.

Opponents argue that these policies are intended to protect Area 15 from incompatible uses that border the area, and should not be used to allow medium to high density residential development that is more compatible with uses allowed in those bordering subareas. The opponents in particular object to the applicant's characterization of Area 15 as a mixed residential area with a range of multi-family dwelling units than one that is predominately characterized by modest single family dwellings with the occasional "granny" cottage, interspersed at the edges by less compatible/illegal multifamily development.

How Area 15 is described is not particularly relevant to the question of whether the proposed zoning is consistent with the applicable refinement plan policies. To the extent "character of the area" is relevant, the hearings official finds that Area 15 includes a single-family residential core, found on Washington Street, surrounded by a gradually increasing density along the perimeter near W. 13th Avenue and Jefferson and Lawrence Streets.

The plan policy clearly allows R-2 densities, so long as the /SR overlay is applied to ensure that development is consistent with the residential nature of the neighborhood. Here, the applicant has shown that the lots on her block are of a relatively uniform size (approximately 9,000 square feet), and are developed between two and four dwelling units. The hearings official concludes that the proposed R-2 zoning will allow for development that is consistent with the policies by providing options for housing design and density, while maintaining the character of the neighborhood through site review.

The hearings official recognizes that the neighbors disagree that the R-2/SR designation is adequate to protect the residential character of the neighborhood, and that recent amendments to the Metro Plan and the zoning map reflect that the city council agrees that more protection needs to be given to retain that neighborhood character. However, applying the policies in effect at the time the application was submitted, and recognizing that the policies clearly allow for the R-2/SR designation, the hearings official concludes that, on balance, the proposal is consistent with the Jefferson/Far West Refinement Plan.

EC 9.8865(2) is satisfied.

9.8865(3) The uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban facilities and services.

Key urban facilities and services as defined in the Metro Plan include wastewater service, stormwater service, water service, fire and emergency medical services, police protection, city-wide parks and recreation programs, electric service, land use controls, communication facilities, and public schools on a district-wide basis. Currently, the subject site is fully served with key urban facilities and services, which could be extended in an orderly and efficient manner to serve increased density. It is noted that four additional dwelling units, the estimated maximum number of dwelling units potentially allowed in the R-2 zone, is not expected to materially increase the impact on existing urban facilities and services. Moreover, future development would be subject to site review approval, which requires the developer to demonstrate compliance with applicable public facility and service standards. Referral comments from the City's Public Works Department provide details regarding Public Works facilities, including wastewater, stormwater, and transportation facilities. The applicant submitted flow reports, and potential natural stormwater detention designs to show that R-2 densities will not exceed the existing capacities or undermine the orderly expansion of urban services.

EC 9.8865(3) is satisfied.

9.8865(4) The proposed zone change is consistent with the applicable siting requirements set out for the specific zone in:

- (a) EC 9.2150 Commercial Zone Siting Requirements.
- (b) EC 9.2430 Industrial Zone Siting Requirements.
- (c) EC 9.2510 Natural Resource Zone Siting Requirements.
- (d) EC 9.2610 Park, Recreation, and Open Space Siting Requirements.
- (e) EC 9.2681 Public Land Zone Siting Requirements.
- (f) EC 9.2735 Residential Zone Siting Requirements.
- (g) EC 9.3055 S-C Chambers Special Area Zone Siting Requirements;
- (h) EC 9.3105 S-CN Chase Node Special Area Zone Siting Requirements;
- (i) EC 9.3205 S-DW Downtown Westside Special Area Zone Siting Requirements.
- (j) EC 9.3305 S-E Elmira Road Special Area Zone Siting Requirements.
- (k) EC 9.3705 S-RP Riverfront Park Special Area Zone Siting Requirements.
- (l) EC 9.3805 S-RN Royal Node Special Area Zone Siting Requirements.
- (m) EC 9.3905 S-W Whiteaker Special Area Zone Siting Requirements.
- (n) EC 9.4205 /EC East Campus Overlay Zone Siting Requirements.
- (o) EC 9.4715 /WP Waterside Protection Overlay Zone Siting Requirements.
- (p) EC 9.4915 /WR Water Resources Conservation Overlay Zone Siting Requirements (only for the purposes of adding the overlay zone. See EC 9.4960.).
- (q) EC 9.4815 /WB Wetland Buffer Overlay Zone Siting Requirements.
- (r) An uncodified ordinance establishing a site specific S-H Historic Special Area Zone, a copy of which is maintained at the city's planning and development department.

The residential siting requirements listed above do not apply to the R-2 zoning district, and none of the remaining standards apply. Therefore EC 9.8865(4) does not apply.

9.8865(5) In cases where the NR zone is applied based on EC 9.2510(3), the property owner shall enter into a contractual arrangement with the city to ensure the area is maintained as a natural resource area for a minimum of 50 years.

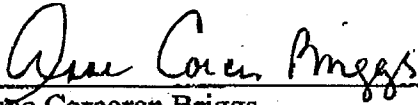
The requested zone change does not involve the application of the NR zone. EC 9.8865(5) does not apply.

Decision:

Based on the above findings of fact and conclusions of law, the Hearings Official APPROVES the applicant's requested zone change from R-1, Low Density Residential to R-2/SR Medium Density Residential with a Site Review overlay.

Dated this 12th day of July, 2007.

Mailed this 13th day of July, 2007.



Anne Corcoran Briggs
Hearings Official

UNLESS AN APPEAL IS FILED PURSUANT TO EC 9.7655, THIS DECISION IS FINAL ON THE 13TH DAY AFTER NOTICE OF THIS DECISION IS MAILED.