

**TESTIMONY IN OPPOSITION TO  
MEININGER ZONE CHANGE APPLICATION**

FILE Z 06-22

June 12, 2007

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**I. INTRODUCTION**

The following statement by the designated representatives of the **Jefferson Westside Neighbors (JWN)**, a City-chartered neighborhood association, provides testimony in opposition to the above captioned zone change application.

The JWN neighborhood association encompasses the subject lot, and the JWN Executive Board voted unanimously at their May 30, 2007 meeting to oppose this zone change.

**II. SUMMARY OF OPPOSITION ARGUMENTS**

The applicant has requested a zone change from R-1 to R-2/SR for a lot that lies within the area covered by the Jefferson/Far West Refinement Plan, specifically within Residential Area 15 of the refinement plan.

The current Metro Plan and refinement plan both designate the entire Area 15 as "Low Density Residential." Applicant acknowledges these designations preclude zone changes to R-2 (with or without an /SR overlay).<sup>1</sup>

However, applicant claims the zone change should be governed by the Metro Plan and refinement plan policies in effect as of October 31, 2006. In support of this claim, applicant asserts she has satisfied the requirements in ORS 197.178(3) that provide an applicant the opportunity to "fix the goal posts" for purposes of evaluating the application.

**A. Application relies on incorrect versions of Metro Plan and refinement plan**

As we explain below, however, applicant failed to "submit the requested additional information within 180 days of the date the application was first submitted," as required by ORS 197.178(3). Therefore, the application must be evaluated under the current Metro Plan and refinement plan policies.

Under the current versions of the Metro Plan and refinement plan, the requested zone change fails to meet EC 9.8865 approval criteria (1) – Consistency with the Metro Plan; and (2) – Consistency with the applicable adopted refinement plan. The application therefore must be denied.

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<sup>1</sup> Applicant's Statement at 2.

## **B. Application is inconsistent with Metro Plan and refinement plan**

Both the current version of the Metro Plan and the version of the Metro Plan that was in effect as of October 31, 2006 contain Policy A.25 that requires land use actions, particularly zone changes, to *“increase the stability and quality of older residential neighborhoods.”* The application fails to demonstrate that it is consistent with this Metro Plan policy.

Both the current version of the refinement plan’s Area 15 policy and the version of this policy that was in effect as of October 31, 2006 require *“maintaining the character of the area.”* The application fails to demonstrate that it is consistent with this refinement plan policy.

Thus, even if the Hearings Official finds the October 31, 2006 versions of the Metro Plan and refinement plan apply to this application, the application must be denied for failing to meet EC 9.8865 (1) and (2), or the Hearings Official must impose sufficient conditions on the approval of this application to assure full compliance with applicable policies.<sup>2</sup>

## **III. BACKGROUND**

Area 15 is a predominantly single-family residential area, characterized by a “grid-pattern” street and alley network, with regularly-shaped, rectangular lots typically 50 to 70 feet wide, that are developed predominantly with detached dwellings having a consistent scale and massing.

There are 263 lots in Area 15, 248 of which are developed as residential. There are eleven vacant lots, two large lots occupied by the Lighthouse Temple church and the O’Hara School, one lot with a converted large bungalow now used as legal offices, and one lot with a medical clinic.

This area was developed for the most part in two major stages: initially mostly as modest pre-war “bungalows,” and in a second phase with even more basic post-war “cottages.” In both cases, homes are typically one to one-and-a-half stories high. Slightly less than a fifth of the residentially-developed lots have two dwellings, and these are almost entirely small-scale duplexes or comprise a primary single-family dwelling plus a “granny cottage” or small second-story or garage apartment.

The area is almost entirely zoned R-1 and has been for over fifty years. The R-1 zone is currently labeled “Low Density Residential,” but for many years it was known as the “Single-Family” zone; and current R-1 development standards still retain the long-standing restriction of a single dwelling per lot, except duplexes are (and have historically been) allowed on corner lots. A single, small secondary dwelling is also allowed with the condition that the property owner must reside in either the primary or secondary dwelling.

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<sup>2</sup> However, see section V, below, regarding whether or not a zone change application can be approved with conditions.

Currently, 93 percent of the residentially-developed lots in Area 15 have a single dwelling or two dwellings, as allowed under R-1 zoning.<sup>3</sup>

Until February 8, 2006, the Metro Plan designated the portion of Area 15 south of Amazon Canal as “Low Density Residential” (LDR). (The subject property lies in this portion of Area 15, and was accordingly designated LDR.) Zone changes to the R-2 base zone in this southern part of Area 15 were thus illegal because the R-2 zone implements the “Medium Density Residential” designation and therefore conflicts with a Metro Plan LDR designation.<sup>4</sup>

On February 8, 2006, the Metro Plan designation for the southern part of Area 15 was changed to “Medium Density Residential” (MDR) as the result of amendments which Planning staff presented to City Council as one of a large number of “minor housekeeping” changes. The minutes of Council’s deliberation and responses from inquiries to City Councilors and Planning staff indicate that there was *no* discussion of the change to Area 15’s designation in the Metro Plan Diagram and that Councilors were entirely unaware of how the change would affect evaluation of future land use actions in the area.

After residents of Area 15 and JWN neighborhood association leaders alerted City Council that this change would potentially allow incompatible development on lots upzoned to R-2/SR, Council voted unanimously on March 12, 2007 to change the Metro Plan and refinement plan designations for all of Area 15 to LDR, thus prohibiting such upzones.<sup>5</sup> Council’s action was specifically based on

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<sup>3</sup> Attachment A.

<sup>4</sup> See Findings in “Taylor” (Z 04-19) at 5: “R-2, regardless of any overlay, implements the medium density designation and does not implement the low density designation [of the Metro Plan].”

Note that Planning staff has at times claimed the Metro Plan did not take precedence over the refinement plan, and thus for some period of time (which staff has been unable to specify more precisely), zone changes to R-2 were legal in the southern part of Area 15. However, the record as early as Berg (Z 84-20), which was filed November 29, 1984, documents that Eugene Code section EC 9.678(2) (b) required that “A proposed change is consistent with the Metropolitan Area General Plan 1) applicable text, \*\* and 3) *applicable land use designations.*”

The only two zone changes to an R-2 base zone that were approved in the section of Area 15 designated LDR in the Metro Plan – Berg and Malcomb (Z 93-41) – were the result of staff and the Hearings Official not even considering the conflict between an R-2 base zone and the LDR designation. This issue was finally resolved in 2005 after residents challenged the “Taylor” application for a zone change to an R-2 base zone, and the Hearings Official, agreeing with opponents, denied the zone change.

<sup>5</sup> Notably, Council specifically included a provision in Section 9 of Ordinance 20380: “\*\*\* in order to prohibit any inappropriate infill development that could occur as the result of the period between passage of this Ordinance and the 30 day effective date provided in the Eugene Charter of 2002, this Ordinance shall become effective immediately upon its passage by the City Council and approval by the Mayor or passage over the Mayor’s veto.”

The adopted ordinance also includes a “sunset clause” in Section 10 that repeals the redesignation only when City Council “establishes area-specific infill standards” for Area 15.

Thus, it’s clear from Council’s actions they recognized the inadvertent exposure to incompatible infill that the previous “housekeeping” change to the Metro Plan had created, and Council acted decisively to protect Area 15 against that possibility.

(Footnote continued on next page.)

their belief that R-2/SR zoning allowed infill development that was incompatible with the character of the area.

The Jefferson/Far West Refinement Plan that covers Area 15 was written during 1980 to 1982 by a planning team consisting of eight residents appointed by the two encompassing neighborhood associations (Jefferson Area Neighbors and Far West Neighborhood Association) and five representatives of the area business and religious community and Lane County Fairgrounds and Ida Patterson Community School. The final draft of the refinement plan was completed in June 1982. The plan was adopted by City Council on January 12, 1983.

The Area 15 policy, which we discuss at more length in subsequent sections, generally envisions selective, carefully controlled cases where residential development would be allowed at higher densities than was permitted by R-1 at the time the refinement plan was written and adopted. The refinement plan (and appendix) make clear the preferred approach was “block planning,” but provision was also made to use site review as a mechanism to assure the character of Area 15 was maintained when the zoning of a lot in that area was changed to allow greater density.

The history of the Metro and refinement plan policies covering the area reinforces the plain language of the Area 15 policy itself. Both residents and City Council have consistently intended that the character of Area 15 be maintained; and, in the case presented here, we urge the Hearings Official to exercise great care that her decision assures that outcome.

#### **IV. APPLICABLE APPROVAL STANDARDS**

##### **A. Application relies on incorrect version of Metro Plan and refinement plan**

Applicant originally submitted an application (Z 06-10) for a zone change to R-2/SR of the subject property on May 12, 2006.<sup>6</sup>

This application was deemed incomplete on June 6, 2006, and applicant was notified by staff that she must submit the following information<sup>7</sup>:

*Provide a written statement demonstrating how the requested change satisfies the criteria in Eugene Code Section 9.8865.*

*Please clearly state whether the applicant believes any Metro Plan policies are applicable in addition to the land use diagram and address compliance with any identified policies.*

*Acknowledge and address all Jefferson/Far West Refinement [sic] Plan policy guidance specific to Residential Area 15. \*\*\*.*

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It's important to recognize that the primary reason Area 15 has been exposed to incompatible infill, despite the Area 15 policy requirement for “maintaining the character of the area” has been Planning staff's failure in previous R-2/SR upzonings (including ones north of the Amazon Canal) to require sufficient site review criteria to maintain the character of the area. This same issue arises in evaluating the current application.

<sup>6</sup> Attachment B.

<sup>7</sup> Attachment C. Zone Change Completeness Review Form, prepared by Shawna Adams and dated 6/6/06.

On June 13, applicant submitted an "Incomplete LUA Time Line Extension" form indicating her intent to submit missing or incomplete materials by the 180 day deadline, which would have been by November 8.<sup>8</sup>

On October 31, 2006, 172 days after the date the application was first submitted, applicant sent an e-mail to Shawna Adams, the Planner handling the application, indicating applicant would not complete the application before the deadline, and applicant intended to withdraw and then resubmit the application to "give me more time to make a complete application."<sup>9</sup>

On the same day, applicant resubmitted an application form that is virtually identical in content to the form submitted on May 12, 2006.<sup>10</sup>

On November 29, 2006, the application was again deemed incomplete, and staff sent applicant a Completeness Review Form with a statement of the required information that was identical to the Completeness Review Form that had been sent on June 6, 2006.<sup>11</sup> Staff also rolled over all but \$137.50 of applicant's fee payment for the May 12, 2006 application to cover the fee for resubmitting the application on October 31, 2007.<sup>12</sup>

On April 24, 2007, applicant submitted supplemental materials.

1. Supplemental materials were submitted more than 180 days after the application was first submitted

The application under consideration is, in fact, the same application that was submitted on May 12, 2006, despite applicant's attempt to reset the "goal posts" clock by resubmitting the application when the 180 day period was about to expire.

The application under consideration is in every substantive regard identical to the originally submitted application, and applicant has expressly stated that her purpose in resubmitting the application was simply to extend the time she had to submit required information because she could not meet the 180 day deadline.

Staff substantively treated the resubmitted application as an extension of the original application by simply rolling over the original fee payment with a minor charge for staff time spent prior to the resubmission date. Staff further treated the resubmission as an extension of the original application by simply resending the verbatim content of the Completeness Review Form that had previously been sent to applicant.

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<sup>8</sup> Attachment D.

<sup>9</sup> Attachment E.

<sup>10</sup> Attachment F.

<sup>11</sup> Attachment G. Zone Change Completeness Review Form, prepared by Shawna Adams and dated 11/28/06.

As evidence that staff used the verbatim response that was in the June 6, 2006 form, note that on both forms staff misspelled "Refinement" on the third line of comments under "Written Statement".

<sup>12</sup> Attachment H.

Applicant's attempt to circumvent the 180 day limit specified in ORS 197.178(3) by withdrawing her application just before the 180 period elapsed and immediately resubmitting the same application does not change the fact that the application under current consideration is, in substance, the application that was first submitted on May 12, 2006.

The ORS 197.178(3) *limited* provision for allowing an applicant 180 days to "fix the goal posts" is not intended to provide an applicant an *unlimited* ability to extend the period for submitting requested information.

Accordingly, the supplemental material submitted on April 24, 2007 was submitted 347 days after the "date the application was first submitted," and applicant has not meet the ORS 197.178(3) requirement to "fix the goal posts."

2. Applicant did not submit all requested additional information.

On April 27, 2007, Planning staff deemed the resubmitted application complete. While this staff determination *may* have satisfied ORS 197.178(2) requirements for the applicant to provide some or all of the missing information, such determination does not necessarily mean applicant satisfied the ORS 197.178(3) requirement that the applicant "submit the requested additional information within 180 days of the date the application was first submitted" in order to have the application evaluation based on the standards and criteria that were applicable at the time the application was first submitted.

In fact, although applicant submitted a substantial amount of supplemental material, this material did not include all the requested additional information. Specifically, the applicant failed to submit a complete statement "demonstrating how the requested change satisfies the criteria in Eugene Code Section 9.8865," as requested on the June 6, 2006 and November 6, 2006 Zone Change Completeness Review Forms. The missing information includes:

- a) Evidence demonstrating the application complies with all applicable Metro Plan policies. Specifically, applicant failed to submit any evidence the application complies with Policy A.25, which is directly applicable to a zone change request.

The language of Policy A.25 is inarguably applicable to this application, as it requires:

*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.*

This policy explicitly requires actions to "increase the stability and quality of older residential neighborhoods" and explicitly identifies "appropriate zoning" as one of the actions encompassed by the policy.

It's thus obvious that an application for a zone change in an older residential neighborhood, such as encompasses the subject property, must address compliance with Metro Plan Policy A.25 or be considered incomplete.

Staff recognizes the necessity to address compliance with Policy A.25 in their report.<sup>13</sup> And, in fact, staff's recognition of this requirement demonstrates clearly that applicant did not submit all the information staff had requested and that was necessary to make the application complete with respect to ORS 197.178(3).

For if the information provided in the original application and the supplemental Application Statement were sufficient for a complete application, that would mean it was not necessary for applicant (or staff) to address compliance with Metro Plan Policy A.25 (since the original application and the supplemental Application Statement contained no information related to Policy A.25).

But Policy A.25 is inarguably applicable to a zone change, and staff – recognizing this fact – *did* deem it essential to address compliance with Policy A.25 in their report. The fact that staff addresses this requirement, however, does not change the fact that applicant submitted nothing to address compliance with Policy A.25, despite the request for applicant to submit information addressing any applicable Metro Plan policies.

(See also sections IV.B.2 and IV.B.4, below.)

- b) Complete and relevant evidence demonstrating that a zone change to R-2/SR will “maintain the character of the area,” as required by the applicable refinement plan policy.

Both the October 31, 2007 and current versions of the refinement plan policy for Area 15 require “maintaining the character of the area.” In this clause “area” clearly refers to the area covered by the policy containing the clause; that is, the area within the boundaries of Area 15.

In attempting to address this policy, however, applicant did not adequately address the specific potential development of the lot with as many as six units, as would be allowed under the R-2/SR zone. Further, in presenting data to support applicant's argument, applicant chose to *ignore* more than half the lots and land area in Area 15 and to include data from an entire block that lies wholly outside Area 15 and that is covered by a completely different Metro Plan designation and refinement plan policy.<sup>14</sup>

Applicant therefore did not submit complete information addressing “all Jefferson/Far West Refinement [sic] Plan Policy guidance specific to Residential Area 15,”<sup>15</sup> as requested.

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<sup>13</sup> June 4, 2007 Staff Report at 3.

<sup>14</sup> Applicant's Statement at 10. Note also at 12 that applicant uses this same incomplete data as applicant's primary evidence of compliance with Jefferson/Far West Refinement Plan Residential Policy 3.0 (page 14 of the plan). Similarly, at 7, applicant uses the same data as the primary evidence for compliance with Metro Plan Policy A.13.

<sup>15</sup> Zone Change Completeness Review Forms dated 6/6/06 and 11/28/06.

(See also sections IV.B.1 and IV.B.6, below.)

- c) Evidence demonstrating that a lot partition, which is allowed under the requested R-2/SR zone and which is also a development feature of the application, is consistent with the refinement plan.

A partition of the subject lot, which is not allowed under the lot's current R-1 zoning, would be allowed by the requested R-2/SR zone ; and applicant is therefore required to demonstrate a partition of this lot satisfies the criteria in EC 9.8865. (See section IV.B.1.)

In section IV.B.2, below, we also assert the application includes a lot partition as a development feature, and applicant is therefore required to demonstrate this specific feature satisfies the criteria in EC 9.8865.

For one or both of the above reasons, applicant was required to submit complete information demonstrating such a lot partition would satisfy the criteria in EC 9.8865 in order for the application to also satisfy the ORS 197.178(3) requirements for "fixing the goal posts."

Applicant, however, submitted no evidence demonstrating a partition of this lot satisfies the criteria in EC 9.8865.

The sections referenced in each bullet item above provide more details on the missing or incomplete information. The referenced sections focus on how applicant has failed to meet the burden of proof to establish the application satisfies EC 9.8865 criteria (1) and (2). The point being made here, however, does not depend on whether or not the application may satisfy EC 9.8865 criteria.

The only issue with respect to which version of the Metro Plan and refinement plan applies to the current application is whether applicant submitted complete information, as requested when the application was deemed incomplete.

As demonstrated above, the applicant did not submit complete information and thus has not met the requirements of ORS 197.178(3). The application must therefore be evaluated under the standards and criteria that were applicable on April 24, 2007.

### 3. Applicant submittals after April 29, 2007 not within 180 day period

Regardless of which date – May 12, 2006 or October 31, 2006 – is considered to be the date the application was first submitted, any information submitted by the applicant after April 29, 2007 is unquestionably after the end of the 180 day period.

Thus, any information submitted by applicant after April 29, 2007 in an attempt to address missing information, such as evidence the application compiles with Metro Plan Policy A.25<sup>16</sup>, relevant evidence demonstrating a zone change to R-2/SR will "maintain the character of the area;" or evidence demonstrating that a lot partition is consistent with the refinement plan, would be too late to satisfy

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<sup>16</sup> As well as Jefferson/Far West Refinement Plan Residential Policy 3.0 and Metro Plan Policy A.13 – See footnote 14.

the ORS 197.178(3) requirement that applicant “submit the requested additional information within 180 days of the date the application was first submitted.”<sup>17</sup>

In fact, if applicant subsequently submits evidence to demonstrate compliance with Metro Plan Policy A.25, when none was submitted prior to April 29, 2007, such an action would be an implicit recognition that this information was required to complete the application and had not been submitted within the 180 day period required by ORS 197.178(3). Applicant cannot logically argue that the application – which included no information *prior* to April 29 regarding Policy A.25 – was complete as of that date, and at the same time argue that the requirement to demonstrate compliance with Policy A.25 can be satisfied by evidence entirely submitted *after* April 29, 2007.

Similarly, applicant cannot argue the application prior to April 29 – which included no information regarding lot partition compliance with the refinement plan – was complete as of that date, and at the same time argue that the requirement to demonstrate a lot partition complies with the refinement plan can be satisfied by evidence entirely submitted *after* April 29, 2007.

#### IV. EVALUATION OF APPLICATION

##### A. Application is not consistent with April 24, 2007 Metro Plan and Jefferson/Far West Refinement Plan

If the Hearings Official finds the evaluation should be based on the April 24, 2007 versions of the Metro Plan and refinement plan, the requested zone change to an R-2 (Medium Density Residential) base zone conflicts with the “Low Density Residential” designation for the subject parcel in both the Metro Plan and the Jefferson/Far West Refinement Plan, and the application must be denied.

Applicant acknowledges such in the Applicant’s Statement (at 2).

Further, the application also fails to satisfy other criteria, as covered in the sections under IV.B, below.

##### B. Application is not consistent with October 31, 2006 Metro Plan and Jefferson/Far West Refinement Plan

###### 1. Scope of evaluation for a zone change.

A zone change request itself does not inherently involve a proposal for development,<sup>18</sup> and therefore in evaluating whether the zone change satisfies the approval criteria, the Hearings Official must consider at least those types of development that are not allowed by the existing zone but would be allowed by the requested zone.<sup>19</sup>

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<sup>17</sup> For the record, we also note that all evidence and arguments submitted by staff were submitted on (or after) June 4, 2007, also after the 180 day period, no matter from which date the period is calculated.

<sup>18</sup> The Meininger application does, however, include a lot partition as a development feature.

<sup>19</sup> The scope of a zone change evaluation may be broader than this, but we focus only on the issues relevant to this request for an upzone.

This principle is reflected, for example, in evaluating the requested zone's *allowable* development density, rather than the density of any specifically proposed development.

This principle is explicitly recognized in the Jefferson/Far West Refinement Plan text describing "How to Use the Land Use Diagram":

*"In addition, 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."*<sup>20</sup> [Emphasis in original.]

This principle is implicitly recognized by applicant's and staff's respective efforts to show that allowable development under R-2/SR complies with Metro Plan and refinement plan policies.<sup>21</sup>

Consideration of *potential* development allowed by a zone change is necessary because otherwise there would be nothing substantive to evaluate with respect to many Metro Plan and refinement plan policies.

A hypothetical example illustrates how this principle should be applied. Consider a zone change request from R-1 to R-2 (no overlay). Suppose further that an applicable refinement plan policy were to state: "The maximum building height shall be 30 feet."

The evaluation of the requested zone change must consider the fact that the existing R-1 zone development standards allow a maximum height of 30 feet, whereas the requested R-2 zone (in this hypothetical example) would allow a maximum height of 35 feet. The required decision must either deny the request because it would allow development that conflicts with the applicable refinement plan policy, or approve the request (assuming other criteria are satisfied) with a condition restricting maximum building height to the limit stated in the refinement plan policy.<sup>22</sup>

If this hypothetical request were approved *without* such a condition, the property owner would be allowed to build a structure that did not comply with the refinement plan policy because, in the general case, approval of a building permit request is based on the development standards of the lot's zone, and does not require compliance with refinement plan policies. The building permit system essentially depends on the land use approval process to assure that a lot's base and overlay zones (e.g., site review), along with conditions of approval, provide sufficient criteria to assure any allowable development complies with Metro Plan and refinement plan policies.

In the Meininger application under consideration, an upzoning from R-1 to R-2/SR would allow all development permitted under R-2 standards, as long as

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<sup>20</sup> Jefferson/Far West Refinement Plan at 17.

<sup>21</sup> See for example, Applicant Statement at 10 where applicant argues that "[a]ny future development" would comply with the Area 15 policy and cites data in applicant's "Dwelling Units Per Parcel" attachment in support.

<sup>22</sup> See also section V, below, regarding whether or not a zone change application can be approved with conditions.

such development satisfies the site review criteria under EC 9.8440. Although these site review criteria impose some constraints, there are several major areas that are not addressed by site review and which require careful consideration in evaluating the current request:

- a) The subject lot (which has approximately 60 feet frontage) cannot be partitioned under its current R-1 zone because of the R-1 requirement for 50 foot minimum frontage, whereas the lot could potentially be partitioned into two or three lots under R-2 because the R-2 minimum frontage is only 20 feet.

The site review process would not apply to a request to partition this lot.

The tentative partition criteria do not include an explicit requirement for compliance with Metro Plan policies.

Also, as a “limited land use action,” the tentative partition approval process itself requires compliance only with codified refinement plan policies, and – unlike the zone change approval process -- tentative partition approval process does not requires compliance with adopted policies that have not been codified.

- b) A maximum of two dwelling units are permitted on the lot under its current R-1 zoning; whereas under R-2, a maximum of six units could potentially be built.

The building permit process required to develop six units does not explicitly include criteria requiring compliance with Metro Plan and refinement plan policies.

The site review criteria do not address density. In particular, the EC 9.8440(1) criteria requiring that “[t]he site review plan’s general design and character is reasonably compatible with surrounding properties, as it relates to building locations, bulk and height, noise, glare and odors” notably omits density or number of dwelling units as “compatibility” factors that must be considered.

Thus, the requested /SR overlay provides no mechanism to evaluate a future partition or the number of dwellings that are built on the subject property. And the tentative partition process and building permit processes do not include important criteria that are included in the zone change criteria.

Consequently, these two aspects of potential development of the subject lot – a partition<sup>23</sup> and construction of additional dwellings – that would be allowed under the requested R-2 base zone must be carefully scrutinized as part of the zone change evaluation, and the zone change must not be approved in a form that would allow a lot partition or a development density that would fail to comply with the zone change criteria.<sup>24</sup>

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<sup>23</sup> Note that EC 9.0500 defines “Develop” as “... to construct or alter a structure ... to divide land ....” EC 9.0500 defines “Development” as “The act, process or result of developing.” Thus, in Eugene Code, “development” includes lot partitions.

<sup>24</sup> The potential for a lot partition that is not currently allowed under the lot’s R-1 zoning is of particular relevance since partitioning the lot is the applicant’s stated reason for the zone change. Whether or not the Hearings Official finds the lot partition is a development feature of the application, there can be no doubt as to the substantial likelihood the lot will be partitioned if the zone change is approved without conditions.

Accordingly, the decision on the zone change request must assure such a partition would satisfy the EC 9.8865 criteria.

After evaluating the potential for lot partitions and the maximum number of units allowed under R-2/SR, the Hearings Official *might* find that all possible forms of potential development allowed under R-2/SR would comply with all zone change criteria, in which case the request could be approved without conditions (assuming compliance in all other regards).

However, if for example, the Hearings Official finds that partitioning the lot into three, 20-foot wide lots with two dwellings on each lot would not comply with Metro Plan Policy A.25 (increase the stability and quality of older residential neighborhoods) and/or Jefferson/Far West Refinement Plan's Area 15 policy (maintain the character of the area), then the request must be denied or approved with sufficient conditions to assure development that conflicts with zone change approval criteria is not subsequently allowed.

This principle also imposes the burden of proof on the applicant to demonstrate that the requested zone change (with conditions, if any are proposed in the request) will not allow subsequent development that conflicts with zone change approval criteria. The applicant cannot merely gloss over this issue with general assurances, but must specifically address the kinds of development that would be allowed under the requested zoning.

In the case at hand, applicant has failed to meet that burden of proof, as we demonstrate in subsequent sections of this testimony. In brief, applicant (and staff) have not dealt at all with the specific question of whether lot partitions allowed under R-2/SR satisfy any the EC 9.8865 criteria, and they have not adequately dealt with the specific question of whether a maximum build-out of the lot (six units) would satisfy EC 9.8865 criteria.

Instead, applicants and staff have addressed the density issue only with respect to whether the R-2 density *range* complies with the Metro Plan Policy A.9's MDR designation and the Jefferson/Far West Refinement Plan Area 15 policy's Low-to Medium-Density Residential designation.

Beyond that, applicants and staff have relied entirely on the site review process, which we've demonstrated above doesn't address the critical issue of how many dwellings can be built on the lot and still comply with applicable policies, particularly Metro Plan Policy A.25 and Jefferson/Far West Refinement Plan's Area 15 policy.

Further, in attempting to address the density issue, applicant has used invalid data – ignoring most of the other lots and development in Area 15 and including in applicant's supporting data lots and development that are encompassed by an entirely different Metro Plan designation, refinement plan policy, and zoning category.

2. Lot partition is a development feature of the application.  
Applicant provides no evidence partition complies with applicable policies.

Applicant unequivocally states the intent of the application is to enable applicant to partition the lot:

*"The reason for this application is that the applicant would like to leave open the possibility of a partition at some point in the future. Such a partition would be precluded by the current zoning."*<sup>25</sup>

Boiled down, this statement can be recast as:

*"The intent of this zone change is to allow the subject lot to be partitioned."*

Applicant has affirmed this proposed use in several other statements in the record. On both the May 12, 2006 and the October 31, 2006 Zone Change Application forms, applicant stated under the "Proposed Use(s) of the Property" section:

*"I would, however like the option of dividing the lot in the future and selling the parcel containing the rental unit \*\*, \* as R1 it cannot be divided because it has only 60' of street frontage. If zoned R2 it will be dividable."*<sup>26</sup>

Applicant also expresses the "more likely event she partitions the lot," and even goes as far as describing *how* "she will design the partition," as further evidence of the intent of the application.<sup>27</sup>

The application thus specifically identifies the partitioning of the lot as a development feature.<sup>28</sup>

We note that applicant attempts in several places to hedge or negate explicit statements in other parts of the application that establish the reason for the zone change is to allow a partition. But applicant cannot undo these statements simply by saying applicant has "no changes planned at this time"<sup>29</sup> or "no definite plans".<sup>30</sup> The fact remains, as established by applicant's own words, that the intent of the application is to allow a partition. Accordingly, the application must be evaluated in that light.

As noted in the Hearings Official decision upholding the appeal of the Auld/Johnston lot partition (PT 06-43)<sup>31</sup>, the issue of evaluating an application's development features was raised and decided by the Land Use Board of Appeals (LUBA) in *McKeown v. City of Eugene*, 49 Or LUBA 494 (2004).

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<sup>25</sup> Applicant's Statement at 1.

<sup>26</sup> Attachments B and F.

<sup>27</sup> Applicant's Statement at 6.

<sup>28</sup> Recall that, in Eugene Code, "development" includes lot partitions. See footnote 22.

<sup>29</sup> May 12, 2006 and the October 31, 2006 Zone Change Application forms under "Proposed Use(s) of Property."

<sup>30</sup> Applicant's Statement at 1.

<sup>31</sup> Auld/Johnston Appeal Decision at 3.

The decision in Auld/Johnston further noted:

*“The partition application includes all documents provided by the applicant in support of the application. The application specifically identifies a four-plex as a development feature. Accordingly, the planning director’s decision must address the development standards that apply to a four-plex when evaluating the applicant’s partition.”*

The current zone change application presents a similar situation by explicitly identifying a lot partition as a development feature, and thus this feature must be considered in the Hearings Official’s evaluation.

In addition, whether or not the lot partition is considered a development feature of the application, the lot can *potentially* be partitioned, and (as explained in IV.B.1, above) the Hearings Official must consider whether such a partition would satisfy EC 9.8865 criteria.

However, applicant provides no evidence a partition would be consistent with the applicable provisions of the Metro Plan or the Jefferson Far/West Refinement Plan. Nor does staff provide any evidence such a partition would satisfy EC 9.8865 criteria.

The consequences of a lot partition are not merely an abstract issue. It’s generally recognized that street and lot configurations, especially in traditional “grid-patterned” neighborhoods, are fundamental elements that define “neighborhood character.” As an example, the narrow lot configurations found in some “shotgun house” neighborhoods in the French Quarter of New Orleans<sup>32</sup>, as well as in row house neighborhoods found in many cities, define substantially different neighborhood character than found in Area 15 of Eugene’s Jefferson neighborhood.

If the subject property were to be partitioned, it would necessarily require that one or more of the new lots have a configuration that is incompatible with the existing character of lots in Area 15. Because the subject property has approximately sixty-foot frontage, at least one lot created by a partition would necessarily have frontage of thirty feet or less. Potentially, the lot could be divided into three lots , each with only twenty-foot frontage.

Of the 263 lots in Area 15, over ninety percent have a frontage of fifty feet or greater, and not one lot has a frontage as narrow as thirty feet. Thus, a partition of the subject lot would, in and of itself, fail to maintain the character of the area, regardless of how the newly-created lots were subsequently developed with structures. Thus the application fails to satisfy EC 9.8865(2).

For similar reasons, a partition of the subject lot would fail to comply with Metro Plan policy A.25 because it would destabilize the fundamental lot configuration of this long-established “grid-pattern” neighborhood. Thus, the application also fails to satisfy EC 9.8865(1).

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<sup>32</sup> See, for example: <http://bywater.org/Arch/shotgun.htm>.

It's important to re-emphasize, that opponents do not bear the burden of demonstrating that a partition of the subject property would conflict with applicable Metro Plan and refinement plan policies. The applicant has the burden of proof to demonstrate a partition complies with applicable policies. Neither the applicant, nor staff, however, has provided any evidence of such compliance, and therefore the application fails to satisfy the EC 9.8865(1) and (2) criteria.

Two final points need to be reiterated. First, both applicant and staff rely heavily on the assertion that a site review (/SR) overlay will assure future development complies with various Metro plan and refinement plan policies. However, as clearly laid out in EC 9.84430 (Site Review – Applicability), site review provisions are not applied to a partition of a developed lot with the /SR overlay. Thus, nothing in the applicant's or staff's discussion of site review has any bearing on whether a partition complies with applicable policies.

Second, the approval criteria for a Tentative Partition (EC 9.8215) do not include a specific criteria requiring compliance with Metro Plan policies. Although this might be considered an implicit requirement for any land use evaluation, the appeals decision in the Auld/Johnston tentative partition application raises questions about how fully the Metro Plan is applied in the evaluation of a tentative partition application. (See item 5 on page 6 of the Appeals Decision.)

3. If the application is approved, a condition must be imposed prohibiting division of lot.

Should the Hearings Official approve the zone change request, the Hearings Official must impose a condition that the lot cannot be divided because neither applicant nor staff have provided any evidence a lot partition allowed under R-2/SR would satisfy all EC 9.8865 criteria.

Such a provision is the only assured way to prevent subsequent development that would create one or more lots that are incompatible with the fundamental character of the area (as explained above) and which would thus conflict with Metro Plan Policy A.25 and Jefferson/Far West Refinement Plan's Area 15 policy.

As mentioned above, neither the site review process nor the tentative partition process provide adequate criteria to prevent creation of lots that are incompatible with the fundamental character of the area, and thus a specific condition to accomplish that effect is necessary with any approval of a zone change to R-2/SR within Area 15.

4. Application fails to comply with Metro Plan Policy A.25.

Metro Plan Policy A.25 states:

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

To comply with this policy, the requested zone change to R-2/SR must “increase the stability and quality of older residential neighborhoods”, in this case, Area 15 of the Jefferson neighborhood.

As described in section III, above, Area 15 is zoned almost exclusively R-1 and predominantly comprises one- to one-and-a-half story, single-family, detached dwellings on rectangular lots that almost entirely have frontages greater than fifty feet.

The R-2 base zone allows partitioning and structural development that is grossly incompatible with the existing character of the neighborhood and that would destabilize Area 15. R-2 allows lots with less than half the frontage of typical lots in Area 15 and allows residential development two to three times the density of the prevalent R-1 development in the area. The subject lot could potentially be divided into three twenty-foot wide lots and could have at least six dwelling units in contrast to the one or two units found on 93 percent of the residentially developed lots in Area 15. R-2 also allows structures forty-feet<sup>33</sup> or higher within five feet of the adjacent property, a mass and scale that would have substantial negative impacts on adjacent properties, especially those developed as a single-family home or as a single-family home plus a secondary unit.

Eugene Planning staff have documented that R-2 zoning is inherently destabilizing for traditional, grid-pattern, predominantly single-family areas of Eugene’s close-in neighborhoods.

During 2004-2005, the Planning Division conducted the Oregon Department of Transportation “Chambers Revisited” project. As part of this project, staff studied a subarea of the Jefferson Westside Neighborhood that became known as the “Eastside Traditional Neighborhood” or “ETN.” The ETN has a very similar character as Area 15, with the same type of street and alley grid pattern, lot configuration, and existing residential development.

In a briefing to the Eugene Planning Commission, Allen Lowe, the principal planner in charge of the project, stated:

*“Following the Design Preferences Survey ‘results’ meeting with the neighborhood in November 2004, staff and consultants spent the next month discussing and analyzing what we’d seen and heard. Those discussions led to the inescapable and somewhat obvious conclusion that City policies that establish the R-2 Medium Density Residential zoning pattern in the area, and the development standards that accompanied that zoning would, in time, result in the complete transformation of that subarea to a more intensively developed neighborhood. \*\*\**

*It is clear that the maximum allowed density in the R-2 zoning district (28 du/net acre), and the current development regulations that apply to the R-2 zone, will, over time, permit development that will result in fundamental changes to the character of the neighborhood.”<sup>34</sup>*

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<sup>33</sup> The R-2 maximum height is 35 feet to the midpoint of a sloped roof. With typical construction techniques, a forty foot high structure is easily accommodated within this limit.

<sup>34</sup> Attachment I, May 23, 2005 Planning Commission Agenda Item Summary at 3.

We concur with staff's "inescapable" conclusion that unconstrained R-2 zoning would result in the "complete transformation" of the ETN and areas with similar character, such as Area 15. And therefore, a zone change to R-2 – unless constrained in a sufficient manner – would be destabilizing of Area 15 and therefore conflict with Metro Plan Policy A.25.

Applicant fails to address compliance with Policy A.25 entirely, and provides no evidence a zone change to R-2/SR would not be destabilizing and conflict with Metro Plan Policy A.25.

Staff does address compliance with Policy A.25 on page 3 of the June 4 Staff Report. Staff rests their entire argument that a zone change to R-2/SR complies with Policy A.25's requirement to "increase the stability and quality of older residential neighborhoods" on the site review provision:

*"Thus, the proposed zone change is consistent with Policy A.25 in that the proposed R-2/SR zoning will allow the existing use \*\*\* and with future development or redevelopment subject to site plan review that is not otherwise required under existing zoning to facilitate the stability and quality of the surrounding neighborhood in conjunction with planned densities."*

Staff provides no other evidence of how R-2 development of this lot would be constrained so as not to be destabilizing, as described above. Staff explicitly (and incorrectly, we assert) excludes the Jefferson/Far West Refinement Plan Area 15 Policy's requirement for maintaining the character of the area as a mechanism that would assure an upzone to R-2/SR would not be destabilizing. Staff asserts this provision is purely "aspirational in nature."<sup>35</sup>

Staff's assertion the site review criteria and process are by themselves sufficient to assure that future development will increase the stability and quality of the neighborhood, as required by Policy A.25, is fatally flawed for four reasons:

- a) Site review is not required for a partition of a developed property with the /SR overlay.
- b) Site review criteria do not address density or maximum dwellings on a lot.
- c) The site review criteria do not require compliance with Metro Plan policies (including A.25), nor do the criteria include any requirement equivalent to the requirements of Metro Plan Policy A.25.
- d) Building permit criteria do not address compliance with Metro Plan policies (including A.25), nor do the criteria include any requirement equivalent to the requirements of Metro Plan Policy A.25.

Thus, a developed property zoned R-2/SR can be partitioned and further developed or redeveloped with additional or larger structures with no site review requirement that assures such actions will "increase the stability and quality of older residential neighborhoods."

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<sup>35</sup> Staff Report at 4.

Consequently, staff's argument does not satisfy the burden of proof that a zone change to R-2/SR on the subject property complies with Metro Plan Policy A.25, and the application must be denied.

Should the Hearings Official approve the zone change request, however, adequate condition(s) must be imposed on the approval to assure all development complies with Metro Plan Policy A.25 (and all other Metro Plan policies applicable to this zone change request.)

5. The October 31, 2006 version of Jefferson/Far West Refinement Plan's Area 15 policy requires the requested zone change maintain the character of the area.

The first paragraph of the October 31, 2006 version of Jefferson/Far West Refinement Plan's Area 15 policy states:

*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.*

For purposes of analyzing how this policy applies to the current request for a zone change to R-2/SR, the paragraph can be redacted to:

*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 rezoning to \*\*\* R-2 in conjunction with site review.*

This policy first sets out the aspiration to increase residential density – but *only* as can be accomplished while maintaining the character of the area. The policy then provides for a specific way an increase in density can be accomplished while maintaining the character of the area: Allow upzones to R-2 (which has a higher maximum density than the prevailing R-1 zoning in Area 15) but impose site review to constrain allowable development under R-2 so as to maintain the character of the area.

Staff asserts the Area 15 policy imposes absolutely no criteria that a zone change to R-2/SR maintain the character of the area:<sup>36</sup>

*“Staff does not find the remaining policy provisions for subarea to constitute mandatory approval criteria as they are directed to the City and aspirational in nature.”*

This blanket claim that the part of Area 15 policy requiring “maintaining the character of the area” does not provide any limitations on land use actions blatantly disregards the Hearings Official's finding to the contrary in the CI 06-13 appeal decision:

*“Accordingly, the Hearings Official concludes that the planning director erred when he concluded that that portion of the policy does not provide any limitations on applications to which EC 9.9850(17) applies.”<sup>37</sup>*

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<sup>36</sup> Staff Report at 4.

Staff, in support of their erroneous interpretation, have attempted to deconstruct the Area 15 policy in a way that completely separates the sentence containing the “maintaining the character of the area” clause and the sentence allowing rezoning to R-2/SR, and staff ignores specific code provisions that directly tie these two key elements together.<sup>38</sup>

The result of staff’s analysis defies any reasonable reading of the policy as it applies to the current request for a zone change. For if staff’s analysis were

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<sup>37</sup> CI 06-22 Decision at 5.

<sup>38</sup> Essentially, staff’s interpretation depends on the following two conclusions, both of which must be correct for staff’s interpretation to be correct:

a) First, staff contends the sentence containing the “maintaining the character of the area” clause has no relationship to the sentence allowing rezoning to R-2/SR.

This conclusion is wrong for several reasons. First, the simple fact that these two sentences are adjacent in the same paragraph is strong *prima facie* evidence the two sentences *are* related. Otherwise, why would the authors of the policy have put them both in the same paragraph? The authors intent that these two sentences are related is confirmed in the testimony of Ms. Mary Bentsen, Attachment J.

Beyond that, the sentences have an obvious structural relationship, with the first sentence addressing the general case, and the sentence that immediately follows providing a specific instance covered by the general case.

Additional evidence of their close relationship is provided in the remainder of this section of our testimony.

b) Second, staff contends the clause “yet maintaining the character of the area” is strictly subordinate to the aspirational term “explore.” In other words, staff contends the sentence should be read as:

*The City shall explore methods of encouraging an increase in residential density while the City explores maintaining the character of the area.*

This is not, however, a grammatically correct interpretation of the sentence. The sentence contains two clauses of equal weight, which can be restated as:

*The City shall explore methods of encouraging an increase in residential density, and the City shall maintain the character of the area.*

On page 4 of the CI 06-13 Appeal Decision, the Hearings Official correctly noted this equal weight of the two clauses when she found that:

*“The goal of maintaining the character of the area has the same importance as increasing residential density.”*

However, an important point that needs to be clarified is that the second clause of the sentence unequivocally directs the City to maintain the character of the area, whereas the first clause only directs the City to “explore” increasing residential density. So, although the two clauses have equal weight in a grammatical sense, they have different legal import because the first clause (“explore methods ...”) is *aspirational*, whereas the second clause (“maintaining the character...”) is *prescriptive*.

And, thus, even in isolation, the sentence under consideration contains a mandatory approval criterion that certain (if not all) land use actions must maintain the character of the area. And the first clause establishes that the types of land use actions subject to this criterion must at least include actions that may increase residential density, e.g., a zone change from R-1 to R-2/SR, such as the one under consideration here.

correct, the redacted portion of the policy could be distilled to the following equivalent sentence with respect to the current R-2/SR zone change request:

*Rezoning to R-2/SR shall be allowed, and there shall be no requirement for subsequent development under R-2/SR to maintain the character of Area 15.*

Such an interpretation is wholly at odds with the overall thrust of the Jefferson/Far West Refinement Plan and would be inconsistent with numerous sections of that plan and the accompanying Appendix. Staff's interpretation also conflicts with direct testimony of authors of the policy, as well as previous testimony of Eugene Planning Staff and multiple statements by the current applicant.

The record in the appeal of Code Interpretation CI 06-13, which we incorporate in its entirety herein by reference, provides extensive evidence in this regard. Here we recap only a portion of that evidence. (All referenced documents can be found in the CI 06-13 record.)

Ms. Mary Bentsen, one of the Jefferson/Far West Refinement Plan authors, directly contradicts staff's interpretation in her testimony<sup>39</sup>:

*"The code interpretation that 'maintaining the character of the area' is aspirational, not proscriptive, is also inconsistent with the policy's intent.*

*The code interpretation also fails to recognize that the specific purpose of the 'site review' requirement for any upzone to R-2 is to require that any development that occurs on an upzoned parcel maintains the character of the area."*

Ms. Bentsen also confirms the Jefferson/Far West Planning Team's intent for Area 15 policy:

*"The policy that we wrote for subarea 15 was intended to allow a limited, carefully-controlled increase in allowable development beyond what the R-1 'single-family' zoning of that area allowed."*

Furthermore, the record of Planning staff comments and hearings official decisions has numerous instances that contradict staff's current interpretation and support the JWN interpretation.

Within just two years of City Council's adoption of the Jefferson/Far West Refinement Plan, the first zone change application in Area 15 was processed (Berg, Z 84-20). The comments of staff and the hearings official leave no doubt as to their interpretation of the applicable policy, as follows.

Staff notes, page 1-A-3:

*"The following site review concerns [sic<sup>40</sup>] would address the concerns in the plan for maintaining the lower-density residential character of the area."*

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<sup>39</sup> Attachment J.

<sup>40</sup> The intended word was probably "criteria" because a list of criteria follow this statement.

Minutes of public hearing record comments by Planning staff member Terry Jones:

*“Terry Jones stated that the staff had used a Refinement Plan as guidance in this application and that it indicates a site review should be imposed to maintain the character of the area.*

Hearings Official Findings, page 3:

*“As suggested by the Staff, site review has been imposed \*\*\*. Under site review compatibility with existing residential uses can be assured.”*

Staff and the hearings official expressed similar opinions in the Iverson (Z 98-14) zone change application.

Staff Report, page 1-B-5:

*“Staff recommend that Site Review criteria be applied to ensure that future development will not negatively impact the character of the surrounding area \*\*\*.”*

Hearings Official Findings, pages 5 and 6:

*“A Site Review overlay shall be added to the proposed zoning district to address concerns about how increasing the density of development on the subject site will impact the area’s character. \*\*\**

*imposition of the site review requirements on the proposed rezoning will further the intent of the refinement plan to make certain that increased densities are accomplished in a manner that assures neighborhood consistency. \*\*\*”*

*In this instance, the hearings officer finds that site plan review is appropriate to help maintain the character and integrity of the area of the proposed rezoning. \*\*\**

Planning staff again affirmed and applied the interpretation that Area 15 policy requires maintaining the character of the area in the Gresset/Taylor (Z 01-7) and the Taylor (Z 04-19) zone change applications. Staff stated the following finding in the “Taylor” case:

*“Therefore, in the Gresset/Taylor case, the /SR Site Review overlay and a specific site review criterion relating to neighborhood character was imposed to serve as an effective means of ‘maintaining the character of the neighborhood [sic]’ as required by this policy.”*

And finally, even in the Staff Report re the current application, staff asserts:

*“\*\*\* the /SR overlay provides a means to address the policy statement to maintain the character of the surrounding area \*\*\*.”<sup>41</sup>*

As Ms. Bentsen’s testimony and our review of staff and hearings officials’ statements show, there is an unbroken record from the original writing of the policy until the present that shows Area 15 policy is intended to *require* “maintaining the character of the area” and that the specific purpose of the site

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<sup>41</sup> Staff Report at 4.

review requirement is to assure the character of the neighborhood is maintained when a lot is upzoned to the R-2 base zone.

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Applicant also affirms this element of the Area 15 policy on multiple occasions:

*“The overlay district would also address future development considerations by ensuring that future development preserves and is compatible with neighborhood character.”<sup>42</sup>*

*“The refinement plan text in effect at the date the application was submitted contemplated that site review would be a mechanism through which higher density residential development would be evaluated, maintaining the quality of the area.”<sup>43</sup>*

*“As noted, the application would allow higher density development than is currently allowed on the subject property subject to site development limitations intended to carry out the mandate to preserve the residential quality of the neighborhood.”<sup>44</sup>*

Thus, even the applicant acknowledges that the Area 15 policy “mandates” preserving (i.e., maintaining) the neighborhood quality (i.e., character).

But it is not just this overwhelming evidence that demonstrates the correct interpretation of the Area 15 policy. In the specific case at hand – a request for a zone change to R-2/SR – Eugene Code itself clarifies how this policy should be applied.

The purpose of the Area 15 policy requirement for an /SR overlay associated with an R-2 upzone is spelled out in the following section:

**EC 9.4400** *Purpose of /SR Site Review Overlay Zone: The /SR Site Review overlay zone is intended to achieve both of the following:*

- (1) *Maintain or improve the character, integrity, and harmonious development of an area.*

Thus, there can be no question that – even if the policy’s “maintaining the character of the area” clause doesn’t apply to *some* land use actions – the policy undeniably applies to an action that applies the /SR overlay, including the current request for a zone change to R-2/SR.<sup>45</sup>

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<sup>42</sup> Applicant’s Statement at 3.

<sup>43</sup> Applicant’s Statement at 8.

<sup>44</sup> Applicant’s Statement at 10.

<sup>45</sup> As an additional point, even if the “yet maintaining the character” of the area were narrowly construed to constrain only actions covered by the sentence’s other clause – that is, only actions that may increase residential density – it would still apply to an upzone to R-2/SR from R-1 because this action would clearly allow such an increase in density.

(Footnote continued on following page.)

This tight tie-in between the site review overlay and *all* codified elements of a refinement plan's policies is explicitly stated in the EC 9.8440(6) site review criterion, which requires: "The proposal complies with applicable adopted plan policies beginning at EC 9.9500."

Thus staff's assertion that the "maintaining the character of the area" clause has no bearing on the current application directly conflicts with Eugene Code itself.<sup>46</sup>

In summary, this application for a zone change to R-2/SR must comply with the Jefferson/Far West Refinement Plan's Area 15 policy requirement to maintain the character of the area.

6. The application fails to maintain the character of the area.

Applicant and staff rely entirely on the /SR overlay to demonstrate the requested zone change complies with the Jefferson/Far West Refinement Plan's Area 15 policy requirement to maintain the character of the area.

And yet, neither applicant nor staff address how a lot partition, which is the stated purpose of this zone change request, would maintain the character of the area. As mentioned earlier, a lot partition of the subject property would not be subject to site review.

Even if a lot partition were not a feature of this application, the fact that a zone change to R-2 for the subject property would allow such a partition must be considered when determining whether site review alone is adequate to assure development under R-2/SR will maintain the character of the area.

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On a further note, in the CU 06-13 appeal decision (at 5), the Hearings Official found:  
*"While not imposing a definitive approval standard, it can be read to provide a gloss for subjective approval standards such as EC 9.8440(1) (site plan is "generally [sic] compatible" with surrounding properties.) Accordingly, the Hearings Official concludes that the planning director erred when he concluded that that portion of the policy does not provide any limitations on applications to which EC 9.9850(17) applies."*

We agree that EC 9.9850(17) ("maintaining the character of [Area 15]") is a subjective approval standard that requires relevant data and thorough analysis and is not as black-and-white as a clear-and-objective standard such as maximum building height. We also believe this standard clearly applies to a zone change evaluation for the reasons stated in this testimony.

It's important to note that, although the EC 9.9850(17) standard ("maintaining the character of [Area 15]") and the EC 9.8440(1) standard ("reasonably compatible with surrounding properties") are both subjective, the former is a significantly stronger requirement than the latter. We believe the stronger EC 9.9850(17) standard must be met by the current application based on the direct language of the EC 9.8865(2) approval criterion.

<sup>46</sup> In CI 06-13 (and repeated in their current report), staff has also claimed that the subject sentence is "directed at the City, not potential applicants." This is an inconsequential distinction, if a distinction at all. When the City is required to "maintain the character of the area," the City cannot approve land use actions that would fail to maintain the character of Area 15. Thus, whether directed at the City or at future applicants, applicants still must satisfy the requirement.

Nor have applicant or staff adequately addressed how potential development of the subject lot to the maximum density allowed by R-2/SR (i.e., six dwelling units) would comply with the Jefferson/Far West Refinement Plan's Area 15 policy requirement to maintain the character of the area. Again, applicant and staff rely almost entirely on site review, which is wholly inadequate because the site review criteria do not explicitly address density or the number of dwellings on the lot.

To the degree applicant has attempted to provide data in support of compliance, applicant uses invalid data that ignores over half the lots and development in Area 15 and that improperly includes substantial data from an area outside Area 15.<sup>47</sup>

Therefore, applicant (and staff) have failed to meet the burden of proof to demonstrate the application complies with Jefferson/Far West Refinement Plan's Area 15 policy, and thus the application fails to satisfy criterion EC 9.8865(2) and must be denied.

If the application is approved, then sufficient condition(s) must be imposed to require all development, including partitions, comply with applicable refinement plan policies. Explicit condition(s) of approval are particularly important in this case because the Planning Director has asserted in his decision in CI 06- 13 (and again in this case) that the Area 15 requirement for "maintaining the character of the area" is purely aspirational and would therefore have no relevance in the evaluation of a site review (or any other) application for development.

## **V. ALTERNATIVES FOR IMPOSING CONDITIONS ON APPROVAL OF THE APPLICATION.**

The EC 9.8865 Zone Change Approval Criteria states:

*Approval of a zone change application, including the designation of an overlay zone, shall not be approved unless it meets all the following criteria \*\*\*\**

This appears to rule out the possibility of approving a zone change application with conditions, despite the fact that EC 9.7330 (Decision) authorizes the Hearings Official to "approve with conditions" a Type III application.

We therefore believe the application must be denied on a number of grounds because it does not meet all the EC 9.8865 criteria.

Applicant appears to agree with our position:

*"This zone change shall be either approved or denied based on compliance with the zone change approval criteria set forth EC 9.8856 [sic]."*<sup>48</sup>

However, if the Hearings Official believes EC 9.7330 provides authority to approve the application with conditions, and the Hearings Official decides to

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<sup>47</sup> Applicant's Statement at 10 and 12.

<sup>48</sup> Applicant's Statement 3. Applicant has transposed the relevant Eugene Code section, which is actually EC 9.8865.

exercise that alternative, we urge that imposed conditions be carefully stated so they cover all forms of development, including division of the lot.

EC 9.7330 provides no further direction regarding how conditions may be structured, nor does EC 9.7330 limit what type of conditions may be imposed.

One of the alternatives is to add “additional specific factors” to the site review criteria as part of approving the /SR overlay. The site review process provides for such additional factors in EC 9.8440 (7): “*Any additional specific factors applied at the time the /SR designation was applied.*”

However, while we believe additional site review criteria could provide an appropriate option to cover certain kinds of structural development, including the number of dwellings on the lot, we have concerns that other development, such as partitioning the lot, would not be adequately covered by site review criteria because the site review process would not be required for such development. We urge the Hearings Official to consider these gaps in the site review process before relying on it as the exclusive remedy.

## **VI. MISCELLANEOUS.**

### **A. Consistency of current Metro Plan and Jefferson/Far West Refinement Plan.**

Applicant asserts that the March 12, 2007 Council ordinance “implicitly” recognizes the current refinement plan LDR designation is inconsistent with the Metro Plan. This is wrong. The same ordinance amended the Metro Plan diagram to designate the area as LDR, as well.<sup>49</sup>

### **B. City Growth Management goals.**

Applicant discusses compliance with Eugene Growth Management Policies; however, these policies are not legal criteria for evaluating land use applications.<sup>50</sup> It’s worth noting that Policy 6 explicitly requires “maintaining the character and livability of individual neighborhoods.”

## **VII. CONCLUSION**

The preceding testimony has established the following points:

- Applicant failed to satisfy ORS 197.178(3) requirements to “fix the goal posts” for the following reasons:
  - Supplemental information was submitted more than 180 days after the date the application was first submitted.
  - Applicant failed to satisfy ORS 197.178(3) requirements to “fix the goal posts” by not submitting all requested information.
- Under the April 24, 2007 versions of the Metro Plan and Jefferson/Far West Refinement Plan, application fails to satisfy EC 9.8865 (1) and (2) because the requested R-2 base zone conflicts with the Metro Plan and refinement plan designations of the subject lot as “Low Density Residential.”

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<sup>49</sup> Applicant’s Statement at 7.

<sup>50</sup> Applicant’s Statement at 11-12.

- Under the October 31, 2006 and April 24, 2007 versions of the Metro Plan and Jefferson/Far West Refinement Plan, application fails to satisfy EC 9.8865(1) and (2) for the following reasons:
  - Applicant provides no evidence a potential lot partition, which is also a development feature included in the application, complies with Metro Plan Policy A.25 and Jefferson/Far West Refinement Plan's Area 15 policy.
  - Application fails to comply with Metro Plan Policy A.25 because site review is an insufficient mechanism to assure all potential development under R-2/SR will "increase the stability and quality of older residential neighborhoods." Applicant has also used inappropriate data in support of applicant's claim of compliance with Metro Plan Policy A.13.
  - Application fails to comply with Jefferson/Far West Refinement Plan's Area 15 policy because site review is an insufficient mechanism to assure all potential development under R-2/SR will "maintain the character of the area." Applicant has also used inappropriate data in support of applicant's claim of compliance with Jefferson/Far West Refinement Plan Residential Policy 3.0 and the Area 15 policy.
- The following conditions should be imposed if the application is approved:
  - The lot may not be divided.
  - Sufficient condition(s) to assure all development, including partitions (if allowed), complies with Metro Plan Policy A.25 (and all other Metro Plan policies applicable to development of this lot).
  - Sufficient condition(s) to assure all development, including partitions (if allowed), complies with Jefferson/Far West Refinement Plan's Area 15 policy (and all other refinement plan policies applicable to development of this lot).

Respectfully submitted this 13th day of June, 2007.

**Jefferson Westside Neighbors**




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Rene Kane  
**Chair**




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Paul T. Conte  
**Treasurer**

## ATTACHMENTS

- A. Area 15 Existing Development, February 20, 2007
- B. Original application (Z 06-10), May 12, 2006
- C. Zone Change Completeness Review Form, prepared by Shawna Adams, June 6, 2006
- D. Incomplete LUA Time Line Extension, June 13, 2006
- E. E-mail with copy of October 31, 2006 e-mail from Susannah Meininger to Shawna Adams
- F. Resubmitted application (Z 06-22), October 31, 2006
- G. Zone Change Completeness Review Form, prepared by Shawna Adams, November 28, 2006
- H. Fee payment receipt for resubmitted application, October 31, 2006
- I. Planning Commission Agenda Item Summary, May 23, 2005
- J. Testimony of Ms. Mary Bentsen