

August 18, 2021

**VIA E-MAIL AND REGULAR MAIL**

Mayor Vinis and City Manager Sarah Medary  
Eugene City Hall  
101 West 10th Avenue, 2nd Floor  
Eugene, OR 97401

City file CA 18-1 – Code Amendments addressing ADUs

Dear Mayor Vinis and Manager Medary:

I want to first thank you for setting in motion a process to allow my client, Paul Conte, and the Jefferson Westside Neighbors (collectively, JWN) to meet with City staff to work on a proposal that satisfies the City's legal obligations and stays true to the vision that created the S-JW Jefferson Westside Special Area Zone (the S-JW Zone). I know that everyone has done a lot of work on this complex issue, but I believe that a resolution is in reach that would satisfy everyone.

I want to take this opportunity to reinforce several points that have been made in the past; I think the most helpful summary of those points can be found in my letter dated July 8, 2021, a copy of which is enclosed with this letter. However, there are some additional points that should be considered in this process.

**The JWN Proposal Complies with All Applicable Laws.**

First, I want to note that I have reviewed the most recent JWN proposal, dated August 10, 2021, which Ted Coopman provided to the Planning Director on August 11, 2021. In my review, I believe that the proposal conforms to all legal standards, including the ADU laws passed by the legislation, as well as the interpretations made of those laws by both LUBA and the Court of Appeals. Moreover, the JWN proposal is consistent with the *Metro Plan's* "Medium Density Residential" designation, regardless of whether or not accessory dwellings

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are counted. I do not believe that is the case with the most recent City proposal that I have seen. Finally, the JWN proposal is also supported in findings by the density analysis and the adopted findings for Ordinance No. 20449, which created the S-JW Zone.

**The JWN Proposal Meets the Council's Direction and Is Supported by the JWN.**

To implement zoning amendments, it is important to get buy-in from all stakeholders. In this case, the JWN proposal has the full support of the JWN, the City-chartered neighborhood association that has been intimately involved in charting its own course. Importantly, the JWN proposal not only has the support of the JWN, but is fully consistent with the direction provided by the City Council when this process began in 2018.

**The JWN Proposal Does not Require Additional Measure 56 Notice.**

Current City code allows persons who own lots in the S-JW Zone that are sized between 4,500 and 8,999 square feet to build two dwellings. That is exactly what they will be allowed to do after the City adopts JWN's proposal. The purpose of this process is to bring the City's code into compliance with the requirements to allow at least one accessory dwelling on every lot that allows single-family dwellings. The City already had met that requirement in the S-JW Zone for lots in the 4,500 to 8,999 square foot range and the JWN proposal makes no changes that would require Measure 56 notice.

Measure 56, which can be found at ORS 227.186, requires notice whenever a city "Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone." As the Court of Appeals held in *Friends of Yamhill County v. Board of Commissioners*, 298 Or App 241, 446 P3d 548, *rev den*, 365 Or 769, 453 P3d 553 (2019), a subdivision is not a "use" of land and, therefore, limitations on dividing land would not be subject to Measure 56. Similarly, a balance revision to parking requirements is not subject to Measure 56.

**The JWN Proposal Is Within the Scope of the Council's Direction.**

Finally, the JWN proposal stays within the scope of the remand. To start, it is worth noting that the City may, in fact, expand the scope of a proceeding beyond just the issues that were remanded by LUBA. *Schatz v. City of Jacksonville*, 113

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Or App 675, 680, 835 P2d 923 (1992). There is nothing problematic in doing so. In this case, the staff proposal went so far as replacing all of the S-JW Zone lot and development standards for accessory dwellings with an entirely new set of standards.<sup>1</sup> If that is “within the scope” of the remand, then it seems clear that the changes in the JWN proposal would be as well.

**Conclusion.**

There is a solution that will comply state law, address the specific situation in the S-JW Zone, and meet the requirements of City staff, and it is not far away. With a little effort by both the City and the JWN we can reach it and my client looks forward to getting there with City staff.

Very truly yours,



William Kabeiseman

Wkk:wkk

cc: Client

Emily Jerome (at [EJerome@eugene-or.gov](mailto:EJerome@eugene-or.gov))

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<sup>1</sup> It is a little ironic that staff has indicated that it would prefer one consistent set of standards for ADUs for the entire city, but the staff proposal would apply standards that were developed for the very specific situation in the area around the University of Oregon.

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Mayor Vinis and Eugene City Council  
Eugene City Hall  
101 West 10th Avenue, 2nd Floor  
Eugene, OR 97401  
Email: MayorCouncilandCityManager@eugene-or.gov

RE: City file CA 18-1 – Code Amendments addressing ADUs

Dear Mayor Vinis and Councilors:

I write this letter to follow up on the material that you received earlier this week from Ted Coopman, Chair of the Jefferson Westside Neighbors (JWN). I urge you to avoid additional appeals and adopt the alternative put forward by Mr. Coopman in his e-mail dated July 7, 2021. I believe that the JWN proposal is consistent with all legislation and LUBA decisions and would best thread the needle to ensure Eugene's code is legal and protects the City's neighborhoods.

I want to begin by noting that I have been practicing land use law for over 20 years and, over that period, I have had significant experience with city and county land use codes and the process of amending those codes. One thing that I have learned is that, without public buy-in, without the support of those subject to the regulations, things quickly go awry. I begin with this observation because of the S-JW Jefferson Westside Special Area Zone (the S-JW Zone). The S-JW Zone is an innovative and successful zone that addresses and responds to the specific circumstances in the area and provides real flexibility for additional density and housing types in ways that the rest of the state is only now catching up to.

More importantly, the S-JW Zone was the result of extensive public engagement and collaboration on the part of City staff, area residents, and the City Council itself. That effort resulted in a unanimous recommendation by the Eugene

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Planning Commission and unanimous approval by the City Council. Notably, the Home Builders of Lane County testified in full support of the S-JW Zone and, unlike the history of the ADU code amendments, there were no appeals.

The S-JW Zone is an innovative and effective special district that continues to work well for the City and its residents. In response to subsequent dictates by the Legislature regarding accessory dwellings, the Jefferson Westside Neighbors initiated good-faith efforts to make required revisions to the S-JW Zone. Despite the Planning Division staff's rebuffing the JWN invitation for genuine collaboration, the JWN has provided the City Council with an exceptionally well-crafted set of amendments to the S-JW Zone. This is the type of citizen buy-in that the current City Council should welcome, but such a constructive attitude by citizens is easy to lose and difficult to re-create. The City should think carefully before deciding to approve a staff proposal that would rip apart the careful contours of the S-JW Zone.

The following sections provide corrections and clarifications on key matters of law that have not always been properly asserted by the city planner.

**Allowing Four Residences on a Standard Lot in the S-JW Zone Would Conflict with the Comprehensive Plan.**

As noted above, the JWN's proposal to amend the S-JW Zone is consistent with state law and accomplishes everything the City set out to accomplish when it undertook this process several years – and several appeals – ago. The staff proposal, however, would almost certainly engender another appeal from my client and other persons interested in keeping the S-JW Zone true to its adopted purpose as set forth in EC 9.3600:

**Purpose of S-JW Jefferson Westside Special Area Zone.**

“The overarching purpose of the S-JW zone is to prevent residential infill that would significantly diminish, and to encourage residential infill that would enhance the stability, quality, positive character, livability and natural resources of the encompassed residential areas.”

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The most important issue with staff's proposal is its allowance of up to two detached one-family dwellings and two ADUs – thus a total of four dwellings – on a single lot that is between 4,500 and 8,999 square feet.

This proposal would unnecessarily double the number of dwellings allowed on these lots, which in no way is required by state statutes or case law. There is no question that the City could take a number of different paths to accomplish the requirements of state law, but this element of the staff proposal simply is not required; and, more importantly, adopting this amendment would make the S-JW Zone inconsistent with the maximum density designated in the comprehensive plan. Staff's dubious attempt to circumvent the plan policy is to simply not count accessory dwellings in determining density maximums. However, there is no legal basis at all for not counting an accessory dwelling as a "dwelling" in legal contexts outside the land use code, including building standards, fire code, and – most importantly in this case – the comprehensive plan residential density designations of the subject area, which is mostly "Medium Density Residential," with a portion designated as "Low Density Residential."

To put it bluntly – the staff code amendments are not consistent with the comprehensive plan. Consequently, should the City Council adopt staff's plan, the ordinance would inevitably be appealed – and almost certainly remanded – yet again.

**The JWN Proposal Presents No Measure 56 Implications.**

The JWN proposal does not have any Measure 56 implications or require re-noticing. At this point, City code allows persons who own lots in the S-JW Zone that are sized between 4,500 and 8,999 square feet to build two dwellings. That is exactly what they will be allowed to do after the City adopts the JWN's proposal. The purpose of this process is to bring the City's code into compliance with the requirements to allow at least one accessory dwelling on every lot that allows single-family dwellings. The City already had met that requirement in the S-JW Zone for lots in the 4,500 to 8,999 square foot range, and nothing changes that would require Measure 56 notice. Mr. Coopman has provided the City Council with a comprehensive comparison that disposes of any evidence of that the proposed JWN amendments would require Measure 56 notification. This issue is entirely a "straw man" without merit.

**The Use of Maximum Bedroom Counts is Permissible Under the Statutes and Case Law.**

In some of staff's statements, staff has intimated that any limitation that counts bedrooms could be problematic, as it may be a standard that is not related to siting or design. In the first place, limitations on the number of bedrooms relates to the "design" of any dwelling type, including accessory dwellings. In any case, the City staff themselves seem to believe that such an approach is workable. In particular, staff's "Alternative B," which was provided to Council last week, also explicitly used "maximum bedrooms" to regulate accessory dwellings in their proposed EC 9.2751 amendments, which are explicitly incorporated into the staff proposed amendments for the S-JW Zone at EC 9.3625(1)(b). In short, there is no prohibition against the use of the number of bedrooms as part of the regulation of the design of accessory dwellings.

**The Scope of the ADU Ordinance Does not Restrict any of the JWN proposed amendments.**

Finally, staff has suggested that JWN's proposal goes beyond the scope of this ordinance in two ways: (a) by removing a limited provision to allow on-street parking to count towards a one space per dwelling requirement, and (b) by removing the (unique to the S-JW Zone among all zones) ability "by right" to create "alley access" lots and small lots. According to staff, these changes would require a separate ordinance because such changes are not within the scope of LUBA's remand and because of Measure 56 notice requirements. These assertions are simply untrue.

The JWN proposal would eliminate the requirement for any off-street parking for accessory dwellings, as required by statute.<sup>1</sup> This would apply even to cases where the JWN proposal would allow two or more accessory dwellings on the same lot. Because the JWN proposal now makes second dwellings explicitly "accessory dwellings," in almost all cases, second dwellings will have no parking requirement. This provides more flexibility than the current code, and removing the prior approach simply avoids "doubling up" the parking waivers. Such an integrated

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<sup>1</sup> As noted on page 5 of the memorandum from Emily Jerome and Jeff Gepper created for the July 12, 2021, work session, on June 30, 2019, the state legislature changed state law to prohibit a city from requiring off-street parking for accessory dwellings.

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approach to implementing compliance with the statutes is obviously related to the remand – in which LUBA specifically required the City to address the S-JW Zone’s parking standards.

Similarly, the S-JW Zone was far ahead of the rest of the City and the State in allowing lot divisions to create what in other zones would not be allowed by right. The research and adopted findings in Ordinance No. 20449 address the reason alley access only lots and small lots are sustainable only with limitations on development, most importantly by allowing only one dwelling on each lot. The legislative dictate creates a potential for unsustainable development and higher-pedestrian risk by mandating that a second dwelling be allowed on these lots. Removing the creation of these lots is necessary to conform to the S-JW Zone’s supporting findings and is perfectly within scope.

Measure 56 requires additional notice when a proposal “limits or prohibits land uses previously allowed” in a zone. As the Court of Appeals held in *Friends of Yamhill County v. Board of Commissioners*, 298 Or App 241, 446 P3d 548, *rev den*, 365 Or 769, 453 P3d 553 (2019), a subdivision is not a “use” of land and, therefore, limitations on dividing land would not be subject to Measure 56. Similarly, a balanced revision to parking requirements is not subject to Measure 56.

More importantly, the changes envisioned by the City, whether under staff’s proposal or the JWN’s proposal, would have significant impacts on the properties subject to this ordinance, and all that the JWN’s proposal does is ensure that the changes adopted by the City remain consistent with the adopted findings for, and purposes of the S-JW Zone, as well as all applicable plan policies. There would be no requirement for additional notice and the changes in the JWN’s proposal are fully within the scope of the remand.

### **Conclusion.**

Eugene has been at the forefront of incorporating accessory dwellings into its code, and the S-JW Zone represented the City’s greatest expansion in that regard. Nonetheless, the City has paid a price recently through the numerous appeals and ongoing disputes about the R-1 Zone’s accessory dwelling standards. In contrast, there has been only one appeal finding regarding an S-JW Zone, and that was by LUBA to merely “clarify” the S-JW Zone’s parking requirements.



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There is no legal or rational basis for the city staff's overreach in their proposed *de facto* upzoning of the S-JW Zone (and the S-C Chambers Special Area Zone) to a *high-density* zone.

The City Council has a straightforward path to avoid exacerbating the disputes over accessory dwelling units by adopting the JWN proposal, and I urge you to do so.

Very truly yours,



William Kabeiseman

Wkk:kms

cc: Client

Emily Jerome (at [EJerome@eugene-or.gov](mailto:EJerome@eugene-or.gov))