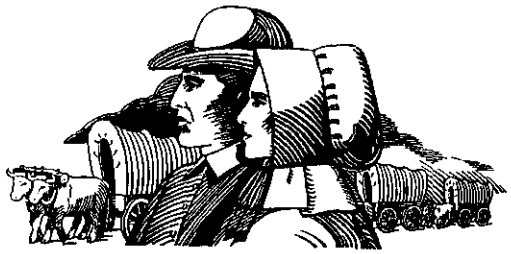
CITY OF OREGON CITY

PLANNING COMMISSION

320 WARNER MILNE ROAD OREGON CITY, OREGON 97045
TEL 657-0891 FAX 657-7892



AGENDA

City Commission Chambers - City Hall
August 27, 2001 at 7:00 P.M.

PLANNING COMMISSION MEETING

7:00 p.m. 1. **CALL TO ORDER**

7:05 p.m. 2. **PUBLIC COMMENT ON ITEMS NOT LISTED ON AGENDA**

7:10 p.m. 3. **APPROVAL OF MINUTES:** *July 23, 2001*

7:15 p.m. 4 **HEARINGS:**

VR 99-07 Remand of **LUBA 2000-125/ City AP 00-03/** James McKnight / 161 Barclay Avenue/ Clackamas County Map # 2-2E-31DC, Tax Lot 5400; Variance to allow a reduction in the lot depth from 100 feet to 80 feet.

7:45 p.m. **CU 01-02;** City of Oregon City; Conditional Use for the creation of a new Amtrak station and parking lot; 1799 Washington Street, Clackamas County Map 2-2E-29, Tax Lot 1402 *(Materials Mailed Separately)*

8:15 p.m. **OLD BUSINESS**

8:20 p.m. 5. **NEW BUSINESS**

A. Staff Communications to the Commission

8:25 p.m. **B. Comments by Commissioners**

8:30 p.m. 6. **ADJOURN**

NOTE: HEARING TIMES AS NOTED ABOVE ARE TENTATIVE. FOR SPECIAL ASSISTANCE DUE TO DISABILITY, PLEASE CALL CITY HALL, 657-0891, 48 HOURS PRIOR TO MEETING DATE.

DRAFT

CITY OF OREGON CITY
PLANNING COMMISSION MINUTES
July 23, 2001

COMMISSIONERS PRESENT
Chairperson Carter
Commissioner Bailey
Commissioner Main
Commissioner Mengelberg
Commissioner Orzen

STAFF PRESENT
Maggie Collins, Senior Planning Manager
William Kabeiseman, City Attorney
Jonathan Kahnoski, Recording Secretary

1. CALL TO ORDER

Chairperson Carter called the meeting to order.

2. PUBLIC COMMENT ON ITEMS NOT LISTED ON AGENDA

None.

3. APPROVAL OF MINUTES: None

4. PUBLIC HEARINGS

Chairperson Carter reviewed the public hearing process and stated the time limitations for the speakers in the public hearing. **Chairperson Carter** asked if any Commissioner had visited the sites or had a conflict of interest.

OPEN OF PUBLIC HEARING (Legislative)

A. AN 01-03/ Harold Schultz/ 1721 Penn Lane/ Clackamas County Map #2-2E-32DC, Tax Lot 500; Annexation into the City of Oregon City.

STAFF REPORT

Maggie Collins presented the staff report, noting Staff recommends the Planning Commission approve, by passage of a motion, the applicant's request for a continuance to date uncertain, but before the March, 2002, election.

Chairperson Carter asked by when, at the latest, would the Commission have to hear the applicant's proposal for annexation so that it could be on the March ballot. **Ms. Collins** replied no later than the Commission's meeting in late November or its first meeting in December.

TESTIMONY IN FAVOR

None.

TESTIMONY IN OPPOSITION

None.

CLOSE OF PUBLIC HEARING

DELIBERATION BY COMMISSIONERS

Commissioner Bailey moved to continue the hearing on AN 01-03 to date uncertain but in time to meet the March 2002 ballot. **Commissioner Orzen** seconded.

Ayes: Bailey, Main, Mengelberg, Orzen, Carter; Nays: None.

B. VR 99-07 Remand of LUBA 2000-125/ City AP 00-03/ James McKnight/161 Barclay Avenue/Clackamas County Map # 2-2E-31DC, Tax Lot 5400/ Variance to allow a reduction in the lot depth from 100 feet to 80 feet.

STAFF REPORT

Maggie Collins reviewed a memo from her to the Planning Commission dated July 23, 2001 that summarized the history of VR 99-07. She noted a correction in the date the Planning Commission denied the variance request – it should be 5/8/00. She highlighted item number 3 limiting the Commission's consideration to only factors (C) and (F) of the City's variance criteria (Chapter 17.56.040), and item number 4 defining the Commission's role as one to determine, based upon the evidence, whether or not the two factors have been met.

William Kabeiseman reiterated the task before the Planning Commission to determine whether or not factors (C) and (F) have been met. Mr. Kabeiseman addressed several procedural objections that had been raised. He stated that the important consideration for the Planning Commission is to protect all the various participants' procedural rights, balancing the right of the applicant to a timely decision with the right of others to an opportunity to enter their evidence into the record. He offered three options: 1) find that

the seven-day notice period is sufficient, 2) open the public hearing tonight to allow additional evidence to be presented, and 3) open the public hearing but continue it to a later date to allow the submission of additional evidence and rebuttal.

Chairperson Carter asked when the notice for this hearing was mailed. Mr. Kabeiseman stated the notice was mailed July 16th. **Chairperson Carter** asked the Commissioners if they wanted to decide the issue this evening or open the public hearing and hear evidence but keep the record open to a later date. **Mr. Kabeiseman** pointed out that the applicant had not, to date, asserted his right to have a decision within 90 days of the remand. **Ms. Collins** stated that all interested parties were sent the appropriate notice with the required seven days notice.

Linda Lord, 142 Holmes Lane, Oregon City, OR 97045.

Ms. Lord spoke in favor of allowing additional time. She pointed out that the notice they received consisted only of a copy of the Agenda, but did not explain that the information record would be re-opened. She said that only in the last few days did she learn that the factual record was to be re-opened, and cited several areas of additional evidence that she had been pursuing since. **Commissioner Bailey** asked if the factual record was, indeed, being re-opened. **Mr. Kabeiseman** explained that the City Commission, at its meeting of May 16, 2001, was presented with three courses of action. He said the City Commission chose to remand the matter to the Planning Commission for additional fact finding. He said that the traditional process has been for the Planning Commission to be the fact-finding agency.

Chairperson Carter asked Ms. Lord that, if the hearing were continued for a month, would she be willing to abide by the Commission's findings. **Ms. Lord** said she would agree that there had been no procedural error having to do with proper notice and that she would make no appeal of any decision based upon a public notice procedural error.

Jill Long, 101 SW Main, 15th Floor, Portland, OR 97204, representing the applicants, James and Diane McKnight.

Ms. Long said that the applicants deliberately have not exercised their right to a decision within 90 days in an attempt to work with the City, but she cautioned that they are finding that the process is taking too long. She said that the applicants will object strenuously to the evidence discussed by Ms. Lord because that evidence is not relevant to the two specific factors (C) and (F) that the City Commission remanded to the Planning Commission.

Chairperson Carter asked Mr. Kabeiseman how much time the Planning Department Staff is devoting to providing documents to Ms. Long, and whether or not there is a conflict of interest in processing an application and, at the same time, providing assistance to opponents of that application. **Mr. Kabeiseman** said that the simple

providing of public records is not a conflict of interest; in fact it is the obligation of the City to provide access to public records. He said that, so long as the Staff is not actively assisting someone by pointing out where they should look for information or by advising what would make a good argument, there is no conflict of interest. **Ms. Collins** estimated that it would require about twelve hours work to complete the research for Ms. Lord. She said that they would be charging for staff time expended.

TESTIMONY IN FAVOR

None.

TESTIMONY IN OPPOSITION

None.

CLOSE OF PUBLIC HEARING

DELIBERATION BY COMMISSIONERS

Chairperson Carter stated that her preference is to proceed with this matter, but agreed that, to insure fairness to all parties, the Commission had no choice but to continue the matter to a date certain of not more than a month.

Commissioner Main moved to continue the public hearing of VR 99-07 to date certain August 27, 2001. Testimony and argument will be limited to the second prong of factor (C) and factor (F). **Commissioner Bailey** seconded.

Ayes: Bailey, Main, Mengelberg, Orzen, Carter; Nays: None.

5. OLD BUSINESS

None.

6. NEW BUSINESS

A. Staff Communication to the Commission

Maggie Collins discussed two articles presented to the Commissioners. The first is an Executive Summary of Complete Communities for Clackamas County. The second is an article from the Tulane Environmental Law Journal: Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement.

Ms. Collins stated that Staff had conducted interviews for the Assistant Planner position with some very qualified candidates. She said Barbara Shields last day was Friday, July 20th. She said two consulting planners are working in the Planning Division.

B. Comments by the Commissioners

Commissioner Mengelberg said she had received from Metro an announcement of speakers' forum to discuss general planning, urban growth boundary, open space, and transportation issues.

Commissioner Bailey expressed his appreciation for receiving a copy Oregon Secretary of State Bradbury's schedule.

Commission Orzen asked Ms. Collins if there was any news concerning the Charter Review Committee. **Ms. Collins** said that there had been no new information. She said interested persons would be notified directly when that Committee begins its work.

Chairperson Carter stated that the next Oregon City Chamber of Commerce meeting, Toast and Topics, is July 27th. She said the topic concerns urban renewal.

7. ADJOURN

All Commissioners agreed to adjourn.

Linda Carter, Planning Commission Chairperson

Maggie Collins, Planning Manager

OREGON CTIY
PLANNING DIVISION

Memo

To: PLANNING COMMISSION

From: Maggie Collins, Planning Manager

CC: Planning Staff

Date: 08/20/01

Re: Supplemental Material Information Remand of VR 99-07

A. At the request of Planning Commissioners, Staff has included:

- The original Staff Report of VR 99-07
- The Planning Commission findings adopted on May 8, 2000.

B. The material entered into the record by Linda Lord at the July 23, 2001 Planning Commission meeting is available from Staff should you need another copy.

Vol2H/Wd/Maggie/PCMemo8-20-01

CITY OF OREGON CITY

PLANNING COMMISSION

320 WARNER MILNE ROAD OREGON CITY, OREGON 97045
TEL 657-0891 FAX 657-7892

STAFF REPORT
Date: April 10, 2000

Complete: 2/24/2000
120 Day: 6/23/2000

FILE NO.: VR 99-07

FILE TYPE: Quasi - Judicial

HEARING DATE: April 10, 2000
7:00 p.m., City Hall
320 Warner Milne Road
Oregon City, OR 97045

APPLICANT/OWNER: James McKnight
161 Barclay Avenue
Oregon City, Oregon 97045

REQUEST: Variance to allow a reduction in the lot depth for Tax Lot 5400 from 100 feet to 80 feet (+/-) to allow a future land partition.

LOCATION: 161 Barclay Avenue, Oregon City 97045. Approximately 200 feet east of the intersection of Barclay and Brighton Street. Clackamas County Map Number 2-2E-31DC, Tax Lot 5400.

SUMMARY OF RECOMMENDATION: Deny the request.

REVIEWERS: Paul Espe, Associate Planner

VICINITY MAP: See Exhibit A

BACKGROUND:

A lot line adjustment was filed and approved by the City of Oregon City on April 1, 1991 which conveyed approximately 6,800 square feet of property from Tax Lot 5500 to 5400 owned by the applicant (See Exhibit H). The property was purchased from Mr. Al Bittner through a statutory warranty deed recorded with the County Clerk Recorder's office in April 30, 1991. A record of survey for the lot line adjustment was not recorded with the County Surveyor's office because a recording of survey documents was not required under County Ordinances until 1994.

The property was conveyed from Mr. Bittner to Mr. McKnight so that it could be combined and subsequently partitioned under the 1994 subdivision ordinance, which allows a 60-foot depth and/or width. (See OCMC 16.20.080, 1994; Exhibit F).

A pre-application conference was held on August 5, 1998 where the applicant was informed that the City was making some changes to the Subdivision Ordinance but was told the changes being proposed would not affect the partition request. Contrary to that statement, Section 16.28.080 (1994) was removed when the new subdivision ordinance was adopted in October of 1998 which automatically required all partitions and subdivisions to follow the dimensional standards of the underlying zone.

The applicant was informed in a subsequent pre-application conference on June 24, 1999, that in order to actually partition the property, a variance to the existing lot size requirements is required and is the reason that this request is before the Planning Commission at this time.

BASIC FACTS:

1. The subject lot is located approximately 200 feet east of the intersection of Barclay and Brighton Street. Clackamas County Map Number 2-2E-31DC, Tax Lot 5400. The common address is 161 Barclay Avenue.

2. The property is approximately 23,800 square feet and proposed Lot 1 would be 13,780 square feet in size and several large fir trees are located at the rear portion. The property is zoned R-10, Single-Family Dwelling District and Designated "LR" Low Density Residential in the Comprehensive Plan. The surrounding land uses are zoned R-10 and R-6, Single Family Dwelling District and RD-4 Two Family Dwelling District.

3. The applicant is requesting a variance to allow a reduction in the lot depth for a proposed lot from 100 feet to 80 feet (+/-) to allow a future land partition. This is a 23,800 square foot property that would be divided into two lots of 10,020 square feet (lot 1) and 13,780 square feet (lot 2). (See proposed partition plat Exhibit B). Lot 1 would have frontage and access from Charmin Street, a lot depth of 80 feet and a width of approximately 131 feet. The subject property is located in the Rivercrest Subdivision.

4. Transmittals on this proposal were sent to various City departments, affected agencies and property owners. Comments were received from the Building Official and the Assistant Fire Marshall for Tualatin Valley Fire and Rescue. All agencies indicated that the proposal does not conflict with their interests. (See Exhibits C and D). A petition recommending variance approval signed by five property owners in the vicinity was received on March 20th 2000 (See Exhibit I). In addition, staff received two letters from Linda Lord, 142 Holmes Lane (Exhibits E and J) and another letter from Mark Reagan, 141 Barclay Avenue (Exhibit K). The first letter states that Ms. Lord intends to uphold the residential CC&R's limiting construction to one residential building per lot through civil action; and the second addresses the variance criteria. The letter from Mark Reagan also objects to the proposed variance (See Exhibit L).

OREGON CITY COMPREHENSIVE PLAN CONSISTENCY:

A. Statement in Growth and Urbanization Section: "*It is the City's policy to encourage small lot single-family development in the low density residential areas...*"

B. Community Facilities Policy No. 7: "*Maximum efficiency for existing urban facilities and services will be reinforced by encouraging development at maximum levels permitted in the Comprehensive Plan and through infill of vacant City land*".

DECISION MAKING CRITERIA:

Municipal Code Standards and Requirements:

Chapter	17.60 Variances
	17.10 "R-10", Single-Family Dwelling District

VARIANCE ANALYSIS AND FINDINGS:

The criteria for review of this variance request are found in section 17.60.020 of the City of Oregon City Municipal Code. A variance may be granted only in the event that all of the following conditions exist:

> **Criterion A: That the literal application of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the surrounding area under the provisions of this ordinance; or, extraordinary circumstances apply to the property which do not apply to other properties in the surrounding area, but are unique to the applicant's site.**

To satisfy this criterion, an applicant must demonstrate that they are a right commonly enjoyed by others is being denied, or that there are unique property features that make it extremely difficult or impossible to comply with the criteria that apply to other properties in the City.

The table below contains the substandard properties listed in the applicant's response under Criterion A (See Exhibit B). These are properties that are located in the Rivercrest Subdivision and around the Rivecrest neighborhood defined in the City of Oregon City Neighborhood Associations Map.

Tax Lot	Dimensions	Comment	in Rivercrest Neighborhood *
2-2E-31DC			
6200	100 feet deep	Triangular shape: 100 feet deep at apex of lot	Yes
8000	100 feet deep	Triangular shape: 100 feet deep at apex	Yes
3-2E-6AB			
5300	100 feet deep	Triangular shape < 100 feet	Yes
7700	80 x 83.3	Below standard	Yes
9200	125.5 x 80	Dual frontage through lot rotated orientation	Yes
9300	125 x 80	Rectangular shaped rotated orientation	Yes
3-2E-6AC			
100	80 x 110	Dual frontage rotated orientation	Yes
200	80 x 110	Dual frontage rotated orientation	Yes
1300	75 x 90.52 (Av. Depth)	Irregular shaped substandard lot	Yes
5700	66.5 x 92.05 (Av. Depth)	Irregular shaped substandard lot	Yes
3-2E-6BA			
4500	90 x 85	Substandard lot	No
3-2E-6BB			
3701	97 x 85	Substandard lot	No
3903	92 x 118	Rotated orientation	No
4007	177 x 57.5 x 113.3 x 60 x 60	Polygonal shaped	Yes
4008	130 x 60	Dual frontage, rotated orientation	Yes
4009	120 x 62	Dual frontage, rotated orientation	Yes
3-1E-1DA			
600	42 x100 feet		No
700	53 x 100 feet		No
1500	97 x 74 feet	Substandard lot	No
1800	205 x 37.6 feet	Long substandard lot	No
1900	205 x 37.6 feet	Long substandard lot	No

* The Neighborhood Boundary includes more territory than the subdivision boundary

While the majority of the properties are outside of the Rivercrest Subdivision most of them are still within the Rivercrest Neighborhood. The Planning Commission is left to decide the extent of "*surrounding area*" when considering this standard. Staff finds that the surrounding area can include the Neighborhood Boundary to illustrate the variety of lot sizes to allow for a greater sample size.

In either case, the applicant has failed to demonstrate that the any of the lots provided in the list above were approved by a legal partition or variance after any of the subdivisions in this area were created. While there may be some substandard lots in the surrounding area, the majority of these lots are existing non-conforming or previously existing remnant lots of other land divisions in the Rivercrest Neighborhood. The City has no record that any of these substandard lots were created by a partition or variance request. The applicant is the only person in the Rivercrest Subdivision, *or surrounding area,* who wishes to create a substandard lot through the variance process. The applicant would not be denied a right commonly enjoyed by others if this request was denied.

Moreover, there is nothing unique about the applicant's property that sets it apart from other properties, other than the fact that a lot line adjustment was processed to increase its area. This is not the type of unique circumstance that justifies a variance or satisfies this criterion.

All property owners in Oregon City must comply with the minimum lot depth requirements that apply within the respective zoning districts. Staff finds that the applicant has not presented evidence that demonstrates the applicant will be deprived of rights commonly enjoyed by other property owners.

The literal application of the provisions of this ordinance would not deprive the applicant of rights commonly enjoyed by other properties in the surrounding area under the provisions of this ordinance; and this issue is not unique to the applicant's site, therefore, section 17.60.020(A) cannot be met.

Criterion B: That the variance from the requirements is not likely to cause substantial damage to adjacent properties, by reducing light, air, safe access or other desirable or necessary qualities otherwise protected by this ordinance.

This property has existed in this configuration since the lot line adjustment was approved in 1991. Creation of an additional lot under the proposed dimensions would not cause significant adverse impacts to the surrounding area. The lot orientation would merely be rotated so that the lot depth and width are reversed. This would allow a house to be constructed that would meet and exceed the setback requirements of the R-10 zone (see Exhibit B).

The requested variance to the lot depth would not directly affect or impact the abutting properties. The request does not reduce light, air, safe access or other desirable qualities as protected under the City Code. In light of the existing and proposed surrounding lots, staff concurs with the applicant's finding that approval of a reduced lot depth will not cause substantial damage to adjoining properties.

Therefore, this section 17.60.020(B) can be met.

Criterion C: The applicant's circumstances are not self-imposed or merely constitute a monetary hardship or inconvenience. A self-imposed difficulty will be found if the applicant knew or should have known of the restriction at the time that the site was purchased.

Under this criterion, if a circumstance that gives rise to the need for a variance is self-imposed the variance will not be granted. If an applicant knew or should have known that a standard applies that will preclude a proposed development, the circumstance is self-imposed.

In April 1991, the applicant was informed by City Planning Staff that new parcels created through the partitioning process would be exempt from the minimum average width and depth requirements of various districts. The applicant purchased property from the adjoining parcel to add sufficient area to create second lot at the rear of the property.

On August 5, 1998 the applicant was again informed by City Planning Staff that the new subdivision ordinance would not change previous partitioning rules described under Ch.16.28.080 (1994), (see Exhibit F). Nevertheless, this section was removed from the subdivision and partitioning ordinance when this title was adopted in October of 1998. Removal of this provision automatically required all partitions and subdivisions to follow lot dimension standards of the underlying zone.

On June 4, 1999, the applicant was informed of these changes in the subdivision ordinance and that a variance would be required prior to the processing of this partition.

The Planning Commission must decide if the city has any obligation to allow for hardship under this standard in light of previous pre-application discussions, or if the request is to be evaluated at face value under the current standards.

OCMC 17.50.050 discusses the purpose of pre-application conferences, which are to provide an opportunity for staff to inform the applicant of required approval standards that may affect the proposal. The pre-application discusses those review standards in place at the time, and may not predict future conditions. Any failure by staff to recite all relevant land use requirements shall not constitute a waiver of any standard or requirement by the City. This in turn also relieves the City from entertaining or approving any exceptions to this rule without undergoing the appropriate process.

Clearly, the creation of a lot that is substandard in size is a self-imposed difficulty. Criterion C and the variance process generally apply to previously existing lots that may have a physical constraint, which precludes someone from the full use of the property. Variances to lot size are sometimes granted if they involve a previously existing platted lot of record that is slightly undersized.

The criterion is not met in this case because the applicant failed to partition the lot when the previous partitioning standards were in place. The lack of financial resources or other monetary hardship is not sufficient reasoning for the delay in processing the land division.

Therefore Staff finds that the creation of a substandard lot is a self-imposed difficulty and since the applicant did not file the partition at the time the relevant standards were in place, the circumstances are considered self-imposed and the variance must be denied.

Staff finds that Section 17.60.020(C) is not met.

Criterion D: No practical alternatives have been identified which would accomplish the same purposes and not require a variance.

The submitted evidence fails to explore the option of conveying 20 feet of additional property from the adjacent Tax Lot (TL 5500). Each of the lots along this block are 200 feet deep and the adjacent parcel could provide the required 100 foot lot depth for proposed Parcel 1 without requesting a variance (See Exhibit B). It is for this reason that criterion D cannot be met.

Staff finds that Section 17.60.020(D) is not met.

Criterion E: That the variance requested is the minimum variance, which would alleviate the hardship.

The submitted evidence fails to explore the possibility of conveying any amount of additional property from the adjacent Tax Lot (TL 5500) to reduce the amount of lot depth being varied (see finding under criterion D). The adjacent lot could provide as much as 20 additional feet of property allowing the required 100-foot lot depth to be satisfied thus eliminating the need for a variance entirely. If the adjacent property owner does not wish to convey that quantity of property the possibility of supplying a smaller amount should be explored to minimize the amount of lot depth being varied. It is for this reason that the submitted evidence does not satisfy Criterion E.

Staff finds that section 17.60.020(E) is not met.

Criterion F: That the variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.

This proposal has been found to be consistent with Policy 1 of the Growth and Urbanization section of the Comprehensive Plan which is to provide land use opportunities within the City's Urban Growth Boundary. In addition, development and urban renewal within Oregon City boundaries will decrease the current land use burden on lands within the urban growth boundary and increase available housing within City boundaries, consequences which are found to be consistent with the Comprehensive Plan.

Section 17.60.020(F) is met.

CONCLUSION:

Staff finds that the requested variance does not meet Criterion A, because the evidence submitted to the record failed to prove that the applicant would be deprived of rights commonly enjoyed by others, since none of the substandard lots mentioned in the record were created through the variance process. Moreover, the submitted evidence did not prove that unique circumstances apply to this property.

The submitted information does not meet Criterion C because the creation of a substandard lot through the partitioning process was found to be a self-imposed hardship. Finally, In order to meet Criterion D and E the applicant needs to explore alternatives to the requested variance through the provision of additional territory from Tax Lot 5500. By adding more lot area to the subject parcel the applicant may reduce the amount of lot depth being varied or eliminate the need for a variance entirely.

RECOMMENDATION:

In light of the above listed evidence and the findings submitted to the record, Staff recommends denial of file VR 99-07 for property identified as Clackamas County Map Number 2S-2E-31DC, Tax Lot 5400, (161 Barclay Avenue to allow a lot depth reduction from 100 feet to 80 feet.

EXHIBITS

A. Vicinity Map
B. Applicant's written statement and site plan
C. Oregon City Building Official
D. Tualatin Valley Fire and Rescue
E. Correspondence from Linda Lord Regarding CC and R's
F. OCMC 16.28.080 (1995) previous subdivision lot width and depth standards
G. Setback Variance Approval 147 Barclay Avenue (Al Bittner)
H. Lot Line Adjustment approval between TL 5500 and TL5400 (4/1/91)

I. Petition from adjacent neighbors recommending approval for the requested variance.
J. Letter from Linda Lord addressing criteria
K. Letter from Mark Reagan objecting to proposal

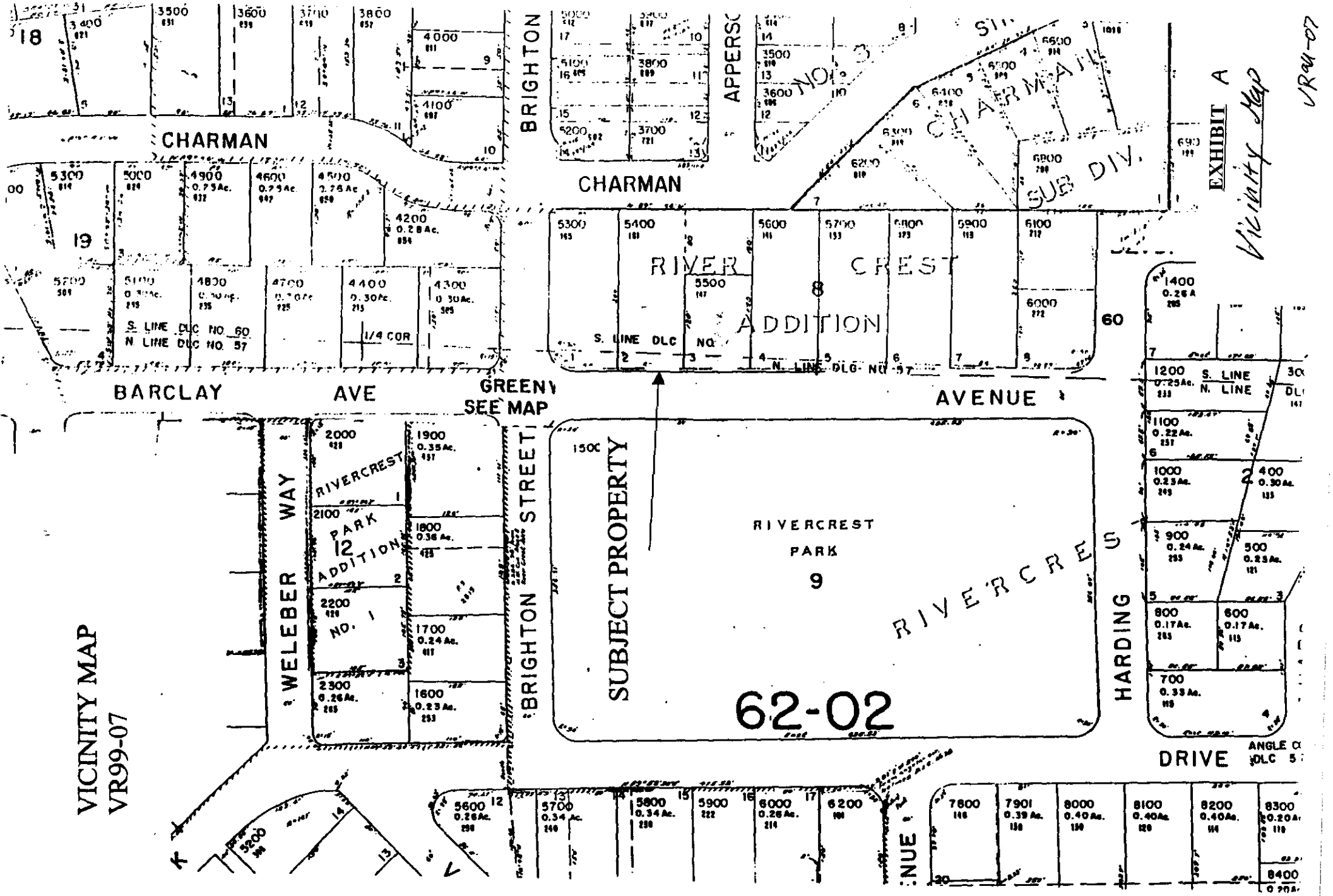


EXHIBIT A
Vicinity Map
VR99-07
CHARMAN
CHARMAN SUB DIV.
RIVER CREST ADDITION
BARCLAY AVE
GREENWOOD AVENUE
SEE MAP
BRIGHTON STREET
WELEBER WAY
RIVERCREST PARK ADDITION NO. 1
RIVERCREST PARK
SUBJECT PROPERTY
62-02
HARDING DRIVE
S. LINE DLC NO 60
N. LINE DLC NO 57
1/4 COR

APPLICATION FOR A VARIANCE

Applicant:	**Mr. James A. McKnight** **161 Barclay Avenue** **Oregon City, Oregon 97045** **(503) 656-6435**
Location:	**161 Barclay Avenue, Oregon City**
Legal Description:	**Tax Lot 5400 2S 2E 31DC, Clackamas County**
Assessor's Account Number:	**581828**
Zone:	**R-10 (Low Density Residential)**
Site Size:	**10,020 SF/13,780 SF**
Proposal:	**To modify the zoning requirement, in an R-10 Zone, from a 100' lot depth to an 80' lot depth.**

EXHIBIT B
Applicant's written statement and site plan

VR99-07

CONTENTS

NARRATIVE JUSTIFICATION FOR A VARIANCE FOR PROPERTY LOCATED AT 161 BARCLAY AVENUE, OREGON CITY, OREGON.

REQUEST: TO MODIFY THE ZONING REQUIREMENT, IN AN R-10 ZONE, FROM A 100' LOT DEPTH TO AN 80' LOT DEPTH.

CRITERION A: Provide a list of properties in our area which have less than the required lot depth in an R-10 Zone.

Tax Lot 6200 and 8000 2 2E 31 DC; Tax Lots 5300, 7700, 9200, 9300, 3 2E 6AB; Tax Lots 100, 200, 1300, 5700, 3 2E 6AC; Tax Lot 4500 3 2E 6BA; Tax Lots 3701, 3903, 4007, 4008, 4009 3 2E 6BB; Tax Lots 600, 700, 1500, 1800, 1900 3 1E 1DA.

I would like approval of my request to modify the lot depth on my property.

There are many, at least 20, other lots in the area that do not meet the lot depth requirement, (see previous list). These lots do not negatively impact the livability of the area.

Money from the sale of the newly created lot would be used to upgrade and repair the home located at 161 Barclay Ave., thereby increasing the value of the home and the tax base in the area. Failure to invest in the home at 161 Barclay Ave. would lower its value, and therefore negatively impact the value of all the other residences in the area.

The new lot would provide an additional building site, increasing the tax base in the area by approximately $2,000 per year.

CRITERION B: Provide detail stating why a reduced lot depth will not have an adverse impact on adjacent properties.

Any home built on the new lot would be limited to a single level, with no windows on the East side. There is also and existing 6 foot fence between the proposed building site, and the adjacent property, providing more than adequate privacy. Other landscaping could provide additional privacy if so desired by the neighbors. Until now, a 6' sight obscuring fence has been adequate to provide privacy for all the residents in the area.

Any new home built would meet, and in most cases, exceed the setbacks of adjacent properties.

CRITERION C: Describe in detail, how the creation of this lot, with a substandard depth dimension, is not a self imposed hardship.

When I bought the additional property, adjacent to my lot, in April 1991, from Al Bitner, a long time member of the Planning Commission, he advised me to go to City Hall and satisfy myself that it would be a legal building site...

I went to the City and talked to Kate Daschle. I showed Kate a sketch of my proposed building lot and she said it met all the parameters of a partition in the R-10 zone.

On August 5, 1998, when I received pre-application approval of my partition (file No. PA 98-78), I asked Tamara Deridder to make a note on my file the deadline for filing for a 6 month extension. Tamara noted that it would be February 1999 and at that time she told me that the Planning Department was making some changes to the City Code but it wouldn't have any effect on my partition. I figured I would need the additional time to save the money for a survey and the partition fee.

On August 4, 1999 , I applied for my extension and was met with a little confusion over my request. I called weekly to check on the status and received a reply 7 weeks later that I had to re-apply and the City would waive the fee. Apparently, when the City Code was changed (October 1, 1998), no one realized it would effect the Partition Section 16.28.080 , thus making Tamara's comment an honest mistake. None the less, now I had to save enough for a variance fee also.

On June 24, 1999, Pre-Application (File No. PA 99-60) was approved and I was cleared to proceed with a variance/partition request and present it to the Planning Commission.

CRITERION D: Are there any alternatives which would accomplish the same purpose?

No practical alternatives have been identified which would accomplish the same purpose and not require a variance.

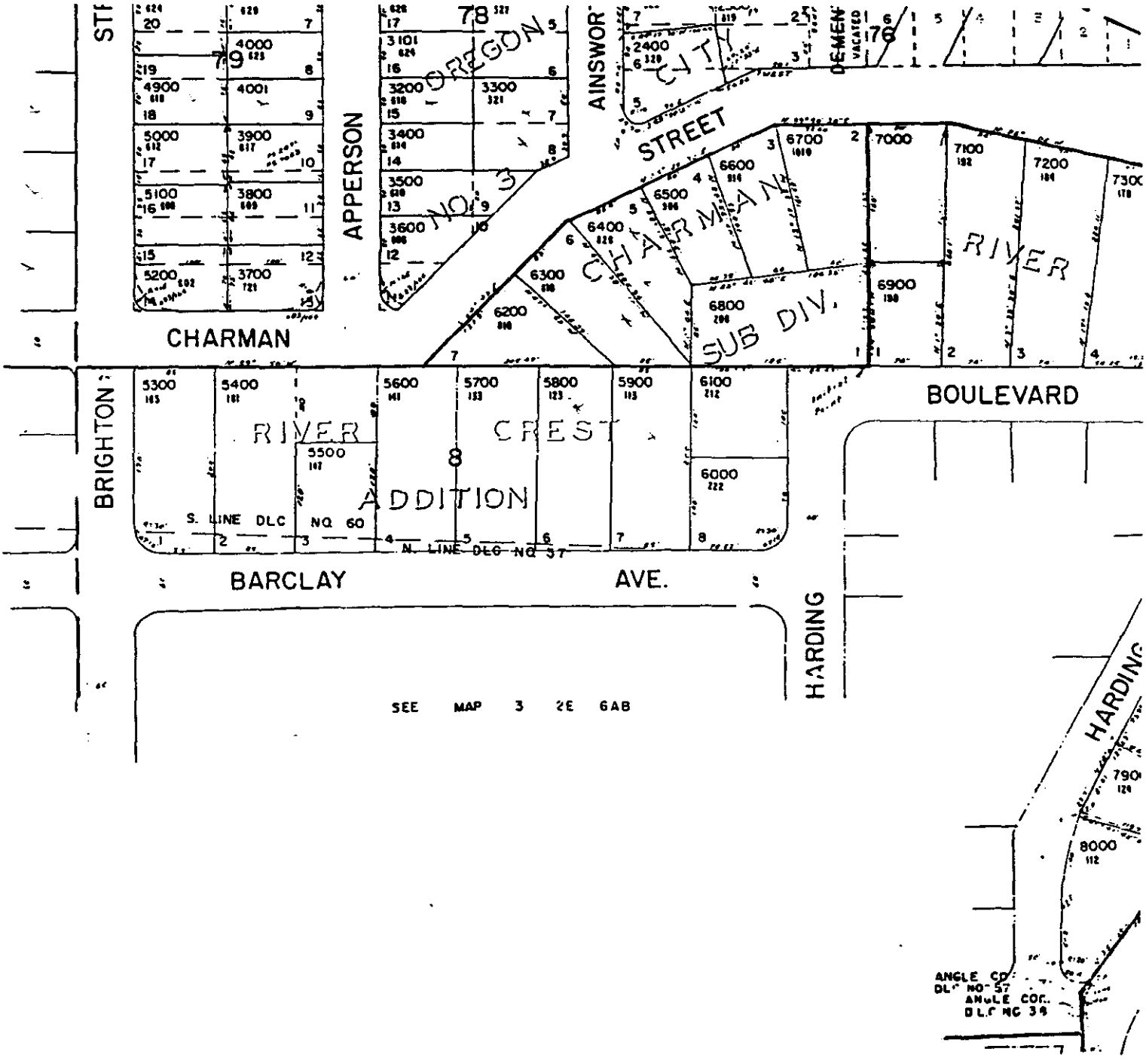
CRITERION E: Is the variance the absolute minimum that would alleviate the hardship?

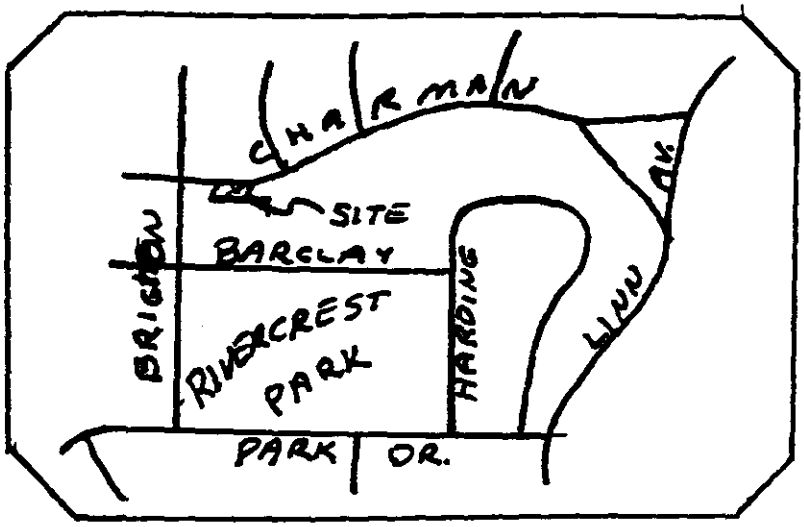
The variance requested is the minimum possible, under the circumstances.

CRITERION F: Does the variance requested conform to the Comprehensive Plan and the intent of the ordinance being varied?

The Plan does not specifically address the issue of a simple partition for a good reason. The City had let the need for a Plan go until the State finally advised us that it was a requirement, under the provisions of the 1973 Oregon Land Use Act, that we adopt a plan without delay! We had no time to deal with minor issues such as partitions. However, I did find material suggesting that the concept of partitioning should be encouraged. Several quotes from the Plan are:

"To maintain an Urban Growth Boundary to prevent sprawl; Plan for full public services in the urbanizing area; Housing is a primary source of income through property taxes; Housing is aimed at the development of new housing units; The City must ensure that transportation facilities and urban services are not overburdened by residential development in the Urban Growth Area; The City shall encourage the private sector in maintaining an adequate supply of single family housing units supported by the elimination of unnecessary government regulations; and it is the City's policy to encourage small lot single-family development in the low density residential areas."


CHARMAN
BOULEVARD
BARCLAY
AVE.
BRIGHTON
APPERSON
STREET
HARDING
OREGON
CITY
RIVER
CRESTON
ADDITION
SUB DIV.
RIVER CREST
S. LINE DLC NO 60
N. LINE DLC NO 57
SEE MAP 3 2E 6AB
ANGLE CO
DL NO 57
ANGLE COR.
DLC NO 36



REQUEST: To modify the zoning requirement, in an R-10 Zone, from a 100' lot depth to an 80' lot depth, while meeting all the setbacks.

NEW LOT SIZE: 10,020 SQ. FT.

OWNER: Jim & Diane McKnight
161 Barclay Ave
656-6435

CHARMAN ST.

#7139

5' ACCESS EASEMENT

5' SEWER EASEMENT

3' SEWER EASEMENT

Lot 1

25'

80'

70'

2445 SQ. FT.
BUILDING SITE

8'

N

46'

20'

10'

200'

37" D.
FIR TREE

85'

SCALE
1" : 30'

Lot 2

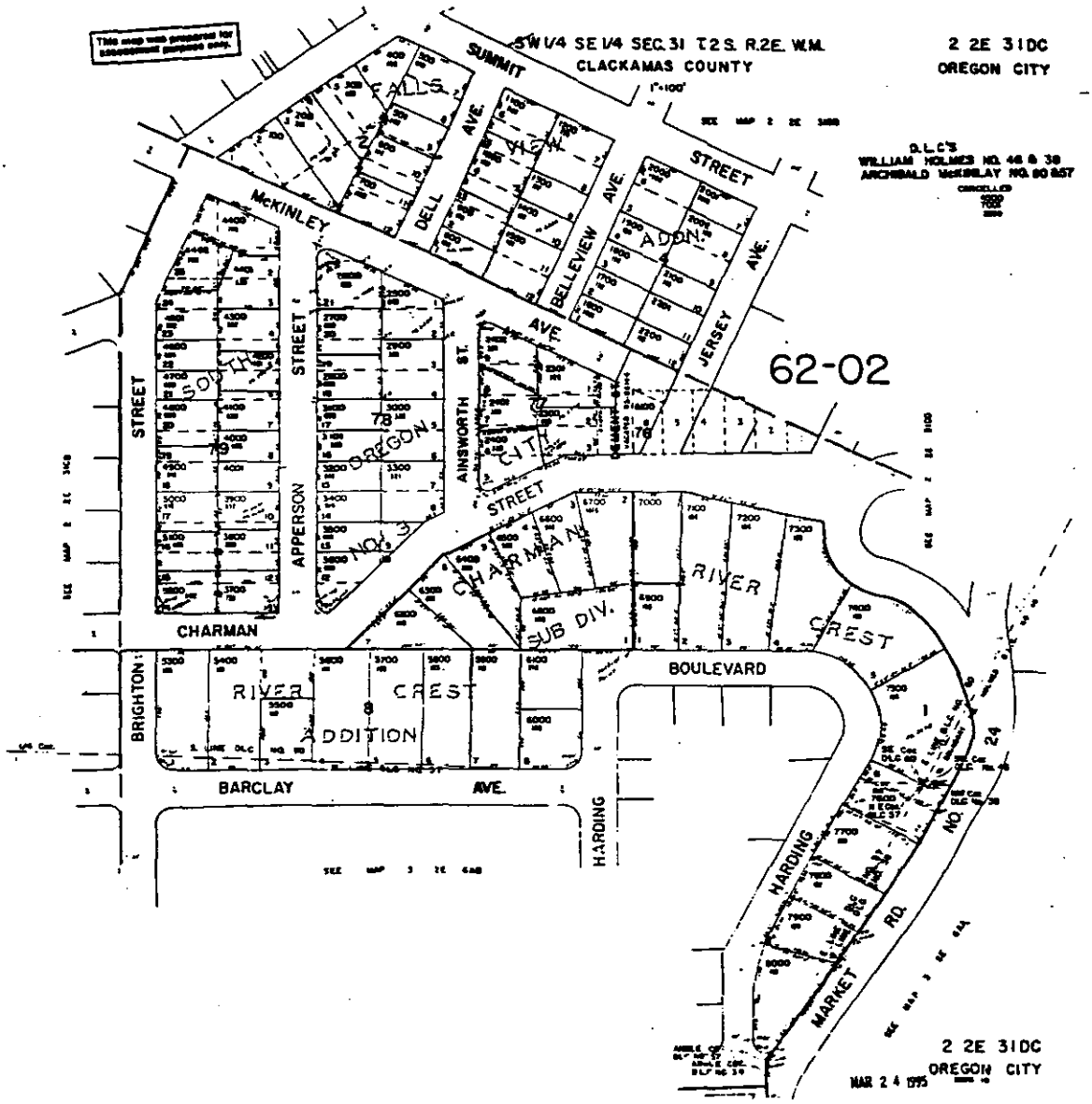
MCKNIGHT
13,780 ☐'

LEESON
10,200 ☐'

120'

BARCLAY AVE.

RIVERCREST PARK


SW 1/4 SE 1/4 SEC. 31 T.2 S. R.2E. W.M.
CLACKAMAS COUNTY
2 2E 31DC
OREGON CITY
1"=100'
D.L.C.'S
WILLIAM HOLMES NO. 46 & 38
ARCHIBALD McKINLAY NO. 60 & 57
62-02
SUMMIT
FALLS
DELL AVE.
BELLEVIEW AVE.
JERSEY AVE.
McKINLEY
STREET
ADDN.
SOUTH
APPERSON
OREGON
AINSWORTH ST.
CITY
CHARMAN
SUB DIV.
RIVER CREST
BOULEVARD
BRIGHTON
ADDITION
BARCLAY
AVE.
HARDING
MARKET
RD.
NO. 24
2 2E 31DC
OREGON CITY
MAR 2 4 1995

CITY OF OREGON CITY

COMMUNITY DEVELOPMENT DEPARTMENT, 320 WARNER MILNE ROAD
P.O. BOX 351, OREGON CITY, OR 97045-0351, (503) 657-0891 FAX: (503) 657-7892

LAND USE APPLICATION FORM

REQUEST:

Type II	Type III	Type III / IV
☒ **Partition**	☐ **Conditional Use**	☐ **Annexation**
☐ **Site Plan/Design Review**	☒ **Variance**	☐ **Plan Amendment**
☐ **Subdivision**	☐ **Planned Development**	☐ **Zone Change**
☐ **Extension**	☐ **Modification**	☐ **Zone Change w/Annex**
☐ **Modification**		

OVERLAY ZONES: ☐ Water Resources ☐ Unstable Slopes/Hillside Constraint

___ **STANDARD PROCESS** ___ **FAST TRACK** ___ **EXPEDITED**

Please *print or type* the following information to summarize your application request:

[redacted] (Please use this file # when contacting the Planning Division)

APPLICANT'S NAME: JAMES A. MCKNIGHT

PROPERTY OWNER (if different): _____

PHYSICAL ADDRESS OF PROPERTY: 161 BARCLAY AVE.

DESCRIPTION: TOWNSHIP: 2S. RANGE: 2E. SECTION: 31DC TAX LOT(S): 5400

PRESENT USE OF PROPERTY: RESIDENTIAL

PROPOSED LAND USE OR ACTIVITY: RESIDENTIAL

DISTANCE AND DIRECTION TO INTERSECTION: 100' WEST

CLOSEST INTERSECTION: BRIGHTON

PRESENT ZONING: R-10

TOTAL AREA OF PROPERTY: 23,800 SQ.FT.

Land Divisions

PROJECT NAME: MCKNIGHT

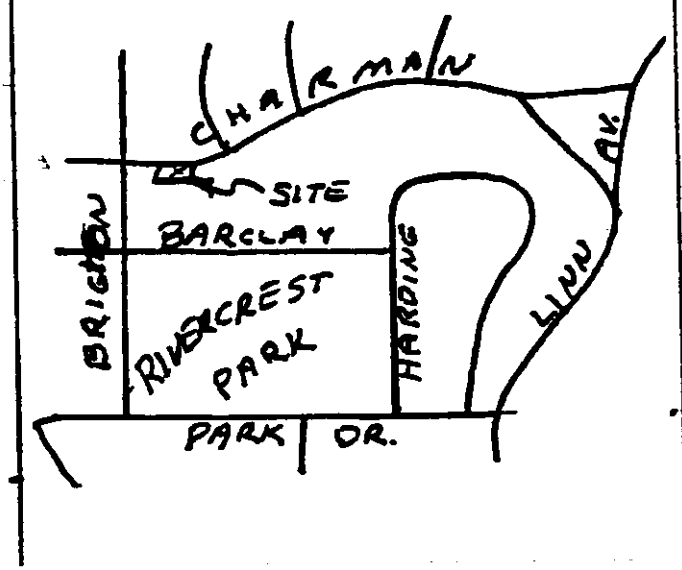
NUMBER OF LOTS PROPOSED: 2

MINIMUM LOT SIZE PROPOSED: 10,020 SQ FT.

MINIMUM LOT DEPTH PROPOSED: 80'

MORTGAGEE, LIENHOLDER, VENDOR, OR SELLER: ORS CHAPTER 227 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO PURCHASER

VICINITY MAP



NARRATIVE JUSTIFICATION FOR A VARIANCE AND MINOR PARTITION FOR PROPERTY LOCATED AT 161 BARCLAY AVE., OREGON CITY, OR.

The owners circumstances are not self-imposed. After my pre-app was approved on August 5, 1998, the City changed the Code October 1, 1998 thereby requiring a variance to the existing 80' lot depth. The previous Code required a 60' lot depth.

A variance from the requirements will not cause substantial damage to adjacent properties. I find no practical alternatives which would accomplish the same objective without this variance, other than "Grandfathering" my rights to the previous Code.

The variance requested is the minimum that can solve the issue and still conforms to the Comprehensive Plan and the intent of the ordinance being varied.

Sincerely,

James A. McKnight

James A. McKnight
161 Barclay Avenue
503-656-6435

City of Oregon City

PA 99-60

Pre-Application Conference Summary

Pre-application conferences are required by Section 17.50.030 of the City Code, as follows:

(A) PURPOSE: The pre-application conference is to provide the applicant the necessary information to make an informed decision regarding their land use proposal.

(B) A pre-application conference is required for all land use permits.

(C) Time Limit: A pre-application conference is valid for a period of **six (6) months.**

(D) An omission or failure by the Planning Division to provide an applicant with relevant information during a pre-application discussion shall not constitute a waiver of any standard, criterion, or requirement of the City of Oregon City. Information given in the conference is subject available information and may be subject to change without notice.

NOTE: The subsequent application may be submitted to any member of the Planning Staff.

DATE: June 24, 1999

APPLICANT: Jim McKnight

SITE ADDRESS: 2 2E 3DC Tax Lot 5400; 161 Barclay Ave

PROPERTY DESCRIPTION:

STAFF: Tom Bouillion, Bryan Cosgrove, Jay Toll ZONING: R-10

PROPOSED USE/ACTIVITY: 2 lot Partition; variance to depth

INFORMATION NECESSARY TO BEGIN DEVELOPMENT: This listing of information does not preclude the Community Development Department or hearings body from requesting additional data necessary to make a recommendation and/or decision regarding the proposed activity.

1. PLANNING

A. Setbacks/Zoning: R-10 standards: Front 25'; Rear 20'; Side 8'/10'

B. Design Review Standards (check list attached):

1) Parking Requirements: N/A

2) Landscaping: N/A

C. Signing: N/A

D. Other:

2. ENGINEERING

A. Grading: Grading plan UBC and residential lot grading criteria

B. Drainage: Discharge to approved discharge point, show location of storm line in the vicinity of 147 Barclay Ave.

C. Sanitary Sewer: Sanitary sewer available in Charman

D. Water: Water Available in Charman

E. Right-of-Way Dedication/Easements: Easements required for utilities crossing proposed lots

F. Street Improvements (including continuation of existing streets within subdivisions): none requirement (Non-remonstrance agreement)

G. Special Analysis (traffic study, geotechnical study, EIS): high ground water possible on site.

H. Development Impact Statement required with Subdivision applications.

3. BUILDING

A Proposed Construction Type: _____
B. Number of Stories: _____
C. Square Footage: _____
D. Number of Buildings: _____
E. Type of Occupancy: _____
F. Fire Sprinklers: _____
G. Valuation (estimate): $_____
H. Fire/Life Safety Required: Yes _____ No _____

4. FIRE

A. Fire Flow Requirements (gallons per minute): _____
B. Location/Number of Hydrants: _____
C. Access Requirements: _____
D. Other: _____

5. FEES/PERMITS

A. Design Review: _____
B. Plan Check/Building Permit/State 5% Surcharge: _____
C. System Development Charges (SDC):
   1) Sanitary Sewer: _____
   2) Water: _____
   3) Storm Drainage: _____
   4) Transportation: _____
   5) Parks: _____
D Engineering 5% Technical Fee (based on improvements): _____
E. Grading Permit: _____
F. Right-of-Way Permit: _____
G. Land Use Application(s): Variance $750. Partition $1,000.

TOTAL ESTIMATED FEES: $ _____

OTHER COMMENTS:

Variance of 20% to lot depth must go before the planning commission (OCMC 17.60). Variance & partition may be processed as one request before the Planning Commission or as separate requests. Variance & Partition packets given to applicant at meeting

NOTICE TO APPLICANT: A property owner may apply for any permit they wish for their property. HOWEVER, THERE ARE NO GUARANTEES THAT ANY APPLICATION WILL BE APPROVED. No decisions are made until all reports and testimony have been submitted. This form will be kept by the Community Development Department. A copy will be given to the applicant. IF the applicant does not submit an application within six (6) months from the Pre-application Conference meeting date, a NEW Pre-Application Conference will be required.

CITY OF OREGON CITY - PLANNING DIVISION
PO Box 3040 - 320 Warner Milne Road - Oregon City, OR 97045-0304
Phone: (503) 657-0891 Fax: (503) 657-7892

TRANSMITTAL

- ■ BUILDING OFFICIAL
- ❑ ENGINEER MANAGER
- ❑ FIRE CHIEF
- ❑ PUBLIC WORKS DIRECTOR
- ❑ TECHNICAL SERVICES
- ❑ ODOT - Sonya Kazen
- ❑ ODOT - Gary Hunt

TRAFFIC ENGINEERS
- ❑ JOHN REPLINGER @ DEA
- ❑ JAY TOLL

- ❑ CICC
- ❑ NEIGHBORHOOD ASSOCIATION (N.A.) CHAIR
- ❑ N.A. LAND USE CHAIR
- ❑ CLACKAMAS COUNTY - Joe Merek
- ❑ CLACKAMAS COUNTY - Bill Spears
- ❑ SCHOOL DIST 62
- ❑ TRI-MET
- ❑ GEOTECH REPORT - NANCY K.
- ❑ DLCD/BRENDA BERNARDS @ METRO
- ❑ OREGON CITY POSTMASTER
- ❑ PARKS

RETURN COMMENTS TO:

PLANNING PERMIT TECHNICIAN
Planning Department

COMMENTS DUE BY: March 15st, 2000

HEARING DATE: **4/10/00**
HEARING BODY: Staff Review: __ PC: _X_ CC: __

IN :ERENCE TO

FILE # & TYPE: **VR 99-07**
APPLICANT: James McKnight
REQUEST: Variance to required lot depth from 100 to 80 feet
LOCATION: 161 Barkley Avenue TL 5400 Map 2-2E-31DC

The enclosed material has been referred to you for your information, study and official comments. Your recommendations and suggestions will be used to guide the Planning staff when reviewing this proposal. If you wish to have your comments considered and incorporated into the staff report, please return the attached copy of this form to facilitate the processing of this application and will insure prompt consideration of your recommendations. Please check the appropriate spaces below.

X The proposal does not conflict with our interests.

____ The proposal would not conflict our interests if the changes noted below are included.

____ The proposal conflicts with our interests for the reasons stated below.

____ ***The following items are missing and are needed for completeness and review:***

Signed _____
Title Building Official

PLEASE RETURN YOUR COPY OF THE APPLICATION AND MAT

EXHIBIT C
Oregon City Bldg. Official

VR 99-07

CITY OF OREGON CITY - PLANNING DIVISION
PO Box 3040 - 320 Warner Milne Road - Oregon City, OR 97045-0304
Phone: (503) 657-0891 Fax: (503) 657-7892

TRANSMITTAL

- ☐ BUILDING OFFICIAL
- ☐ ENGINEER MANAGER
- ■ FIRE CHIEF
- ☐ PUBLIC WORKS DIRECTOR
- ☐ TECHNICAL SERVICES
- ☐ ODOT - Sonya Kazen
- ☐ ODOT - Gary Hunt

TRAFFIC ENGINEERS
- ☐ JOHN REPLINGER @ DEA
- ☐ JAY TOLL

- ☐ CICC
- ☐ NEIGHBORHOOD ASSOCIATION (N.A.) CHAIR
- ☐ N.A. LAND USE CHAIR
- ☐ CLACKAMAS COUNTY - Joe Merek
- ☐ CLACKAMAS COUNTY - Bill Spears
- ☐ SCHOOL DIST 62
- ☐ TRI-MET
- ☐ GEOTECH REPORT - NANCY K.
- ☐ DLCD/BRENDA BERNARDS @ METRO
- ☐ OREGON CITY POSTMASTER
- ☐ PARKS

RETURN COMMENTS TO:

PLANNING PERMIT TECHNICIAN
Planning Department

COMMENTS DUE BY: March 15st, 2000

HEARING DATE: 4/10/00
HEARING BODY: Staff Review: __ PC: _X_ CC: __

IN REFERENCE TO

FILE # & TYPE: **VR 99-07**
APPLICANT: James McKnight
REQUEST: Variance to required lot depth from 100 to 80 feet
LOCATION: 161 Barkley Avenue TL 5400 Map 2-2E-31DC

The enclosed material has been referred to you for your information, study and official comments. Your recommendations and suggestions will be used to guide the Planning staff when reviewing this proposal. If you wish to have your comments considered and incorporated into the staff report, please return the attached copy of this form to facilitate the processing of this application and will insure prompt consideration of your recommendations. Please check the appropriate spaces below.

X The proposal does not conflict with our interests.

___ The proposal would not conflict our interests if the changes noted below are included.

___ The proposal conflicts with our interests for the reasons stated below.

___ ***The following items are missing and are needed for completeness and review:***

Signed
Title Asst Fire Marshal

PLEASE RETURN YOUR COPY OF THE APPLICATION AND MATE

EXHIBIT D
Tualatin Valley Fire & Rescue

VR99-07

September 16, 1999

To: Members of the RNA Steering Committee

From: Linda Lord

After the last meeting of the land use subcommittee another member of the committee asked me to let you know that the property in my subdivision (a small part of the RNA) has deed restrictions, and that I intend to compel compliance with those contractual obligations if other landowners in the subdivision attempt to use their property in ways impermissible under the restrictions. I am not requesting assistance or authorization from you to proceed with enforcement if necessary or for you to be involved in related disputes in any way. Since I've been requested to disclose this information to you, I want you to understand the basic legal principles so you can see the situation in context. I have enclosed a single-page explanation of the general definition of what CCRs are and how they work. Please read it before reading the rest of this memo.

This issue arose because some proposed actions by other landowners in the subdivision where I live, Rivercrest Addition, are contrary to relevant CCRs as I understand them and as the courts have interpreted similar CCRs. Specifically, I oppose the partitioning of the properties in the subdivision since I like to live in a neighborhood with large lots and open spaces. When I bought my home over a decade ago I relied on a CCR binding on the subdivision's lots which states

> All lots in the tract shall be known and described as residential lots except as hereafter noted; **no structures shall be** erected, altered, placed or **permitted on any residential building plot other than one detached single-family dwelling** not to exceed two and one-half stories in height, and a private garage for not more than two (2) cars and other outbuildings incidental to residential use.

There are several instances where landowners have had to ask a court to issue a permanent injunction against others in their subdivisions who attempted to resubdivide property subject to the same density restrictions or to otherwise use it contrary to a CCR. My research has revealed four decisions of the Oregon appellate courts that set the precedents for interpreting this deed restriction:

> a) In *Ludgate v. Somerville*, 256 P 1043 (Or 1927), the Oregon Supreme Court ruled that "the purchaser of residence property, relying on restrictive covenants, may enforce them against other lot owners, regardless of city zoning ordinance". They declared it is a constitutional right.
>
> b) In *Cadbury v. Bradshaw*, 43 Or App 33, 602 P2d 289, *review denied* 288 Or 519 (1979), the Oregon Court of Appeals ruled that "where restrictive covenants in deeds required all of parcels to be used as residential parcels and prohibited building of more than one dwelling on a parcel, the restrictions prohibited resubdivision by necessary implication" and even assuming resubdivision was permissible, "construction on resubdivided parcels was

EXHIBIT E
Correspondence from
Linda Lord 9/16/2000
VR99-07

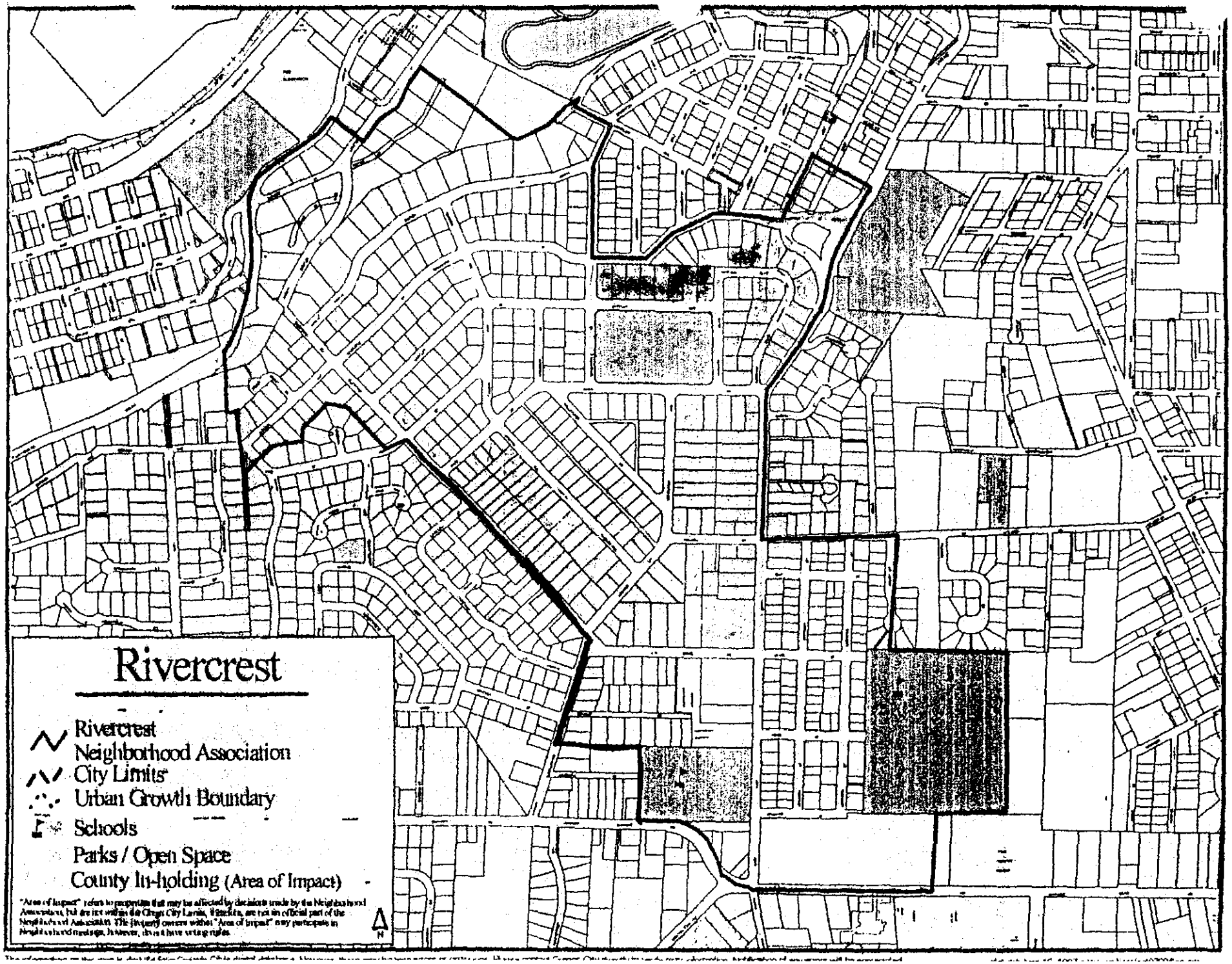
not permissible...[and] it would be inconsistent with these provisions for fractional parcels to be created where no residential use can occur".

c) In *Swaggerty v. Petersen*, 280 Or 739, 572 P2d 1309 (1977), the Oregon Supreme Court required a landowner to remove a house that had been built on a lot created by resubdivision contrary to a CCR which allowed only one residence per lot. Since Mr. Petersen had been told early on by Mr. Swaggerty that the project was contrary to an existing CCR which would be enforced but he proceeded anyway, he was required to remove the house at his own expense and enjoined from building another residence there when one residence was already on the lot.

d) In 1998 the Oregon Court of Appeals cited the Swaggerty decision in another ruling, *Taylor v. McCollom*, 958 P2d 207 at 213 (Or App 1998), and stated that the language of a CCR which provided "Not more than one single-family residence shall be erected or maintained on any lot" was "clear, objective, and precise".

I've attached a copy of a map of the RNA with the area included in the Rivercrest Addition highlighted in green. No other properties are restricted by my subdivision's CCRs.

I hope this memo provides you with useful information. If you want to discuss the matter I invite you to approach me directly with any concerns or any questions I can answer.


Rivercrest
Rivercrest Neighborhood Association
City Limits
Urban Growth Boundary
Schools
Parks / Open Space
County In-holding (Area of Impact)
"Area of Impact" refers to properties that may be affected by decisions made by the Neighborhood Association, but are not within the Oregon City Limits. Residents, are not an official part of the Neighborhood Association. The property owners within "Area of Impact" may participate in Neighborhood meetings, however, do not have voting rights.
N

Covenants, Conditions, and Restrictions on Use of Property

When a landowner decides to sell property, he may decide to require the purchaser to restrict the ways in which the property is used and does so by making deed restrictions, called Covenants, Conditions, and Restrictions (CCRs), part of the real estate sales contract. This part of the contract is as binding on the buyer as payment of the purchase price or any other contract term. The promise must be kept or the seller may require the buyer to abide by the agreement, i.e. enforce the CCRs, through the courts. If the seller intends that the deed restrictions apply to all future owners of the property as well, the CCRs are written to "run with the land" and are recorded with the land titles or incorporated into them by reference. They then are part of the chain of title and provide notice to all prospective purchasers of the property that they too would be subject to the restrictions on the use of the land if they decide to buy it.

If a landowner decides to subdivide a parcel and makes CCRs which run with the land applicable to all lots in a residential subdivision, then the contractual agreement is binding among all the subsequent owners of those lots. The purpose of these CCRs is to insure the benefit of the restrictions for the homeowners in the subdivision, making the neighborhood more enjoyable for all concerned. In that situation the CCRs are enforceable by any property owner if another landowner in the subdivision attempts to use his lot in ways other than allowed by the deed restrictions. The principle in law is that anyone who takes possession of land with notice of the deed restrictions cannot in equity be permitted to violate those restrictions.

Deed restrictions are contractual obligations which are not affected by zoning regulations in that a use may be allowed by a zoning ordinance but still be impermissible if contrary to a CCR applicable to the property. The rule is whichever is more restrictive, the deed restriction or the zoning regulation, controls. For instance if an owner wants to paint his house neon orange the municipal officials would not object even if all the neighbors clamored for action, unless there was a relevant city ordinance. However if there was a CCR which regulated the appearance of houses to the extent that a neon orange painted house was not permissible, any of the property owners who were also subject to that CCR could enforce the deed restriction and the landowner would be required by the courts to use a color which was allowable under the contractual obligation.

A property owner who is interested in maintaining a neighborhood characteristic which is guaranteed by a CCR must enforce that CCR promptly and every time he learns it is violated or that another landowner in the subdivision intends to violate it. If he does not, he may be considered to have waived his right to benefit from the CCR when he asks a court to issue an injunction against an impermissible action. In other words, a person may not pick and choose which neighbors he will allow to violate the CCR and which he will oppose.

More information on CCRs is available in an Oregon State Bar publication called *Principles of Oregon Real Estate Law*, Chapter 4: "Covenants, Conditions, and Restrictions". The book can be found at the Clackamas County Law Library which is open to the public and is located in the courthouse on Main Street.

SON v. HUGHES et al.

Supreme Court of Oregon. June 21, 1927.

peal and error ⇐425—Deposit of appeal notice in post office less than 60 days after decree, followed by similar service of undertaking, held sufficient (Or. L. § 541).

Service of notice on appeal, by deposit of y in post office within less than 60 days m time of entry of decree, and similar serv- of undertaking 6 days later, *held* sufficient, view of Or. L. § 541, providing service by il is deemed complete on first day after date leposit of copy in post office that mail leaves h post office for place to which it is sent.

n Banc.

Appeal from Circuit Court, Douglas Coun- J. W. Hamilton, Judge.

Action by Gordon Lawson against Thomas Hughes and Mary C. De Mund. From the ree, plaintiff and defendant last named peal. On motion to dismiss appeal. Mo- n denied.

Thomas A. Hughes, of Los Angeles, Colo., the motion.

lbert Abraham, of Roseburg, opposed.

AND, J. This is a motion by the respond- Hughes, to dismiss the appeal. The ap- l is from a decree which the record shows s entered on September 15, 1926. Hughes peared as his own attorney in the suit l was represented by any other at- ney. is a resident of Los Angeles, l., and . . proof of service shows that a y of the notice of appeal and of the un- taking on appeal were each deposited in post office at Roseburg, Or., addressed him at his proper place of residence in Angeles, Cal., with postage prepaid; the ce having been mailed on November 13, the undertaking on November 19, 1926. y section 541, Or. L., service by mail is ned complete on the first day after the e of deposit of a copy in the post office the mail leaves such post office for the e to which the same is sent. The serv- of the notice was therefore completed on ember 14th, and this was within 60 days n the time of the entry of the decree. Hutchison v. Crandall, 82 Or. 27, 160 24, and McCargar v. Moore, 88 Or. 682, P. 1107, 171 P. 587, 173 P. 258. A copy e undertaking having been mailed on No- ber 19th, service thereof was completed November 20th, and, there being no ex- on to the sufficiency of the sureties, the al was perfected 5 days thereafter. The cript, consisting of copies of the decree, e, and undertaking, with proof of service of and of the original testimony, dep- ns, and other papers containing the nce, all properly certified to, was filed is court on February 18, 1927, together with two orders made and entered by the trial judge extending the time for filing the transcript, both of which orders were made within the time in which a transcript could be filed. On the same day that the transcript was filed, the appellant made an application to this court for an extension of time to April 1, 1927, for filing the printed abstracts, and on March 22, 1927, an order was made extending the time to and including April 1, 1927, on which last-named date the abstracts were filed in strict compliance with the order thus made.

Respondent has wholly failed to point out any legal grounds upon which this appeal can be dismissed, and, finding none in the record, the motion to dismiss must be denied.

LUDGATE v. SOMERVILLE.

Supreme Court of Oregon. May 31, 1927.

1. **Municipal corporations ⇐601—Zoning ordinance must have some rational relation to public health, morals, safety, or general welfare.**

Only justification for city zoning ordinance is that it have some rational relation to public health, morals, safety, or general welfare, and general scheme of maintaining and perpetuating high class, exclusively residential district promotes general welfare.

2. **Covenants ⇐1—Restrictive covenants imposed by former owner on all subsequent owners held not contrary to public policy.**

Restrictive covenants imposed by original owner of land on all subsequent owners of lots platted *held* not contrary to public policy.

3. **Covenants ⇐72—Purchaser of residence property, relying on restrictive covenants, may enforce them against other lot owners, regardless of city zoning ordinance.**

Purchaser of residence property in reliance on covenants in deed against use of land for business purposes acquires property right of which he cannot be divested by city zoning ordinance.

4. **Injunction ⇐62(1)—Public inconvenience in requiring consumers of gasoline to go 1,900 feet further held not to prevent enforcement of restrictions on property.**

Public inconvenience in having to go 1,900 feet further to unrestricted property is not sufficient to prevent property owner enforcing restrictions against erecting filling station, regardless of profit owner of such filling station might make therefrom.

5. **Constitutional law ⇐81—Police power should not be exercised to thwart lawful agreements not operating against public welfare.**

Police power is not to be exercised to thwart or nullify lawful agreements not operating to detriment of public welfare.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of such business? Does it supersede or nullify the restrictions previously put upon the p[illegible]ty by those who platted it? This in[illegible]g and important question is res integra [illegible] this state. After diligent search we have been able to find only one jurisdiction wherein the point has been squarely passed upon. Gordon v. Caldwell, 235 Ill. App. 170. The zoning ordinance of Portland divides the city into four districts. It undertakes to place no restriction upon single detached dwelling houses. As stated in section 2 of the ordinance, it was "for the purpose of regulating the location of trades and industries. * * *" The primary object of the law, without doubt, was to prevent the invasion of residential districts by commercial interests. The original owner of Laurelhurst undertook to do by covenant and agreement that which is in keeping with the general legislative policy of the city. The only justification for such exercise of the police power is that it has some rational relation to the public health, morals, safety, or general welfare. The general scheme of maintaining and perpetuating Laurelhurst as a high class, exclusively residential district certainly promotes the general welfare. The contractual obligations imposed upon all lot owners is not contrary to public policy. An act which so deprives a citizen of his property rights cannot be sustained under the police power unless the public health, comfort, or welfare demands such enactment. It cannot well be argued that the purpose to enjoy that which we are ple[illegible]o call home and to protect it against the [illegible]oachment of commercial interests is inimical to public welfare. The precise question was considered in Gordon v. Caldwell, supra, and the court said:

"Notwithstanding said [zoning] ordinance the owners of said lots have the constitutional right to make use of them in accordance with such restrictions so long as they do not endanger or threaten the safety, health, and comfort or general welfare of the public, * * * and the fact that said subdivision has been so classified does not require the owners of said lots to yield the rights secured by such covenants. We fail to see that their enforcement in any wise contravenes public policy."

[3] Plaintiff purchased her lot in reliance upon the covenants in her deed and had the right to expect that every other lot owner in Laurelhurst would comply therewith. Grussi v. Eighth Church of Christ, Scientist, 116 Or. 336, 241 P. 66. Such is a property right of which she cannot be divested by legislation of the character in question.

[4, 5] Who is clamoring for this gasoline service station? Surely not the public. No great public inconvenience will result if consumers of gas are obliged to go 1,900 feet to that part of Sandy boulevard to which the restrictions do not apply. True this triangular lot, from defendant's standpoint, would make an ideal service station, and, no doubt, much profit would result. However, the call of Mammon makes no appeal to equity. Police power is not to be exercised to thwart or nullify lawful agreements which in no way operate to the detriment of the public welfare.

[6] Besides Sandy boulevard, there are other main arteries traversing Laurelhurst. If the restriction is to be removed as to one, it may be as to others. If the city can authorize the operation of business within the 100-foot strip, it could extend back for 1,000 feet, or it could throw the entire district open to commercial activity. We conclude that the zoning ordinance has no validity so far as it contravenes the restrictions in question.

[7, 8] Has the residential character of Laurelhurst adjacent to Sandy boulevard so changed by reason of surrounding business activity that equity will not intervene to prevent the violation of these building restrictions? Has there been such a radical change that the restrictions can no longer serve the purpose for which they were intended? Ordinarily, equity may be invoked to enforce negative agreements and clauses in deeds restricting the use of real property. Duester v. Alvin, 74 Or. 544, 145 P. 660. However, it does not follow that equitable jurisdiction will be exercised in all cases where there has been a violation of a legal right. Under some circumstances the party injured may be relegated to his remedy at law. Whether injunctive relief is to be granted is a matter within the sound legal discretion of the chancellor, to be determined in the light of all the facts and circumstances. Many authorities could be cited wherein equity has refused to intervene, and, perhaps, even more where it has assumed jurisdiction. Each case must be considered in the light of its own particular facts. For this reason it would be a useless and endless task to review and distinguish the large number of cases cited. We prefer to discuss the facts in the instant case as applicable to well-recognized equitable principles.

Many courts have undertaken to state the rule for the interposition of equity in proceedings of this character. We quote with approval the following clear and concise statement found in Robinson v. Edgell, 57 W. Va. 157, 49 S. E. 1027:

"The right to invoke relief by injunction in such cases is not absolute, however. To a certain extent, the jurisdiction is discretionary. It is governed by the same general principles which control the jurisdiction to compel specific performance of contracts. Where a proper case for its exercise is shown, relief is granted as a matter of course, but if, under the conditions and circumstances obtaining, the granting of the relief sought would work injustice or be ineffectual of any meritorious result, it will

he facts in that case are far removed from ose be[illegible] us for consideration. The same ght [illegible]d of Jackson v. Stevenson, 156 ass. 4[illegible]1 N. E. 691, 32 Am. St. Rep. 476, pon which defendant also relies. Pierce v. . Louis Union Trust Co., 311 Mo. 262, 278 . W. 398, is an instructive case in which the ithorities are reviewed and one which is in eeping with the conclusions here reached.

The trial court exercised its discretion in ssuming equitable jurisdiction of this cause, nd we see no reason to interfere therewith. The decree of the lower court is affirmed.

CREDIT SERVICE CO. v. KORN.

Supreme Court of Oregon. June 21, 1927.

Pleading ⟸106(1)—Plea in abatement may be joined with one in bar, but must allege facts with particularity, and conclude with prayer asking abatement (Or. L. § 74).

Under Or. L. § 74, plea in abatement may e joined with one in bar, but pleader must al- ge facts with high degree of certainty and articularity, and must conclude with prayer sking for abatement of action.

Pleading ⟸106(1)—One entering plea in abatement must conform strictly to applicable rules of pleading.

Plea in abatement being dilatory, plea is ot favored in law, and pleader must conform trictly [illegible]pplicable rules of pleading.

Plea ⟸434—Plea in abatement, not concluding with prayer for abatement, though defective, held not fatally defective after verdict.

Plea in abatement, not concluding with rayer asking for abatement of action, though efective, *held* not fatally defective after verdict, n absence of demurrer.

Pleading ⟸34(1)—In determining whether pleadings are fatally defective, courts should be more concerned with substance than form.

In determining whether defects in pleadings are fatal, courts in administration of jus- ice should be more concerned with substance han form, since object of pleadings is to ap- rise adverse party of what is to be relied on during trial.

In Banc.

Appeal from Circuit Court, Multnomah County; J. W. Knowles, Judge.

Action by the Credit Service Company against Israel Korn, doing business as the Korn Furniture Company. From judgment abating the action, plaintiff appeals. Affirmed.

On June 11, 1924, the plaintiff commenced an action to recover the amount alleged to be due for goods, wares, and merchandise, aggregating $463.73, sold to the defendant at his express instance and request. To the complaint, defendant filed an answer in bar, and, as a further and separate defense, by plea in abatement, alleged:

"(1) That the goods, wares, and merchandise mentioned in the complaint were sold to defendant upon a credit of sixty days from June 1, 1924.

"(2) That such period had not elapsed before the commencement of this action."

The answer thus concluded:

"Wherefore defendant demands judgment against plaintiff for his costs and disbursements."

After reply both to the plea in bar and in abatement, the trial court, upon hearing, rendered judgment abating the action. Plaintiff appeals.

W. B. Layton and Edward A. Boyrle, both of Portland, for appellant.

BELT, J. (after stating the facts as above). [1, 2] It is contended that the alleged plea in abatement is insufficient, and that therefore such defense has been waived. Under section 74, Or. L., it is permissible to join a plea in abatement with one in bar, but there has been no change in the requisites of such pleas at common law. Since the above defense is a dilatory plea, it is not favored in law (Walker v. Hewitt, 109 Or. 366, 220 P. 147, 35 A. L. R. 100), and he who would avail himself of it must conform strictly to the rules of pleading applicable to such defenses. The pleader is required to allege facts with a high degree of certainty and particularity, and must conclude with the prayer asking for the abatement of the action.

Our attention is directed to Sutherlin v. Bloomer, 50 Or. 398, 93 P. 135, wherein it is said:

"Where matter in abatement concludes in bar, it must be so treated * * * and its character must be determined, not from the subject matter of the plea, but from its conclusion or prayer."

[3, 4] It will be observed that the defendant did not ask for the abatement of the action, and his plea is therefore defective in this respect. Is it fatally so in the absence of demurrer and after verdict? In Sutherlin v. Bloomer, supra, a demurrer was interposed to such plea, and what was said there must be read in the light of the record before the court. In the instant case the trial court, in keeping with well-established practice in this jurisdiction, proceeded, without objection on the part of appellant, to determine the issues under the plea in abatement, and judgment was rendered to the effect that plaintiff's action was prematurely commenced. We think, after verdict, the defense pleaded is sufficient,

43 Or.App. 33

William E. CADBURY, III, Maxine D. Scates, Peter C. Lorenz and Helen G. Lorenz, Appellants,

v.

Dorothy R. BRADSHAW and Dennis Clark, Respondents,

v.

Don HAASE, Douglas Bates, Gloria J. Bates, Lloyd Lovell, Robert H. Painter, Alice Barckley, James H. Freuen, Claire E. Freuen, Richard T. Marrocco, Mary E. Marrocco, Barry W. Dumnich, M. A. Dumnich, James W. Waning, Margaret A. Waning, Gary V. Koyen, Harold R. Primrose, Emma Dell Primrose, John H. Doyle, Betty B. Doyle, Wayne E. Vanderhoff, Duane W. Mogsted, Joanell Mogsted, Lonnie E. Williams, Mary E. Williams, George Wickes, Louise Westling, Rickie H. Howell, Gladys M. Scott, Edward H. Meyers, Dereatha A. Meyers, Duane Marshall, Marie L. Marshall, Carl D. Richart, Francis J. Richart, Gene Mross, Melinda Mross, Villian Gillman, Gene Moyer, Darlene Moyer, Lloyd D. Brown, Monica Brown, Theo B. Allen, Andrew G. Iskra, Personal Representative of the Estate of John R. Seely, Deceased, Evelyn Seely, Larry L. Parker, Harold B. Evans, Beverly M. Evans, Scott Ferguson, Marlene Dehn, Marshall A. Dix, Hillary Dix, Edwain Foster, Michael S. White, Michael D. Copely, Marilyn Papich, John R. Dubin, Timothy L. Blood, Robert M. Langford, Michael T. Grant, Janna K. Grant, Holoway R. Jones, Frances D. Jones, Robert J. Guthrie, Judy F. Guthrie, Martin H. Acker, Julia A. Acker, William J. Larson, Jane S. Larson, Leeann Robertson, Dorothy Haberly, Blaine R. Newnham, Bob L. Wynia, Marjorie L. Wynia, Helen D. Racely, Jack Racely, Greg Buller, Jeanne Buller, Fred Deffenbacker, Ester L. Deffenbacker, Russell Peterson, Arlene H. Peterson, Georgia K. Haynes, Eugene P. Flores, George M. Currin, Gail C. Currin, Courtney L. Healy, V. J. Healy, Joanna Newnham, Ruth A. Copely, Kathleen Lovell, Jean Seely, John Does and Jane Does, Third Party Defendants,

John Kovtynovich, Elva Kovtynovich, Douglas A. Warner, Edith R. Warner, Dan Kovtynovich, and Richard A. Brown, Third Party Defendants-Appellants,

William G. Ross, Melba D. Ross, and Gertrude M. Andrews, Trustee, Third Party Defendants-Respondents.

No. 77-5866; CA 13708.

Court of Appeals of Oregon.

Argued and Submitted Sept. 10, 1979.

Decided Nov. 5, 1979.

Landowners in an area brought an action against seller of a parcel in the same area and her buyer to prohibit further subdivision and construction on resubdivided parcels. The Circuit Court, Lane County, Helen J. Frye, J., granted summary judgment for the seller and for her buyer and the landowners appealed. The Court of Appeals, Richardson, J., held that: (1) where restrictive covenant contained in grantor's deed to first purchaser and incorporated by reference in subsequent instruments of conveyance permitted only one dwelling to be built or maintained on any parcel and the term "parcel" was not ambiguous and referred to units of property which were originally conveyed by common grantor, construction on resubdivided parcels was not permissible, and (2) where deeds contained restrictive covenants, requiring all parcels to be used as residential parcels and prohibiting the building of more than one dwelling on a parcel, the restrictions prohibited resubdivision by necessary implication.

Reversed and remanded.

1. Covenants ⇐51(2)

Where restrictive covenant, contained in grantor's deed to first purchaser and incorporated by reference in subsequent in-

map. For example, paragraph 3 of the restrictions deals with setback lines and other distance requirements, and creates various exceptions for *Parcels* 41, 69, and 10, as shown on the map. Paragraph 5 relates to building sizes and specifications, but creates exceptions for nine specified *parcels*. Paragraph 10 limits animals in the area to household pets and certain others, but permits horses to be kept on ten particularized *parcels*.

It is clear from the foregoing that the word "parcel," as used in the restrictions, refers to the units of property which are shown on the map and which were originally conveyed by the common grantor. In addition, the surveyor's affidavit, which appears on the face of the map, confirms that meaning of "parcel." The affidavit, after referring to a galvanized iron pipe which was used as the initial point of the survey, states:

> "* * * said galvanized iron pipe being the Southeast corner of *parcel* # 71 as indicated on said map." (Emphasis added.)

The meaning of the word "parcel" being clear, the meaning of paragraph 2 of the restrictions is also clear. The paragraph permits only one dwelling unit to be built or maintained on any "parcel," i. e., on any of the original units of land shown on the map. We therefore reject defendants' contention that construction is permissible on resubdivided parcels, even assuming that resubdivision would in itself be permissible.

[2] Defendants are also mistaken in contending that resubdivision is permissible. Paragraph 1 requires all of the parcels to be "used * * * as residential parcels," and paragraph 2 prohibits the building of more than one dwelling on a parcel. It would be inconsistent with these provisions for fractional parcels to be created where no residential use can occur. We conclude that the restrictions prohibit resubdivision by necessary implication. *See Friedberg v. Building Committee*, 218 Va. 659, 239 S.E.2d 106 (1977).

Defendants argue that *Schmitt et ux v. Culhane et al.*, 223 Or. 130, 354 P.2d 75 (1960), is analogous to the present case. In *Culhane*, the Supreme Court rejected the contention that a restriction against " 'more than one dwelling * * * on a single *tract* of land conveyed' " (Emphasis added.) prohibited construction of dwellings on parts of *lots*. However, the word "tract" was ambiguous in context, and nothing in *Culhane* affirmatively suggested that the word "tract" as used in the restrictions was intended to be synonymous with the original lots shown on the subdivision plat. Here, conversely, both the restrictions and the map clearly show that the word "parcel," used in the relevant covenants, refers to the units of land originally mapped and conveyed.

Defendants also argue that certain language is used in the restrictions which manifests the grantor's intention or expectation that resubdivision would occur. The language defendants cite is itself ambiguous in context, and consists of peripheral phrases which play no role in the substantive definition of any of the restrictions. The meaning of the specific covenants before us for interpretation is clear, and the language to which defendants refer from other parts of the restrictions is not inconsistent with that meaning.

Reversed and remanded.

43 Or.App. 39

E. Laverne GODDARD, Personal Representative for the Estate of Forrest I. Goddard, Deceased, Appellant,

v.

AVEMCO INSURANCE COMPANY, Respondent.

No. 106,739; CA 13389.

Court of Appeals of Oregon.

Argued and Submitted Aug. 22, 1979.

Decided Nov. 5, 1979.

Suit was brought on an aviation policy for property damage to insured aircraft and

Penal Code § 221.1, pp. 59–60 (Tent Draft No. 11 1950):

"To specify 'any crime' comports better with the realities of law enforcement. The burglar is often apprehended, if at all, in the process of entering, when it may be difficult to know more than that he is up to some mischief. Recognition of this is reflected in the rule that the specific criminal purpose need not be pleaded or proved with the same particularity in prosecuting burglary as in prosecuting the crime which the burglar had in mind. * * *."

After reading the cases cited in the footnote to support that statement, we are of the opinion that the Institute meant that the indictment for burglary need not allege all the elements of the crime intended, not that it did not have to allege the specific crime intended.

[1] The state argues and the Court of Appeals reasoned that the omission of an allegation of the particular crime intended did not work a hardship on the defendant because of his pretrial discovery rights. In some instances the availability of discovery can remedy a deficiency in the specificity of the indictment; for example, *State v. Shadley/Spencer/Rowe*, 16 Or.App. 113, 517 P.2d 324 (1973) (failure to name the person to whom drugs furnished). However, the pretrial discovery available to the defendant in this case would not enable him to know what criminal intent the state was going to attempt to prove. ORS 135.805 and following. Statements of witnesses, which are discoverable, might or might not give the defendant a clue, but one charged with a felony is entitled to more than a clue to what the state contends are the elements of the crime charged.

[2] The intent the state charges the defendant had when he entered is important to the defendant. If the state can prove the defendant entered illegally with the intent to commit a crime, the defendant faces a maximum of five years in the penitentiary for burglary. If the state only is able to prove an illegal entry but not an intent to commit a crime, the defendant only faces a maximum of 30 days in jail for criminal trespass in the second degree.

In light of the long practice in Oregon of specifying the intent which the defendant is charged with having at the time of the breaking and entering, the unanimous view of other jurisdictions with comparable statutes that it is necessary to specify the intent and the lack of any showing of prejudice against the state by continuing such practice, other than imposing upon the state the usual burden of alleging and proving each element of the crime charged, we hold that an indictment failing to specify such intent is subject to demurrer upon the ground that it is not definite and certain.

Reversed.

committed an assault after entry and testified he entered with the intent to commit assault, not theft. *Commonwealth v. Ronchetti*, 333 ss. 78, 81–82, 128 N.E.2d 334 (1955). Like-e, if the defendant was charged with an illegal entry with intent to commit theft, and there was evidence to support this charge, but he committed no crime after entry and he testified he intended to commit no crime, the jury can convict for burglary.

280 Or. 739

David A. SWAGGERTY and Carol Swaggerty, husband and wife, Kenneth A. Springate and Kathleen M. Springate, husband and wife, Svent Toftemark and Lois Toftemark, husband and wife, Paul S. Holbo and Kay A. Holbo, husband and wife, James W. Kays and Marilyn Kays, husband and wife, Respondents,

v.

Carl PETERSEN, Appellant.

Supreme Court of Oregon,
Department 1.

Argued and Submitted Nov. 7, 1977.

Decided Dec. 28, 1977.

Property owners brought action to enjoin construction by builder of houses al-

in nature of subdivision justifying finding that general plan embodied in restrictions had been abandoned.

7. Covenants ⇐103(3)

Other violations of density restrictions applying to lots in subdivision, which were relatively few, and of which property owners were unaware until shortly before they brought action against builder to enjoin construction of houses in violation of density restrictions, were not so obvious as to require finding that property owners had acquiesced in relaxation of density restrictions and thus had waived or abandoned restrictions or were estopped from enforcing them.

8. Injunction ⇐23

Because policy and practical considerations may differ depending upon source of right which suit is brought to vindicate, proper circumstances for application of doctrine of relative hardship may also differ.

9. Injunction ⇐128(6)

Where builder of houses violating density restrictions applying to lots in subdivision testified that he knew nothing about moving houses and that he had not attempted to find out whether houses could be moved and if they could what cost would be, and thus failed to show what harm injunction requiring removal of houses would cause him, and permitted must construction on houses to be completed while suit was pending, and thus himself was responsible for most of hardship which moving or dismantling houses would entail, action to enjoin construction of houses was not proper one in which to apply "balance of hardship" doctrine.

10. Injunction ⇐23

Defendant cannot, after suit has been filed and he is thus clearly informed of both nature of plaintiffs' claim and their intention to insist upon it, deprive plaintiffs of their right to complete relief by increasing his investment, and thus his potential hardship, before final decision, and thus warrant application to case of "balance of hardship" doctrine.

11. Injunction ⇐108

Preliminary injunction is not prerequisite to final decree enjoining a defendant. ORS 32.010.

12. Injunction ⇐23

Neither statutes nor traditional equity practice place on plaintiffs the burden of deciding whether defendant shall carry on disputed activities pending final decision in case, so that failure of plaintiffs to request preliminary injunction might be found to be cause of increased investment by defendants in activity to be enjoined which, if attributable to defendants, would preclude application of "balance of hardship" doctrine; plaintiffs may, if they wish, apply for temporary injunction, but there is no penalty attached to their failure to do so. ORS 32.010.

H. Thomas Evans, Eugene, argued the cause for appellant. With him on the briefs were Dave Phillips and Evans & Armstrong, Eugene.

Joe B. Richards, of Luvaas, Cobb, Richards & Fraser, Eugene, argued the cause and filed a brief for respondents.

Before DENECKE, C. J., HOWELL and BRYSON, JJ., and GILLETTE, J. Pro Tem.

HOWELL, Justice.

This suit arises out of a dispute over the meaning of the density provisions of certain subdivision building restrictions. All of the parties own property within the subdivision. The plaintiffs contend that two houses built by defendant are in violation of the applicable building restrictions. The trial court agreed, and ordered the houses removed. Defendant appeals, contending that the restrictions have not been violated; that if they have been violated, the plaintiffs have

also intended to permit the original lots to be redivided, but only if each new lot contains parts of two adjacent original lots.

This is, to be sure, a somewhat indirect way of expressing a density limitation. Our interpretation of the restrictions does, however, give direct effect to the language of both of the relevant paragraphs of the restrictions. Construed in this way, those two paragraphs, together with the provisions for minimum house size and minimum setbacks,[1] effectively limit the overall density of the subdivision.

When defendant constructed residences on lots 1, 3, and 5 of the new subdivision, he had built a residence on each of the three original lots. He was not entitled, under the restrictions, to treat a fraction of each of those lots as a permissible building site and thus create two additional lots which, considered in isolation, are in literal compliance with Paragraph 11.

In support of his position, defendant relies on the rule that:

> "* * * because of the public policy favoring untrammeled land use, such restrictions are construed most strongly against the covenant and will not be enlarged by construction." *Aldridge v. Saxey*, 242 Or. 238, 242, 409 P.2d 184, 186 (1965).

We have recognized and applied that rule many times. *See, e. g., Johnson v. Campbell*, 259 Or. 444, 447, 487 P.2d 69 (1971); *Smoke v. Palumbo*, 234 Or. 50, 52, 379 P.2d 1007 (1963); *Rodgers et ux. v. Reimann et ux.*, 227 Or. 62, 65, 361 P.2d 101 (1961); *Schmitt et ux. v. Culhane et al.*, 223 Or. 130, 354 P.2d 75 (1960); *Hall v. Risley and Heikkila*, 188 Or. 69, 87–88, 213 P.2d 818 (1950); *Crawford et al. v. Senosky et al.*, 128 Or. 229, 232, 274 P. 306 (1929); *Grussi v. Eighth Ch. of Christ, Scientist*, 116 Or. 336, 342, 241 P. 66 (1925).

[2] We are doubtful, however, whether we should continue to do so. Public policy, as expressed in recent legislation, no longer favors "untrammeled land use," but requires the careful public regulation of the use of all of the land within the state. *See especially*, ORS chapter 197.

[3] In this case we need not inquire whether this legislative expression of public land use policy requires a new approach to the construction of private restrictions on the use of land. Even under the traditional rule, upon which defendant relies, a "construction in favor of the unrestricted use of property must be reasonable." *Hall v. Risley and Heikkila*, supra 188 Or. at 87, 213 P.2d at 826. As we have pointed out, defendant's proposed construction of Paragraph 11 is not reasonable because it would result in building sites composed of a fraction of a single lot, contrary to the express provisions of Paragraph 11.

We hold, then, that the trial court was correct in its conclusion that defendant violated the restrictions applicable to the Amended Plat of Hawkins Heights.

[4] We further hold that the trial court correctly concluded that defendant had not established his affirmative defenses of waiver and estoppel.

Defendant contends that plaintiffs waived any right to complain by failing to act promptly to enforce their rights, and by failing to bring suit before he had made substantial expenditures. He points out that the suit was not filed until approximately a year and a half after he first applied for approval of his eight-lot subdivision, and slightly more than a year after final approval was received.

There was no evidence that any of the plaintiffs had notice of the application for

1. Paragraph 2 provides:

"No residential structure shall be erected or maintained on any lot which has a ground floor area of less than twelve hundred square feet on the main floor, exclusive of open porches and garages."

Paragraph 4 provides:

"No building erected on any lot shall be less than twenty five feet from the front street line or fifteen feet from the side street line, or less than ten feet from the side lot line except on the rear quarter of the lot."

[7] There is also evidence that the relevant provisions of Paragraphs 1 and 11 have been violated in other instances without objection by these plaintiffs. The evidence convinces us that these violations are relatively few, that plaintiffs were unaware of them until shortly before this suit was filed, and that they were not so obvious that plaintiffs must be held to have acquiesced in a relaxation of the density restrictions. We agree with the trial court that these violations do not establish a defense to the present suit.

[8, 9] Finally, defendant urges that if plaintiffs are entitled to any relief, that relief should be limited to money damages. He contends that if the houses must be removed, the harm he would suffer would be greatly disproportionate to the benefit the plaintiffs would enjoy. He asks that we apply the so-called "balance of hardship" doctrine, to which we referred in *Tauscher v. Andruss*, 240 Or. 304, 308–9, 401 P.2d 40, 42 (1965):

> "There being an encroachment, plaintiffs are entitled to a mandatory injunction ordering the removal unless it would be inequitable to require such removal. *Under the proper circumstances* the court will consider the relative hardship of the parties and if the removal of the encroaching structure would cause damage to the defendant disproportionate to the injury which the encroachment causes plaintiff, an injunction will not issue." (Emphasis added.)

We have recognized, and sometimes applied, that doctrine in other cases as well. We have treated the defendant's hardship as relevant to the allowance of a mandatory injunction of this kind in suits based on a violation of a zoning ordinance,[3] encroachments,[4] obstruction of easements,[5] breach of trust agreement,[6] and improvement of another's land under mistaken claim of ownership.[7] Because policy and practical considerations may differ depending upon the source of the right which the suit is brought to vindicate, the "proper circumstances" for application of the doctrine of relative hardship may also differ.

However, we need not employ such distinctions in the present case. We hold, for two reasons which are applicable regardless of the source of plaintiffs' right, that this is not a proper case in which to weigh the parties' relative hardships.

In the first place, defendant has not shown what harm the injunction would cause him. He testified that he would lose $60,000 or more if the houses had to be destroyed. He further testified that because these houses had concrete slab floors and were built on a hill, it would be very difficult to move them. He admitted, however, that he knew nothing about moving houses and that he had not attempted to find out whether these houses could be moved and, if they could, what the cost would be. On this evidence we cannot hold that defendant has shown that it would be inequitable to grant the injunction.

In the second place, we find that defendant himself is responsible for most, if not all, of the hardship which moving or dismantling the houses would entail. There was only cement work in place when plaintiff Swaggerty's attorney wrote to defendant, notifying him of a claim that the construction would violate the restrictions. At the time suit was filed, a short time later, the foundation work had been completed on both houses and, according to the defendant, one of them had been framed and

3. *Frankland v. City of Oswego*, 267 Or. 452, 478–79, 517 P.2d 1042 (1974).

4. *Tauscher v. Andruss*, 240 Or. 304, 308–09, 401 P.2d 40 (1965).

5. *Andrews v. North Coast Development*, 270 Or. 24, 526 P.2d 1009 (1974).

6. *Heitkemper v. Schmeer et al.*, 130 Or. 644, 668, 275 P. 55, 281 P. 169 (1929).

7. *Jensen v. Probert*, 174 Or. 143, 160, 148 P.2d 248 (1944).

153 Or.App. 670

e F. TAYLOR and Susan Taylor, band and wife, Respondents–Cross–Appellants,

v.

art McCOLLOM and Ann McCollom, husband and wife, Appellants–Cross–Respondents,

and

Virginia W. Cotton and Peter Cotton, Defendants.

90–2095–E–2; CA A91609.

Court of Appeals of Oregon.

rgued and Submitted Nov. 19, 1997.

Decided April 29, 1998.

Homeowners brought suit against adjoining owners for breach of covenants, conditions and restrictions (CC & Rs) arising out of construction of home that impaired homeowners' view. The Circuit Court, Jackson County, Donald A.W. Piper, Senior Judge, entered judgment on jury verdict awarding homeowners damages, denied injunctive relief requiring adjoining owners to modify their home to lower their roof line, and denied award of attorney fees. Adjoining owners appealed, and homeowners cross-appealed. The Court of Appeals, Haselton, J., held that: (1) issue of whether architectural committee's action regarding roof line precluded jury award of damages for breach of covenant was not preserved; (2) adjoining owners did not knowingly violate restrictive covenant so as to permit injunctive relief regardless of balance of hardships; (3) balance of hardships did not support injunctive relief; and (4) homeowners were entitled to reformation of attorney fees provisions in covenants and to award of reasonable fees to prevailing parties.

Affirmed on appeal; affirmed in part, reversed in part and remanded on cross-

1. **Injunction** ⇐12, 23

Under "relative hardship" or "balance of hardships" test injunctive relief, damage caused by view impairment in violation of restrictive covenant is weighed against costs of mitigation, and if damages associated with removal of encroaching structure are disproportionate to injury which the encroachment causes, injunctive relief is inappropriate.

2. **Injunction** ⇐50

Where homeowner has continued to build notwithstanding notification of clear violation of restrictive covenant that precludes view impairment, court may order injunctive relief, even if balance of hardship cuts against injured party.

3. **Injunction** ⇐50

"Knowing violation" exception to general rule that injunctive relief is not appropriate for violation of view impairment covenant if costs of mitigation outweigh damage caused by violation would not be applied where restriction was not clear, objective and precise but provided only that views "shall be preserved to the greatest extent reasonably possible."

4. **Covenants** ⇐103(2)

Homeowners did not willfully violate restrictive covenant precluding view impairment where they submitted their plans to subdivision's architect one year before commencing construction, architect did not express major reservations about home's height, and architectural control committee informed homeowners during construction that it had rejected neighbors' height complaint.

5. **Injunction** ⇐50

Injunctive relief requiring owners to make structural modifications to their home costing between $50,000 and $70,000 would not issue under balance of hardships test to remedy impairment caused neighboring home in violation of restrictive covenant where roof and clerestory of home substantially impinged on view of mountains only at one end of panoramic range and "best" parts of view were unimpaired.

In June 1989, roughly six months after defendants submitted their preliminary plans to Peter, but before defendants started building, plaintiffs began looking into buying property at Quailhaven. On two occasions, Peter met plaintiffs and showed them Lot 2, which was uphill from defendants' lot; on a third occasion, he showed them the adjacent Lot 3, which was also uphill and directly behind defendants' lot. On each occasion, plaintiffs emphasized that view preservation was critical to their decision to buy and build; that was especially so for Susan Taylor, for whom the views to the north toward Mt. Grizzly were reminiscent of the landscape around Yreka where she grew up. On each occasion, Peter represented that under the Quailhaven CC & Rs, plaintiffs' view would be preserved. On one visit, Peter had plaintiffs climb a step ladder to a height approximating the projected level of their first floor and told them that their view would be unimpaired at that level. On the same visit, Peter referred to a downslope power pole, and told plaintiffs that the roofline of defendants' as-built home on Lot 4 would be no higher than the pole. Peter also represented that defendants' home would be a low-built "farm" house. Ultimately, plaintiffs bought both Lots 2 and 3.

Plaintiffs began building their home in September 1989. Construction on defendants' home started several months later, in early 1990. In March 1990, shortly before plaintiffs moved into their home, they first became aware of a possible view impairment when a header on defendants' home was put in place. Plaintiffs' concerns heightened a few days later, when the trusses for defendants' cathedral-style roof were put in place. Plaintiffs met with defendants [674] and asserted that defendants' construction and design violated various provisions of the CC & Rs, including, particularly, Section 8.1. That provision reads:

> "It is important that Quailhaven owners restrict the height of improvements on their lots and the height of trees and vegetation growing thereon in order that the view of other Quailhaven residents *shall be preserved to the greatest extent reasonably possible*[.]" (Emphasis added.)

Plaintiffs suggested, as a possible compromise, that defendants eliminate the clerestory.[3] Defendants met with their architect, Zaik, and ultimately refused to delete the clerestory—a modification that would have cost approximately $10,000.

Plaintiffs then initiated a complaint to the Quailhaven Architectural Committee, asserting that defendants' home violated several provisions of the CC & Rs, including the "view preservation" covenant, Section 8.1. Under Section 7.1 of the CC & Rs, the Architectural Committee was authorized "to regulate the external design, appearance, location and maintenance of any and all improvements on the Property and any and all landscaping thereon in accordance with provisions of this Declaration and the [Design Review] Manual."[4] On April 26, 1990, Virginia Cotton wrote to plaintiffs, stating, "The full Architectural Committee has met. We regret that you feel so strongly about the matter, but we do not believe that a violation of the Covenants, Conditions and [675] Restrictions exists."[5] Defendants completed their house, and this litigation ensued.

3. At the meeting, Stewart McCollom told plaintiffs that, if he were in their position, he would be "very upset" by the house blocking their view. He also advised plaintiffs to consider hiring a lawyer. The context of those remarks is unclear. Although plaintiffs cast those comments as admissions of liability, it is at least equally plausible that they were expressions of sympathy and an implicit invitation to seek redress against the defendants for Peter's misrepresentations.

4. Section 3.3 of the Design Review Manual, entitled "Committee Discretion," reads as follows:

> "It is recognized that this manual does not contain specific requirements for every situation that may require Committee approval; therefore, the Committee will necessarily exercise discretion in many instances in approving or disapproving of a specific proposal. It is further recognized that a proposal may deserve consideration on its own merit even though it does not meet a specific standard set forth in this manual; therefore, the Committee is authorized, in its sole discretion, to approve a proposal notwithstanding that it may conflict with a standard set forth in this manual."

5. The parties dispute whether that letter or another exhibit, which purports to memorialize minutes of the Architectural Committee meeting on April 15, 1990, evinces a valid decision by the Committee, entitled to deference under *Valenti v.*

hat, under *Valenti v. Hopkins*, 324 Or. 926 P.2d 813 (1996), the trial court erred ailing to give the Architectural Committ- purported approval preclusive effect. re addressing the substance of that ar- ent, it is essential to briefly review *Va- nti* and then to put defendants' present uments, based on *Valenti*, into the proce- l context of what occurred at trial.

Valenti, the plaintiffs purchased a me with an unobstructed mountain view, subdivision. The subdivision's CC & Rs ired that new construction be approved the Architectural Control Committee C). The defendants subsequently pur- ed a nearby lot and submitted their e plans to the ACC. The plaintiffs ob- ed to the defendants' proposed design as iring the view from the second floor of house, but the ACC ultimately ap- ved the defendants' plans, concluding under the operative view protection ision of the CC & Rs, the plaintiffs' lot not "adjacent" to the defendants' lot. plaintiffs filed an action in circuit court ing, alternatively, injunctive relief or ges. The trial court dismissed the tiffs' complaint, concluding that, because ACC had not acted "arbitrarily or unrea- bly," its decision was binding.

plaintiffs appealed, and we reversed. *v. Hopkins*, 131 Or.App. 100, 883 82 (1994). We concluded that, under *v. Salishan Properties, Inc.*, 267 Or. 5 P.2d 1325 (1973), the ACC's con- on of "adjacent lot" in the view protec- venant was not entitled to preclusive *See Valenti*, 131 Or.App. at 107, 883 82 ("[W]hen the issue on appeal con- n interpretation of covenants, that bility is assigned exclusively to the nless the agreement expressly pro- herwise."). We further concluded n the broadly protective purpose of preservation covenant, the plaintiffs' adjacent" to the defendants' lot, manded to the trial court to deter- proper remedy. *Id.* at 108–09, 883

On review, the Supreme Court reversed. The essence of the court's analysis is that, where restrictive covenants clearly express that a designated third party (in *Valenti*, the ACC) "is to make final decisions respecting the relevant issues," those decisions are preclusive unless the 678 decision maker's determination was tainted by "fraud, bad faith, or failure to exercise honest judgment." *Valenti*, 324 Or. at 335, 926 P.2d 813, (citing *Lincoln Const. v. Thomas J. Parker & Assoc.*, 289 Or. 687, 692–93, 617 P.2d 606 (1980), *and Friberg v. Elrod et al.*, 136 Or. 186, 194–95, 296 P. 1061 (1931)). Because the plaintiffs had not pleaded or proved that the ACC's decision was so tainted, that decision was binding. *Valenti*, 324 Or. at 335, 926 P.2d 813.

So much for *Valenti*. At the time this case was tried, the Supreme Court had accepted review of our decision in *Valenti* but had not yet issued its reversal. The parties' arguments to the trial court were framed and phrased accordingly. Defendants contended that our decision was "bad law" and that the Architectural Committee's decision was absolutely preclusive. Conversely, plaintiffs asserted that the Architectural Committee had not rendered any decision approving defendants' home and, even if it had, the trial judge was free, under our decision in *Valenti*, to construe and apply the CC & Rs, and especially Section 8.1, "*de novo*." [6] In urging their respective absolutist positions, neither party anticipated the "fraud, bad faith, or failure to exercise honest judgment" exception that the Supreme Court ultimately endorsed in *Valenti*—and, thus, neither party attempted to relate the evidence to that principle.

However skewed the parties' arguments may have been at trial, defendants' *Valenti*-based assignment of error fails for an even more fundamental reason: Defendants' arguments at trial were not directed against the source of the judgment they now attack. As described above, the judgment here was based on the *jury's* award of damages for defendants' breach of the CC & Rs—and not on the claim for equitable/injunctive relief,

s counsel characterized our holding in The court can sit *de novo* and deter-

mine whether what the architectural review committee did was reasonable."

the injury [that] the encroachment causes." *Tauscher*, 240 Or. at 309, 401 P.2d 40. Accordingly, we affirm the denial of injunctive relief.

Plaintiffs' second assignment of error on cross-appeal challenges the trial court's denial of their petition for attorney fees, which was based on Section 14.3 of the CC & Rs. That section, entitled "Enforcement," reads:

> "Declarant, the Association, the owners of Lots or Dwellings within the Property, the holder of any recorded mortgage on any Lot or Dwelling shall have the right to enforce all of the covenants, conditions, restrictions, reservations, easements, liens and charges now or herein/after imposed by any of the provisions of this Declaration as may appertain specifically to said bodies or owner by any proceeding at law or in equity. Failure by any of them to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of their right to do so thereafter. In the event suit or action is commenced to enforce the terms and provisions of this Declaration, the prevailing party shall be [683] entitled to its attorney's fees, *to be set by the appellate court.* In addition thereto, the Association shall be entitled to its reasonable attorney's fees incurred in any enforcement activity taken on delinquent assessments, whether or not suit or action is filed." (Emphasis added.)

The trial court concluded that, because it was not an "appellate court," it could not award fees. In so holding, the court observed that the emphasized language, "though somewhat illogical, says what it says."

Plaintiffs argue to us, as they did to the trial court, that, because literal application of Section 14.3 as written would produce incongruous results, the term "appellate court" must be disregarded as a "scrivener's error": [14]

> "A reasonable construction of this paragraph is that the prevailing party is entitled to attorney's fees incurred both at trial and on appeal. It simply does not make sense to have the right to attorney's fees contingent upon an appeal to be set by an appellate court.
>
> "* * * * *
>
> "In the instant case, it is clear from viewing the matter as a whole that Section 14.3 contained a scrivener's error." [15]

Conversely, defendants assert that the language is unambiguous and that "it may well have been included as an attempt to induce litigants to consider carefully the monetary risk of appealing a trial court decision."

[6] We agree with plaintiffs that the term "to be set by the appellate court" is susceptible to reformation. In *Sea Fare v. Astoria*, 6 Or.App. 605, 610–11, 488 P.2d 840 (1971), we described the controlling analysis:

> "Every presumption should be invoked in favor of the instrument in question as written on the theory that the [684] sanctity of written agreements should be preserved. *Teachers' Fund Ass'n. v. Pirie*, 147 Or. 629, 34 P.2d 660 (1934).
>
> "In addition to overcoming the presumption in favor of the instrument, a party seeking reformation of the same on the basis of a 'scrivener's' error has the further burden of proof to show that the reformation is necessary. He must support that burden with 'clear and convincing evidence.' *Weatherford v. Weatherford*, 199 Or 290, 257 P.2d 263, 260 P.2d 1097 (1953). * * *
>
> "The recognized grounds for reformation are: (1) A mutual mistake of fact. See, e.g., *Ray v. Ricketts*, 235 Or. 243, 383 P.2d 52 (1963). (2) Mistake of law where both parties misapprehend the legal import of the words used or use words through mutual mistake or inadvertence. See, e.g., *Harris Pine Mills v. Davidson*, 248 Or.

14. Plaintiffs do not contend that the trial court can somehow be an "appellate court" within the meaning of Section 14.3.

15. Plaintiffs also assert that, based on the last sentence of Section 14.3, they have a reciprocal entitlement to attorney fees under ORS 20.096(1). However, as the trial court noted, that sentence refers only to enforcement actions by the Quailhaven Homeowners Association to collect delinquent assessments, and this action is not one by the Association to collect assessments. Accordingly, reciprocity under ORS 20.096(1) does not apply.

Client Identifier: **LINDA LORD**
Date of Request: 10/05/99
Current Database is OR-CS
Your Natural Language Description:

COVENANT RESTRICTION ON DENSITY IN RESIDENTIAL SUBDIVISIONS

Citations List
Database: OR-CS

Search Result Documents: 20

20. 1000 Friends of Oregon v. Board of County Com'rs, Benton County, 32 Or.App. 413, 575 P.2d 651 (Or.App., Feb 07, 1978)

width requirement for the parcel. The number of units to be served shall not exceed six.

C. A minimum twelve-foot wide fire access corridor shall be provided to all parcels created through the partitioning process. No vehicular obstruction, including trees, fences, landscaping, and structures shall be located within the fire access corridor.

D. The area of any accessway shall be excluded from calculations of a minimum lot area for any new parcels or lots. (Ord. 94-1003 §8(part), 1994)

16.28.070 Pavement requirements. A minimum of ten feet of paved driveway shall be provided for single-family units on parcels created through the partitioning process. If more than one unit will use the drive, a minimum of eight feet of pavement width shall be provided for each unit. No paved drive shall be required to exceed twenty-eight feet in width. If the proposed accessway exceeds one hundred fifty feet in length, it shall be paved to a minimum width of twenty feet and, if more than two residences are served, a turnaround for emergency vehicles shall be provided. The turnaround shall be approved by the city engineer and fire chief. (Ord. 94-1003 §8(part), 1994)

Previous width LD standards

16.28.080 Width/depth requirements. New parcels created through the partitioning process shall be exempt from the minimum average width and depth requirements of the zoning code. The minimum width and/or depth of any new parcel created through the partitioning process shall not be less than sixty feet. (Ord. 94-1003 §8(part), 1994)

16.28.090 Conformance. All parcels created shall conform to the requirements of this title, ORS 92.010 to 92.160, the city comprehensive plan and zoning ordinance, and any other applicable city ordinances and regulations. The applicant shall submit a written statement addressing conformity with these standards. (Ord. 94-1003 §8(part), 1994)

16.28.100 Sale of a parcel prohibited. A person may negotiate to sell any parcel in a partition with respect to which approval under this title is required prior to the approval of the tentative plan for the partition. However, no person may sell any parcel in a partition for which approval is required prior to the granting of such approval and the recording of the partition by the county clerk. The sale of any parcel shall conform to the requirements of state law. (Ord. 94-1003 §8(part), 1994)

CITY OF OREGON CITY
INCORPORATED 1844
7th & JOHN ADAMS STREETS
OREGON CITY, OREGON 97045

February, 1980

Appeal No. 345

REPORT FOR THE OREGON CITY

ZONING BOARD OF ADJUSTMENT

REQUEST: Reduce required side yard from 12% of lot width (or 10.3 feet) to 5 feet, to construct a carport.

BY: Albert E. Bittner

LOCATION: 147 Barclay Avenue

ANALYSIS: The applicant requests a 5.3 foot reduction in the required side yard (12% of lot width or 10.3 feet in an R-1 zone) for the purpose of constructing a carport. The property fronts on Barclay Avenue, in an area of oversized lots and large houses. This lot has 17,000 square feet, 7,000 square feet in excess of the R-1 requirement. The variance would allow the construction of a carport, maintaining the side yard of the existing residence and driveway.

RECOMMENDATION: Approval. The proposed variance will have no detrimental effect on the adjacent property owners. The proposed side yard will maintain the existing separation between this and the adjoining property.

EXHIBIT G
Setback Variance 2/80

VR99-07

FEE: $100

CITY OF OREGON CITY

APPLICATION FOR LOT LINE ADJUSTMENT

APPLICANT: Jim McKnight PHONE: 656-0435

SITE ADDRESS: 161 Barclay Ave., Oregon City ZIP CODE: 97045

CITY: Oregon City

PROPERTY OWNER: SAME PHONE: SAME
(if different)

SITE ADDRESS: SAME ZIP CODE: SAME

PROPERTY DESCRIPTION: T 2 S. R 2 E. S 3/DC TAX LOT: 5400

ADJOINING PROPERTY INVOLVED IN THE LOT LINE ADJUSTMENT

PROPERTY OWNER: Albert Bittner PHONE:

SITE ADDRESS: 147 Barclay Ave, Oregon City ZIP CODE: 97045

PROPERTY DESCRIPTION: T 2 S. R 2 E. S 3/DC TAX LOT: 5500

GENERAL LOCATION: Rivercrest Park

REASON FOR ADJUSTMENT: Purchase existing garden & orchard space, that is surplus to neighbor, for eventual building site.

PRESENT ZONE OF APPLICANT'S PROPERTY: R-10

PRESENT ZONE OF ADJOINING PROPERTY: R-10

PRESENT AREA OF APPLICANT'S PROPERTY: 85' x 200' = 17,000 SQ. FT.

AREA OF APPLICANT'S PROPERTY AFTER ADJUSTMENT: ~~85' x 120' = 10,200 SQ. FT.~~ 23,800 SQ. FT.

PRESENT AREA OF ADJOINING PROPERTY: 85' x 200' = 17,000 SQ. FT.

AREA OF ADJOINING PROPERTY AFTER ADJUSTMENT: 85' x 120' = 10,200 SQ. FT

RECEIVED
CITY OF OREGON CITY
00 MAR 23 PM 12:26

PLEASE ATTACH A MAP DRAWN TO SCALE

* *NOTE* *

1) All taxes for parcels are paid in full (attach a receipt from County Assessor's Office

2) The deeds are in the same name for all parcels to be adjusted:

3) Accurate legal descriptions have been prepared for all

EXHIBIT H
Lot Line Adjustment between TL 5300 and TL 5400

INCOMPLETE APPLICATIONS WILL NOT BE

* *

VR99-07

x Jim McKnight
Applicant's Signature

4/1/91
Date

x Albert E Bittner
Property Owner's Signature

4/1/91
Date

PROPERTY DESCRIPTION: T 2S. R 2E. S 31C

ADJOINING PROPERTY INVOLVED IN THE LOT LINE ADJUSTMENT

PROPERTY OWNER: Albert Bittner PHONE:

SITE ADDRESS: 147 BARCLAY AVE, OREGON CITY ZIP CODE: 97045

PROPERTY DESCRIPTION: T 2S. R 2E. S 31DC TAX LOT: 5500

GENERAL LOCATION: RIVERCREST PARK

REASON FOR ADJUSTMENT: PURCHASE EXISTING GARDEN & ORCHARD SPACE, THAT IS SURPLUS TO NEIGHBOR, FOR EVENTUAL BUILDING SITE.

PRESENT ZONE OF APPLICANT'S PROPERTY: R-10

PRESENT ZONE OF ADJOINING PROPERTY: R-10

PRESENT AREA OF APPLICANT'S PROPERTY: 85' x 200' = 17,000 SQ. FT.

AREA OF APPLICANT'S PROPERTY AFTER ADJUSTMENT: ~~85' x 120' = 10,200 SQ. FT.~~ 23,800 SQ. FT.

PRESENT AREA OF ADJOINING PROPERTY: 85' x 200' = 17,000 SQ. FT.

AREA OF ADJOINING PROPERTY AFTER ADJUSTMENT: 85' x 120' = 10,200 SQ. FT

PLEASE ATTACH A MAP DRAWN TO SCALE

* NOTE *

1) All taxes for parcels are paid in full (attach a receipt from County Assessor's Office)
2) The deeds are in the same name for all parcels to be adjusted or consolidated;
3) Accurate legal descriptions have been prepared for all adjustments.

INCOMPLETE APPLICATIONS WILL NOT BE ACCEPTED

* *

x Jim McKnight
Applicant's Signature

4/1/91
Date

x Albert E Bittner
Property Owner's Signature

4/1/91
Date

THIS APPLICATION MUST BE PROCESSED WITHIN THE 120-DAY DEADLINE

OFFICE USE ONLY

FILE NUMBER: LL 91-05 DATE SUBMITTED: 4/2/91

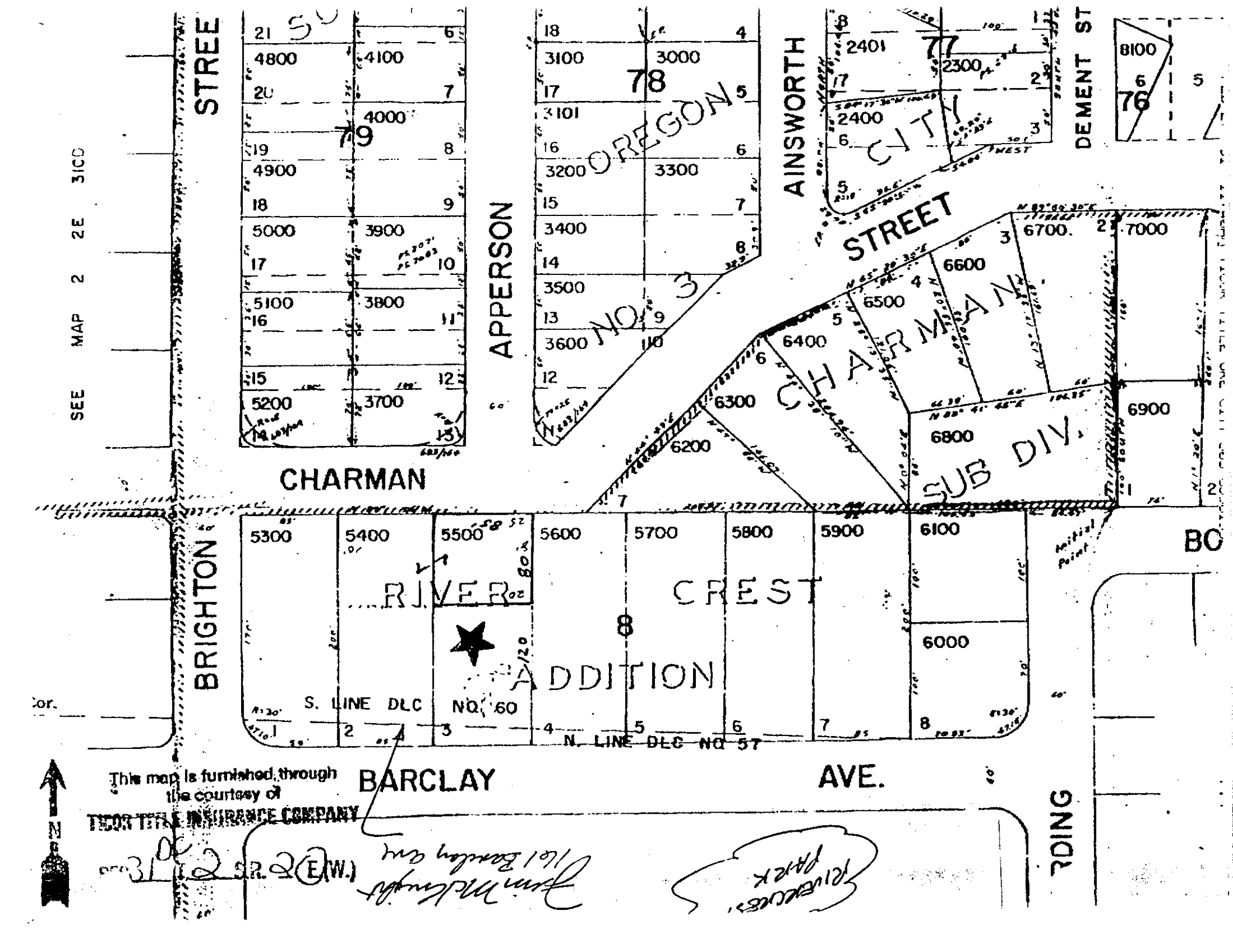
(APPROVED) DENIED RECEIVED BY: KD

Planner

FEE PAID: 100.00 RECEIPT NO. 044983

4/9/91
Date

* *


STREE
SEE MAP 2 2E 31CD
21
4800
4100
20
4000
19
4900
18
5000
3900
17
5100
3800
16
15
5200
3700
APPERSON
18
3100
3000
17
3101
16
3200
3300
15
3400
14
3500
13
3600
12
OREGON
NO. 3
AINSWORTH
2401
2300
2400
CITY
STREET
DEMENT ST
8100
6700
7000
6600
6500
6400
6300
6200
6800
6900
CHARMAN
SUB DIV.
CHARMAN
5300
5400
5500
5600
5700
5800
5900
6100
6000
RIVER CREST
ADDITION
BRIGHTON
S. LINE DLC NO. 60
N. LINE DLC NO 57
BARCLAY
AVE.
This map is furnished through the courtesy of
TICOR TITLE INSURANCE COMPANY
31E 2 SR. 2 (E.W.)

LEGAL DESCRIPTION TO BE RECORDED BY TICOR TITLE INSURANCE COMPANY FOLLOWING APPROVAL OF LOT LINE ADJUSTMENT APPLICATION:

1. APPLICANTS PROPERTY AFTER ADJUSTMENT:

LOT 2 AND THE NORTHERLY 80 FEET OF LOT 3,
BLOCK 8, RIVER CREST ADDITION.

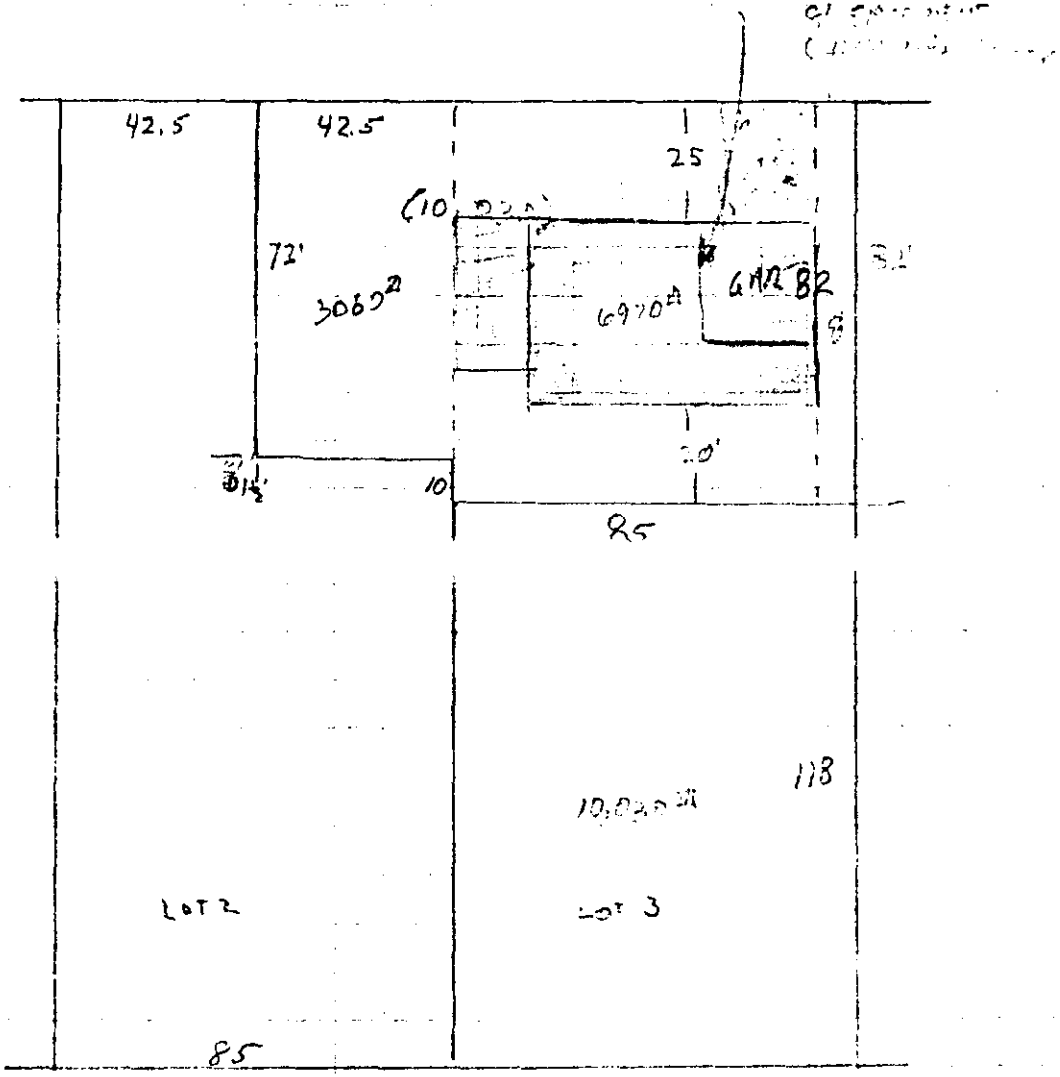
2. ADJOINING PROPERTY AFTER ADJUSTMENT:

~~SOUTHERLY 120 FEET OF LOT 3,~~
~~BLOCK 8, RIVER CREST ADDITION.~~

Lot 3, Block 8, RC Addn,
except the northerly 80 feet thereof

2730 ft² (2100 ft² HSE)

BUILDING



BARCLAY

1:40 SCALE

PETITION

TO: OREGON CITY PLANNING COMMISSION

SUBJECT: VARIANCE TO THE LOT DEPTH RE: FILE VR 99-07

WE, THE UNDERSIGNED, RECOMMEND YOU PERMIT THE APPLICANT, JIM MCKNIGHT, TO MODIFY THE ZONING REQUIREMENT, IN AN R-10 ZONE, FROM A 100' LOT DEPTH TO AN 80' LOT DEPTH.

NAME	ADDRESS
CHARLES LEESLIE	147 BARCLAY AVE.
Mary Wise	165 Barclay Ave
Josie KEHOE	602 Brighton Cre.
Mary J Thibault	606 Jefferson St Oregon City
Emilie Cathcart	721 Chanman St

RECEIVED
CITY OF OREGON CITY
00 MAR 20 PM 2:52

EXHIBIT I

Petition From Adjacent Neighbors

VR99-07

142 Holmes Lane
Oregon City, OR 97045
March 27, 2000

City of Oregon City, Planning Commission
320 Warner-Milne Road
Oregon City, Oregon 97045-0304

00 MAR 27 PM 4:13

RECEIVED
CITY OF OREGON CITY

RE: Variance 99-07

From: Linda Lord

I oppose the applicant's petition for a variance and partition to create a substandard lot in the Rivercrest neighborhood, an area zoned R-10. The applicant has not presented facts to show the request meets the grounds for an acceptable variance. I will address each criterion in sequence.

The grounds for considering a variance are given in Code §17.60.020:

1. The literal interpretation of the provisions of the City's zoning requirements must deprive the applicant of rights commonly enjoyed by other properties in the surrounding area.

Mr. McKnight misstated the first criterion listed in the Code, which requires him to show that not granting the variance would deprive him of rights commonly enjoyed by other properties in the surrounding areas. No other property owners in the City have the right to create building lots with a depth of less than 100' in an R-6, 8 or 10 residential zone, and none of the lots he cited was created by means of a variance to a zoning requirement in force at the time the lots were platted. The lots met the lot depth requirement which existed at the time they were created, and over half of the lots applicant cited in his application currently have a lot depth exceeding 100 feet, according to the information in the Assessor's packets for each tax lot. (Exhibit 1). Applicant presents no evidence that any of the cited lots was created by means of a variance to the lot depth then required by the Code.

Applicant evidently expects to make three lots from two by creating a substandard lot. He appears to argue that because the law changed, and some properties exist with less than the lot depth presently required for new lots, he should be allowed to ignore the current law which took effect before he filed his application. Code § 17.50.070 states clearly that the approval standards which were in effect on the date the application was first submitted will control the city's decision on the application. Mr. McKnight was a planning commission member and knows the variance decision making process. Expecting him to conform to the law does not deprive him of any rights enjoyed by other Oregon City property owners. Granting the variance, without solid evidence to support the petition, would be inequitable.

EXHIBIT J
Letter from Linda Lord
Dated 3/27/00

VR99-07

2. The proposal must not be likely to damage adjacent properties by reducing ...desirable or necessary qualities.

Applicant listed the steps he expects to take to prevent the proposed building from reducing desirable qualities of neighboring properties. He has promised that the proposed residence will have no more than one story and no windows on the east side. There are no zoning requirements to prevent such building features. The owner of the existing residence on Tax Lot 5500 added a second story to that house shortly after moving into it in 1992. The only way applicant's suggested building restrictions could be enforced would be through CCRs. Existing deed restrictions already forbid the building of a second residence on either lot. (Exhibit 2).

By proposing the protections he listed, the applicant acknowledges that adjacent properties are at risk of having desirable qualities of their properties substantially damaged. He proposes to prevent the deterioration of his neighbors' enjoyment of their properties by remedies which he cannot ensure if he sells the proposed substandard lot to another owner.

Another particularly desirable quality of adjacent properties threatened by the proposal is that the lots are large and the neighborhood is well-established. At the time the Plan was written, Oregon City was under a sewer moratorium which "restricted residential development". (C-7). However, in the recent spurt of residential developments, the direction established in the Plan has been followed and smaller lots have been encouraged by zoning requirements with reduced lot sizes. Lot depths in residential zones R-6, 8 and 10 *all* require a minimum 100' lot depth. Applicant is asking for a major variance, twice as much as a minor variance. He has not justified such a drastic deviation from the requirements.

An article in the Oregonian two weeks ago explained the growing reluctance of homeowners to sell properties with large lots because newer subdivisions usually have much smaller lots and higher population densities. (Exhibit 3) The smaller lots are not as marketable as larger lots in established neighborhoods. The article discussed the phenomenon:

> "Builders and government officials think that the undesirable aspects of *new* houses, often *built* on *small lots* in *isolated* corners of the metropolitan area, increase the appeal of homes in older neighborhoods....Jim Feild of Progressive Builders Northwest said prospective buyers 'look at new houses on small lots and say they are happier where they are.' ...The region's close-in neighborhoods have advantages usually associated with the most distant suburbs: larger lots with more room to grow" (March 11, 2000, p. B1).

If the existing lot sizes are reduced for this R-10 property, the neighboring properties will be less desirable and property values WILL DECREASE. Low population density was so important to the subdivision's

developers that they made it part of the FIRST covenant they created when the subdivision was platted and the CCRs were recorded. They also provided that the restrictions would run with the land and be automatically renewing. Subsequent homeowners, such as Mr. McKnight and I, have benefited from that density restriction for over 50 years. Maintaining large lots with only one residence per lot is a very important desirable quality for most of the applicant's neighbors in Rivercrest. The applicant's petition is not in the best interests of neighboring properties and should be denied.

3. The applicant's circumstances must not be self-imposed or merely constitute a monetary hardship or inconvenience.

There could be no clearer instance of a self-imposed hardship than the situation facing the applicant. He purchased his home in 1970 and has lived there for nearly thirty years with NO HARDSHIPS requiring any variances to allow him to enjoy his home. Then, in 1991, he decided to buy part of the neighbor's backyard before the property next door was sold. Applicant does not have a depth of 100' for his proposed lot because he only bought 80 feet of Tax Lot 5500 in 1991, although the lot was 200' deep at the time. If applicant's neighbor had sold the full 100' necessary for a buildable lot, however, Tax Lot 5500 would have become substandard.

The only hardship the applicant mentions is that he needs money to maintain his house. According to the Code, merely a monetary hardship or inconvenience is not sufficient to meet the requirements for a variance.

Applicant purchased his home in 1970 for $23,500, and the Assessor estimated the 1999 real market value (RMV) at $226,600. The mortgage was retired in 1995. (Exhibits 4, 5 & 6) In April 1991, applicant purchased the rear 80' of Tax Lot 5500 for $5000, although the first deed reported the consideration was $80000. (Exhibits 7 & 8). In June 1991, applicant purchased residential property at 105 Randall Court for $90,000, and sold it for $125,500 in April 1994. (Exhibits 9 & 10). Applicant appears to have more than sufficient resources to raise funds needed to keep his house from deteriorating and reducing the neighbors' property values.

In December 1997, a field inspection of the applicant's property, conducted at applicant's request, found that it is "located in one of the premier areas of Oregon City overlooking the park". The appraiser noted that there was "some deterioration holding down the percent good at reappraisal to 10% OVER the base. (Exhibit 11). There is no imminent danger of declining values for homes surrounding Rivercrest Park.

Applicant has not given evidence of any hardship other than financial inconvenience. The proposal does not meet this criterion.

4. No practical alternatives can have been identified which would accomplish the same purposes and not require a variance.

There are many practical alternatives. If applicant needs to finance home maintenance, it appears he has access to other avenues for funding the repairs. There is no hardship evidenced sufficient to meet this criterion.

5. The variance must be the minimum variance which could alleviate a legitimate hardship.

Applicant has defined no legitimate hardship to be alleviated through the planning process. Enforcing the existing zoning requirement for lots in the R-10 residential districts in Oregon City is appropriate, and the application should be rejected.

6. The variance must conform to the Comprehensive Plan and the intent of the ordinance being varied.

The applicant's suggested partition and variance are in direct conflict with specific provisions of the city's Comprehensive Plan regarding housing.

The Plan recognizes that "housing supplies a personal identity to the neighborhood" (C-1), and it defines buildable lots as "sites...not substandard in size." (C-12). (Emphasis added). Rivercrest is "one of the newer areas of the city which tends to emphasize larger concentrations of one housing type", e.g. R-10. (C-2). Oregon City's Housing Goal #2 is to "encourage the maintenance of the existing residential housing stock through appropriate zoning designations, considering existing patterns of development in established older neighborhoods." (C-16) (Emphasis added.) Goals 10 and 14 of the LCDC include "preservation of older housing and residential neighborhoods." (E-3-4). The Comprehensive Plan map displaying development potential in Oregon City (C-14) shows NO BUILDABLE PROPERTY IN RIVERCREST.

To create a substandard lot in Rivercrest would violate these elements of the Comprehensive Plan as well as city ordinances.

ADDITIONAL COMMENTS:

I also object to the proposed partition because the resubdivision would violate restrictive covenants which apply to all properties in the Rivercrest Addition, including the applicant's and mine. I understand that the City does not enforce private contractual obligations, and I am not requesting your assistance. However, I do want you to fully understand my interests in your decision.

Applicant informed me he was aware of our land's deed restrictions when he purchased the Barclay property about thirty years ago, that he understood then as now that the restrictions run with the land, and that he knows the restrictions are binding on him as well as all other current property owners in Rivercrest Addition. I wrote him about my objections to the proposed variance and partition,

and gave him a copy of the restrictions on file at the Clackamas County Records Office. The restrictions are more fully discussed in that correspondence. (Exhibit 12).

I sent the applicant a formal notification of my objection to his proposed partition and requested that he abandon his intention to re-subdivide the two Rivercrest properties. I have given him express notice that, if necessary, I intend to ask the Circuit Court to enforce the CCRs and to enjoin the proposed resubdivision as a violation of a binding restrictive covenant. I received my copy of the deed restrictions when the title search revealed them at the time I purchased my property in 1988, and I have relied on them as contractual guarantees that the basic character of the neighborhood will remain as it was when I acquired my home. I object to any actions in violation of the covenants, especially partition of any of the lots in the subdivision. I believe the proposed partition violates several obligations mandated in Rivercrest Addition's CCRs, as well as violating the City's zoning ordinances.

The Oregon Supreme Court has already ruled on density restrictions by restrictive covenants. In a very similar situation, *Cadbury v. Bradshaw*, 43 Or App 33, 602 P2d 289, 291, *review denied*, 288 Or 519 (1979), the court ruled that:

> where restrictive covenants in deeds required all of the parcels to be used as residential parcels and prohibited building of more than one dwelling on a parcel, the restrictions prohibited resubdivision by necessary implication.., *[C]onstruction on resubdivided parcels was not permissible...[and] it would be inconsistent with these provisions for fractional parcels to be created where no residential use can occur*. (Emphasis added.)

SUMMARY:

The applicant's proposal does not meet any of the requirements established in the Oregon City Zoning Ordinance for an acceptable variance petition, and it is required to meet all the requirements to be approved. Additionally, the petition directly conflicts with applicable elements of the Comprehensive Plan. I ask that you reject it.

Sincerely,

Linda Lord

Linda Lord

Encl.

CC: James McKnight

LIST OF EXHIBITS

1. Dimensions of Lots Cited in Narrative of VR 99-07, March 2000
2. Restrictive Covenants of Rivercrest Addition, July 1940
3. "Changing the View from Within", Oliver Gordon, *Oregonian*, March 11, 2000. Page B1
4. Deed to 161 Barclay, July 1970
5. Cover of Assessment Packet for 161 Barclay, March 2000
6. Satisfaction of Mortgage for 161 Barclay, October 1995
7. Deed for Part of Tax Lot 5500, April 1991
8. Deed for Part of Tax Lot 5500, May 1991
9. Deed for 105 Randall, June 1991
9. Deed for 105 Randall,April 1994
11. Appraisal Report for 161 Barclay, December 1997
12. Letter to James McKnight from Linda Lord, September 1999

Dimensions of Lots Cited
in Narrative of VR 99-07

	Map	Tax Lot	Dimensions	Acreage	Var?	99 RMV Land	Total RMV	Address	Owner
	2 2E 31 DC	5400	85 x 200	0.55		69190	226600	161 Barclay	James McKnight
1	2 2E 31 DC	6200	135 x 73 (C)*	0.23	N	52810	170480	810 Charman	Jeffrey Miller
2	2 2E 31 DC	8000	119 x 110 (C)*	0.3	N	57660	198690	112 Harding	Charles Hudson
3	3 2E 6AB	5300	68 x 131 (C)*	0.2	N	50020	125770	152 Valley View	Steven Phillipson
4	3 2E 6AB	7700	85 x 83	0.16	N	45180	118290	114 McCarver	Paul Wickstrom
5	3 2E 6AB	9200	125 x 80	0.23	N	53920	127700	333 Holmes	Clarence Richardson
6	3 2E 6AB	9300	80 x 125 (C)*	0.23	N	53920	176470	886 Linn	William Johnson
7	3 2E 6 AC	100	80 x 110	0.2	N	50020	101960	344 Holmes	Howard Lafave
8	3 2E 6 AC	200	80 x 110	0.2	N	50950	120610	334 Holmes	Violet Carnes
9	3 2E 6 AC	1300	75 x 103	0.18	N	46860	117030	110 Holmes	Melvin Weseman
10	3 2E 6 AC	5700	60 x 92	0.13	N	39230	111090	192 AV Davis	Geraldine Robinson
11	3 2E 6BA	4500	85 x 97(C)*	0.18	N	48540	167620	105 Randall Ct.	Richard Ferguson
12	3 2E 6BB	3701	85 x 97	0.19	N	48540	106240	305A Barker Ave	Forest Jones
13	3 2E 6BB	3903	115 x 97	0.24	N	53860	306560	379 Barker	Kevin Dale Dier
14	3 2E 6BB	4007	68 x 179	0.28	N	75300	206200	439 Ridgecrest	Alfred Simonson
15	3 2E 6BB	4008	130 x 75	0.2	N	52810	152670	441 Ridgecrest	Leslie Kegg
16	3 2E 6BB	4009	82 x 155	0.29	N	56540	184190	430 Ridgecrest	Kurt Bevers
17	3 1E 1DA	600	42 x 100	0.09	N	35330	87730	119 Warner-Parrot	Bobby Pierce
18	3 1E 1DA	700	53 x 100	0.12	N	38290	99390	125 Warner-Parrot	Steven Winchester
19	3 1E 1DA	1500	97 x 74	0.16	N	45180	126920	1018 King Road	Gary Todd
20	3 1E 1DA	1800	37 x 200	0.17	N	35180	81810	147 Warner-Parrot	Rosa Sargent
21	3 1E 1DA	1900	42 x 230 (C)*	0.22	N	48540	105890	151 Warner-Parrot	Melvin Bayless

Exhibit 1

* Indicates irregular corner lot

Exhibit 1

Submitted by Linda Lord
3/27/2000

RESERVATIONS AND RESTRICTIONS UPON USE AND OCCUPANCY OF PROPERTY IN RIVER CREST ADDITION TO OREGON CITY, OREGON AND CORRECTION OF NAME OF PLAT AND DEDICATION

KNOW ALL MEN BY THESE PRESENTS, That River-Crest Development Co., a corporation created and existing under the laws of the State of Oregon, does hereby certify and declare that the following reservations, conditions, covenants and agreements shall become and are hereby made a part of all conveyances of property within the plat of River Crest Addition to Oregon City, Oregon, as the same appear on the map and plat recorded in Book 23, at page 21, Record of Town Plats of Clackamas County, Oregon, of which conveyances the following reservations, conditions, covenants and agreements shall become a part by reference and to which they shall thereupon apply as fully and with the same effect as if set forth at large therein during the period of twenty-five years from and after the 28th day of June, 1940.

1. All lots in the tract shall be known and described as residential lots except as hereinafter noted; no structures shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height, and a private garage for not more than two (2) cars and other out-buildings incidental to residentail use.

2. No building shall be located on any residential building plot nearer than twenty (20) feet to the front lot line, nor nearer than twenty (20) feet to any side street line, and no building, except a garage or other out-building located sixty (60) feet or more from any front lot line, shall be located nearer than five (5) feet to any side lot line. No residence or attached appurtenance shall be erected on any lot farther than thirty (30) feet from the front lot line. No residential structure shall be erected or placed on any building plot, which plot has an area of less than 7500 square feet not a width of less than 60 feet at the front building setback line.

3. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood. No animals other than domestic pets shall be kept on any part of Blocks One (1), TWo (2), Three (3), Four (4) and Eight (8). Blocks Five (5), Six (6) and Seven (7) shall be under the same general limitations and restrictions as Block Four (4), except the owners in Blocks (5), Six (6) and Seven (7) who own lots containing One (1) Acre of ground or more have the privilege of keeping poultry sufficient for family use, and any out buildings in which poultry is kept must be built on rear 1/2 halfheoftthettract; not nearer than twenty (20) feet to side lines of lot or tract.

4. No persons of any race other than the Caucasian race shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner tenant.

5. No trailer, basement, tent, shack, garage, barn or other out building erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.

Exhibit 2 - 1

6. No dwelling costing less than $3,500.00 shall be permitted on any of the following described lots in said subdivision: All lots in Blocks One Two (2) and Eight (8), and Lots One (1) and Twenty (20) in Block Three No dwelling costing less than $2,000.00 sahll be permitted on any other lot in the tract. The ground floor area of the main structure, exclusive of one-story open porches and garages, shall be not less than 700 square feet in the case of a one -story structure nor less than 600 square feet in the case of a one and one-half, two or two and one-half story structure.

7. It is understood and agreed by and between the parties hereto that Lot Ten (10) in Block Three (3), and Lots One (1) and Five (5) in Block Four (4) of said subdivision are hereby reserved to be used for commercial or other purposes, and none of the restrictions, covenants or conditions contained in paragraphs two, three, six or eight hereof shall apply thereto, and said lots may be sold with or without such restrictions and for such purposes as the grantor may elect.

8. No advertising signs shall be erected on any of the lots herein or on any improvements thereon, save and excepting plates of professional men and "for sale" and "for rent" signs, all of which are to relate only and be restricted to the lots to which the same apply, and further excepting such general advertising signs as may relate to all unsold property in River Crest Addition to Oregon City, Oregon.

9. An easement is reserved over the rear five (5) feet of each lot for utility installation and maintenance.

10. Until such time as the city sewer is available, all sewage disposal shall be by means of septic tanks of type and construction and outlets in accordance with recommendations of the Oregon State Board of Health and the City of Oregon City.

11. These covenants are to run with the land and shall be binding on all the parties and all persons claiming under them until June 28, 1965, at which time said covenants shall be automatically extended for successive periods of ten years unless by a vote of the majority of the then owners of the lots it is agreed to change the said covenants in whole or in part.

12. It is further agreed and covenanted that no breach of the restrictions contained herein shall of itself work a forfeiture of the land conveyed in fee simple, but any such breach shall give the grantor, its officers and agents, or any owner of land in River Crest Addition to Oregon City, Oregon, the right to compel performance of these agreements, and to abate and remove any structures or erections in violation of them through the court or courts having jurisdiction in such cases, and

It is further agreed that the grantor, its officers and agents, shall have the right summarily to ender upon the granted premises, and to abate and remove at the expense of the owner therof any erection, nuisance, thing or condition that may be thereon contrary to the true intent and meaning of such restrictions or any of them, and that the grantor, its officers or agents, shall not thereby be deemed guilty in any manner of trespass.

13. Invalidation of any one of these covenants by judgment or court order shall in no sise affect any of the other provisions which shall remain in full force and effect.

14. That whereas the dedication as shown on the plat recorded in Book 23 at Page 21 of Record of Town Plats of Clackamas County, Oregon, describes the same as River Crest and the caption of the plat describes it as River Crest Addition to Oregon City, Oregon. Now therefore, the true and correct name of the plat and dedication as recorded in Book 23 at Page 21 of Record of Town Plats, as recorded in the office of the County Clerk, Clackamas County, Oregon, is hereby declared to be River Crest Addition to Oregon City, Oregon.

IN WITNESS WHEREOF, River-Crest Development Co., pursuant to a resolution of its Board of Directors, duly and legally adopted, has caused these presents to be signed by its President and Secretary and its corporate seal to be hereunto affixed this 1st day of July 1940.

River Crest Development Co.

s/s Geo. F. Vick
President

River-Crest Development Co.

s/s Maree Odom
Secretary

(2)

BOOK 272 PAGE 355

AMENDED AND SUPPLEMENTAL RESERVATIONS AND RESTRICTIONS UPON USE AND OCCUPANCY OF PROPERTY IN RIVER CREST ADDITION TO OREGON CITY, OREGON

KNOW ALL MEN BY THESE PRESENTS, That River-Crest Development Co., a corporation created and existing under the laws of the State of Oregon, does hereby certify and declare that the following reservations, conditions, covenants and agreements shall hereafter become and are hereby made a part of all conveyances of property within River Crest Addition to Oregon City, Oregon, as the same appears on the map and plat recorded in Book 23, page 21, Record of Town Plats of Clackamas County, Oregon, of which conveyances the following reservations, conditions, covenants and agreements shall become a part by reference and to which they shall thereupon apply as fully and with the same effect as if set forth at large therein during the period of twenty-five years from the date hereof. It being the intention to supplement and amend the reservations and restrictions heretofore filed upon River Crest Addition to Oregon City, Oregon, on July 2, 1940, in Book 270, page 312, Deed Records of Clackamas County, Oregon, and except as so supplemented and amended herein the prior reservations and restrictions are to remain and be in full force and effect.

1. Lots 6, 7, 8, 9 and 10, Block 5; Lots 1 and 2, Block 6; and all of Block 7, all in River Crest Addition to Oregon City, Oregon, are hereby divided into northeasterly and southwesterly halves by a line through said lots and blocks parallel to Max Telford Road.

2. Poultry sufficient for family use in Blocks 5 and 6 and the buildings in which they are housed, must be kept on the rear 100 feet, or rear half of each lot; and in Block 7, poultry and the buildings in which they are housed, must be kept on the

rear 79 feet of each lot.

3. No building shall hereafter be erected, placed, or altered on any building plot in this subdivision until the building plans, specifications, and plot plan showing the location of such building have been approved in writing by a majority of a committee composed of F. L. Odom, and Geo. F. Vick, and N. H. Cherry, or their authorized representative, for conformity and harmony of external design with existing structures in the subdivision; and as to location of the building with respect to property and building setback lines. In the case of the death of any member or members of said committee, the surviving member or members shall have authority to approve or disapprove such design or location. If the aforesaid committe or their authorized representative fails to approve or disapprove such design and location within 30 days after plans have been submitted to it, or if no suit to enjoin the erection of such building, or the making of such alterations has been commenced prior to the completion thereof, such approval will not be required. Said committee or their authorized representative shall act without compensation. Said committee shall act and serve until 5 years at which time the then record owners of a majority of the lots which are subject to the covenants herein set forth may designate in writing duly recorded among the land records their authorized representative who thereafter shall have all the powers, subject to the same limitations, as were previously delegated herein to the aforesaid committee.

IN WITNESS WHEREOF, River-Crest Development Co., pursuant to a resolution of its Board of Directors, duly and legally adopted, has caused these presents to be signed by its President and Secretary and its corporate seal to be hereunto affixed this

2-5

/9th day of September, 1940.

River-Crest Development Co.

By Geo. F. Vick
President

River-Crest Development Co.

By Maree Odom
Secretary

STATE OF OREGON
ss
County of Clackamas

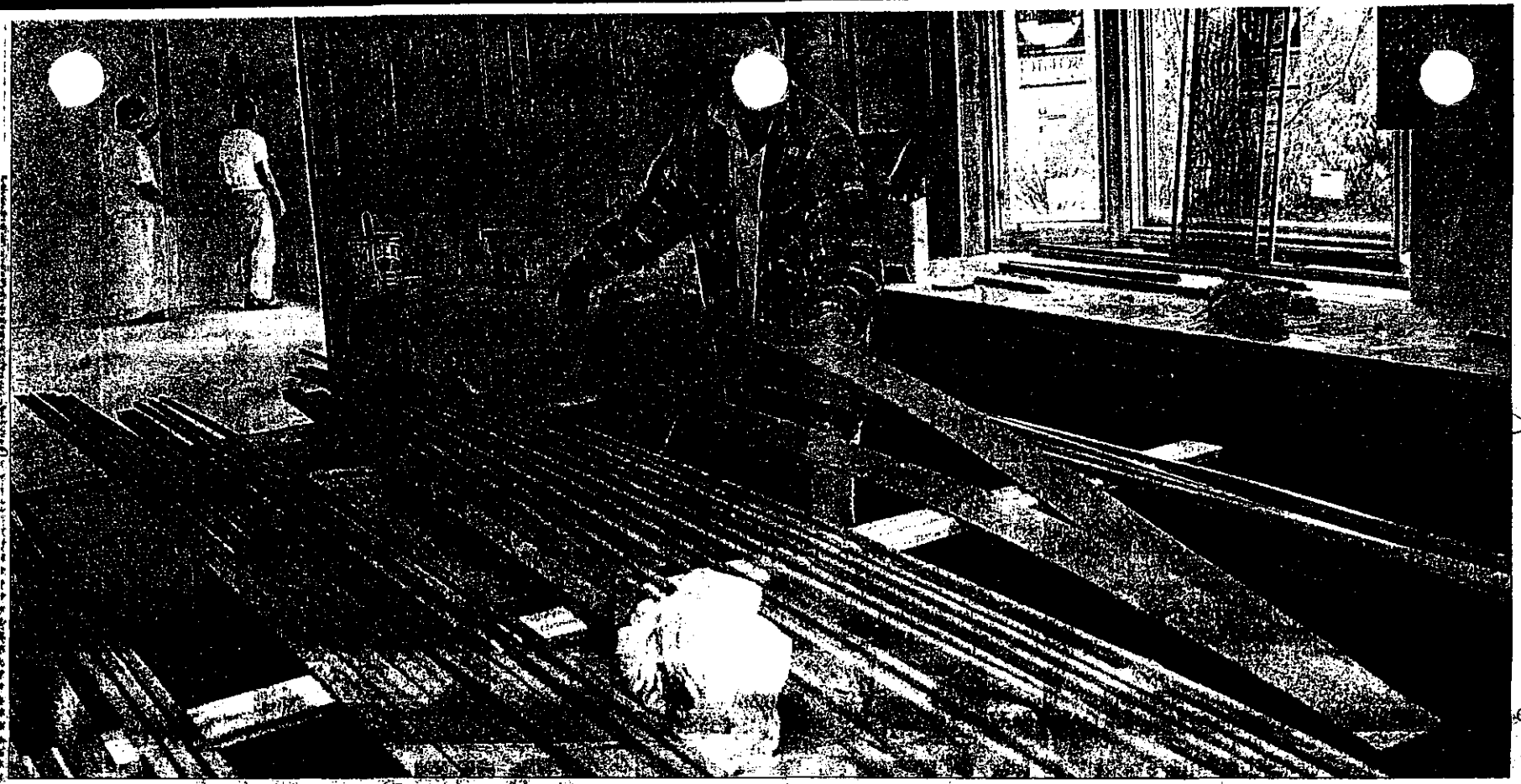
On this /9th day of September, 1940, before me appeared Geo. F. Vick and Maree Odom, both to me personally known, who being duly sworn, did say that he, the said Geo. F. Vick is the president, and she, the said Maree Odom is the Secretary of River-Crest Development Co., the within named corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Geo. F. Vick and Maree Odom acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and seal, the day and year last above written.

Alden E. Miller
Notary Public for Oregon
My comm. expires: Nov. 13, 1942

(SEAL) DOCUMENT 6518 RECORDED SEP 10 1940 8:53 P M. GUY H. PAGE, COUNTY CLERK

2 - 6



ROGER JENSEN/THE OREGONIAN

Brian Stitzel of Tri-County Painting moves stained boards to another room for drying in a large remodeling job. Unprecedented prosperity, declining city crime rates and the growing appeal of urban neighborhoods are contributing to an increase in remodeling.

Changing the view from within

Homeowners hooked on large lots remodel aging houses instead of buying new

By GORDON OLIVER
THE OREGONIAN

More homeowners are deciding to stay put in their older homes instead of searching for greener pastures, because many of those once green pastures are being transformed into crowded subdivisions.

Growth patterns in the Portland region have added a new twist to the timeless homeowner quandary of whether to remodel an older house or move to something bigger, newer and better.

Builders and government officials think that the undesirable aspects of new houses, often built on small lots in isolated corners of the metropolitan area, increase the appeal of older homes on larger lots in established neighborhoods.

"Moving is becoming less of an option for most people," said Jim Feild of Progressive Builders Northwest, one of hundreds of small-sized residential remodeling contractors in the Portland area. "They look at new houses on small lots and say they are happy where they are."

The region's unprecedented prosperity, declining city crime rates and the growing appeal of urban neighborhoods to middle-class Americans contribute to the growing strength of the remodeling industry. But the unusual turn of history is that the region's close-in neighborhoods have advantages usually associated with the most distant suburbs: larger lots with more room to grow. And they have the added advantages of being closer to jobs in an increasingly con-

Please see **REMODEL**, Page B3

Remodel: Home tour starts Saturday

Continued from Page B1

gested region.

A dozen of the region's remodeling contractors will show the latest in remodeling techniques in the Portland area's first Tour of Remodeled Homes, sponsored by the Remodelers Council, a 2-year-old committee of the Home Builders Association of Metropolitan Portland. The tour is a showcase for the new organization and some of its 150 members, in homes scattered throughout the region. It is from 10 a.m. to 5 p.m. today and Sunday. Tickets, to the show's maximum of 2,500 attendees, are available at all Parr Lumber outlets. The cost is $15.

Feild's addition to the Lake Oswego home of Tom and Sue Marks is among the most modest of the display homes, with a two-floor bedroom, bathroom and loft that takes advantage of west-facing views of the Willamette River and the Cascades.

The Markses chose their small [illegible] because of its prime location in Lake Oswego. They couldn't afford a new house in Lake Oswego and weren't interested in new houses elsewhere on small lots, Susan Marks said. "We bought the house for the lot and the view," said Sue Marks, a 46-year-old substitute teacher. "We knew it wasn't a fabulous house."

That was three years ago, and their decision to remodel the 1951 ranch-style home came when they needed a new roof. The work cost them about $80,000, and they already are looking forward to saving enough for the next remodeling job.

"We have a vision of doing the kitchen next," Sue Marks said.

The definition of remodeling is vast enough to include everything from installing a new countertop to a whole house remodel. Nationally, the almost $150 billion spent every year on residential remodeling rivals spending on new construction, according to a report released a year ago by Harvard University's Joint Center for Housing [illegible]dies.

Few people spend large amounts of money on remodeling. A 1994-95 American Housing Survey found that 17 percent of homeowners spent less than $500 during a two-year period on home projects, and just 9 percent of homeowners put more than $10,000 into improvements and repairs. Those 9 percent were responsible for more than half of all home improvement spending.

But few homeowners escape the remodeling impulse. A majority of homeowners who stay in a home 10 years make at least one remodeling improvement during those years, according to the Harvard study. One-quarter of those owners had undertaken a major addition, kitchen or bathroom project.

Big-ticket projects fuel the industry and make for the kind of showcase projects that dominate the Tour of Remodeled Homes. The remodelers are not disclosing costs, although some say their projects are in the half-million dollar range or above. They include full house remodels that are a huge logistical challenge to builders and homeowners.

"The remodeling itself is stressful, and it's almost like you are living in another house," said Scott Gregor of Master Plan Remodeling, who completed a three-phase whole house remodel of a 1950s ranch home while owners were living in the home. The home is on the tour of remodeled homes.

"Remodeling is not something done for profit," said Sam Hagerman of Hammer and Hand, a fast-growing remodeling firm whose customers spend an average of $180,000 for remodeling work. "You are spending real dollars you won't get back. If you want to make money, you should buy a mutual fund."

Demographic trends tend to favor a rise in demand for remodeling. The average age of homes is rising, and home demolitions have fallen by three-quarters since the 1960s, the Harvard study reported. There are more homeowners in the high-spending 45-to-65 age group, and they are increasingly inclined to hire contractors rather than doing the work themselves.

Locally, the huge run-up in housing prices during the '90s has given longtime owners plenty of equity to pay for remodeling. Adding fuel to the national trends are the strength of close-in city and suburban neighborhoods, traffic congestion that discourages long commutes, and the region's anti-sprawl growth restrictions.

"Basically the trend in Portland is going to high-density housing," Gregor said. "That's what I'm counting on."

◆

You can reach Gordon Oliver at 503-221-8171 or by e-mail at gordonoliver@news.oregonian.com.

FORM No. 831—WARR DEED
1967/50

KNOW ALL MEN BY THESE PRESENTS, That
ROBERT J. McEAHERN and JANET E. McEAHERN, husband and wife
, hereinafter called the grantor, for the consideration hereinafter stated
to grantor paid by JAMES A. McKNIGHT and DIANE L. McKNIGHT, husband and wife
, hereinafter called the grantee,
does hereby grant, bargain, sell and convey unto the said grantee and grantee's heirs, successors and assigns, that certain real property, with the tenements, hereditaments and appurtenances thereunto belonging or appertaining, situated in the County of Clackamas *and State of Oregon, described as follows, to-wit:*

Lot 2, Block 8, RIVER CREST ADDITION TO OREGON CITY

To Have and to Hold the same unto the said grantee and grantee's heirs, successors and assigns forever.

And said grantor hereby covenants to and with said grantee and grantee's heirs, successors and assigns, that grantor is lawfully seized in fee simple of the above granted premises, free from all encumbrances except 1970-71 taxes due but not yet payable and conditions and restrictions as recorded July 2, 1940 in Deed Book 270, page 312 and amended and supplemented recorded September 10, 1940 in Deed Book 272, page 355, Records of Clackamas County, Oregon

and that grantor will warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, except those claiming under the above described encumbrances.

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ 23,500.00 *(However, the actual consideration consists of or includes other property or value given or promised which is part of the the whole consideration (indicate which).)*

In construing this deed and where the context so requires, the singular includes the plural.

WITNESS grantor's hand this 30th *day of* July *, 19* 70

Robert J. McEahern

Janet E. McEahern

STATE OF OREGON, County of Clackamas) ss. July 30 *, 19* 70

Personally appeared the above named Robert J. McEahern and Janet E. McEahern

and acknowledged the foregoing instrument to be their *voluntary act and deed.*

(OFFICIAL SEAL)

Before me Lorraine Hair

Notary Public for Oregon

My commission expires 10-29-72

NOTE—The sentence between the symbols ①, if not applicable, should be deleted. See Chapter 462, Oregon Laws 1967, as amended by the 1967 Special Session.

WARRANTY DEED

McEahern

TO

McKnight

AFTER RECORDING RETURN TO

AFTER RECORDING RETURN TO
TRANSAMERICA TITLE INS. CO.
902 Main Street
Oregon City, Oregon 97045
10-2472 lh

STATE OF OREGON, County of Clackamas, } ss.

I, George D. Pepper, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Clackamas, do hereby certify that the within instrument of writing was received for and recorded in the records of DEED on July 30 PM 2 14 of said County at

RECORDER OF CONVEYANCES * CLACKAMAS COUNTY

Witness my hand and seal of County affixed. GEORGE D. PEPPER, County Clerk

By Deputy

Recording Certificate

'70 14949

Exhibit 4

PRAISAL

2 2E 31DC 05400
KEY 581828 CODE 062002

SITUS.

1	0	1	1	4	1	4	0	0	3	9	3	9	1		
Land Class		Bldg.		Year Built		Maint. Area		Year Appr.		Appr. No.					

2 2E 31DC 05400

161 BARCLAY AVE

OREGON CITY OR

VALUATION SUMMARY OF REAL PROPERTY

Assessment Year	Total Acres	Land	Improvements	F.P. Acres	F.P.L.V.	Remarks
97		37200	88820			
R22E31DC05400 93T		18% L 37,200	82% B 95,920			
R22E31DC05400 94T		20% L 44,640	14% B 109,340			
R22E31DC05400 95T		11% L 49,550	12% B 122,460			
R22E31DC05400 96T		4% L 51,530	19% B 145,720			
R22E31DC05400 97T		11% L 57,190	32% B 192,350			BOPTA #97-0439 RMV Reduce
98		57,190	152,810			
R22E31DC05400 98T		10% L 62,900	2% B 155,860			BOPTA 98-0207 Sustained
R22E31DC05400 99T		10% L 69,190	1% B 157,410			

Exhibit 5

10 M

STATE OF OREGON
CLACKAMAS UNTY
Received and pl...ed in the public
records of Clackamas County
RECEIPT# AND FEE: 28981 $15.00
DATE AND TIME: 10/24/95 12:28 PM
JOHN KAUFFMAN, COUNTY CLERK

OREGON
DEPARTMENT OF
VETERANS' AFFAIRS

(Reserved for Recording Purposes)

SATISFACTION OF MORTGAGE

Account No. M29173

The STATE OF OREGON, acting by the Director of Veterans' Affairs, certifies that the mortgage executed by James A. McKnight and Diane L. McKnight, husband and wife, recorded on the 30th day of July 1970, in the Clackamas County, Oregon, Mortgage Records, #70-14950, a Mortgage recorded July 28, 1975, #75-20555, and a Mortgage recorded November 6, 1979, #79-49578, together with the debt is paid, satisfied, and discharged.

WITNESS the STATE OF OREGON has caused these presents to be executed this 20th day of October 1995, at Salem, Oregon.

Director of Oregon Department of Veterans' Affairs

By _____
Curt R. Schnepp
Manager, Accounts Services

STATE OF OREGON)
) ss.
County of Marion) On October 20, 1995

this instrument was acknowledged before me by the above-named Curt R. Schnepp, who personally appeared, and, being first duly sworn, did say that he is duly authorized to sign the foregoing document on behalf of the Oregon Department of Veterans' Affairs by authority of its Director.

Before me: _____
Notary Public for Oregon

OFFICIAL SEAL
JUDY WILLEMS
NOTARY PUBLIC-OREGON
COMMISSION NO. 023057
MY COMMISSION EXPIRES MAY 22, 1997

AFTER RECORDING RETURN TO:

JAMES A. MCKNIGHT
161 BARCLAY AVE.
OREGON CITY, OR 97045

453-W (10-95)

95-065827

20.00
5.00

TICOR TITLE INSURANCE

196-652

STATUTORY WARRANTY DEED

ALBERT E. BITTNER — Grantor,
conveys and warrants to JAMES A. McKNIGHT AND DIANE L. McKnight husband and wife

Grantee, the following described real property free of encumbrances except as specifically set forth herein situated in CLACKAMAS County, Oregon, to wit:

The northerly 80.00 feet of Lot 3, Block 8, RIVER CREST ADDITION TO OREGON CITY, said 80.00 feet to be cut off by a line drawn parallel with the south boundary of said Lot 3.
TOGETHER with an 8 foot utility easement along the Easterly line of the Northerly 80 feet of Lot 3, Block 8, RIVER CREST ADDITION TO OREGON CITY.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES. The said property is free from encumbrances except CONDITIONS, RESTRICTIONS, EASEMENTS AND POWERS OF SPECIAL DISTRICTS, IF ANY.

The true consideration for this conveyance is $ 80,000.00 (Here comply with the requirements of ORS 93.030)

Dated this 30 day of APRIL 19 91

Albert E. Bittner
Albert E. Bittner

State of Oregon, County of Clackamas
The foregoing instrument was acknowledged before me this 30 day of April, 19 91 by Albert E. Bittner

Notary Public for Oregon
My commission expires: 11-2-93

State of Oregon, County of _____
The foregoing instrument was acknowledged before me this _____ day of _____, 19____ by _____ President and _____ Secretary of _____ a _____ corporation, on behalf of the corporation.

Notary Public for Oregon
My commission expires:

Recorded by TICOR TITLE

WARRANTY DEED

Albert E. Bittner
James A. McKnight

Until a change is requested, all tax statements shall be sent to the following address:
James A. McKnight
161 Barclay Avenue
Oregon City, Oregon 97045

Escrow No. 196652E Title No.. 196-652

After recording return to:
Same as above

STATE OF OREGON
County of Clackamas

I, John F. Kaufman, County Clerk, for the County of Clackamas, do hereby certify that the instrument of writing was received for recording in the records of said county at

'91 MAY-2 AM10:32

and duly recorded in Book _____ Page _____ Fee/File/Instrument/Microfilm/Reception No. 91 19939

Witness my hand and seal affixed.

JOHN F. KAUFMAN
County Clerk

By _____ Deputy

Recording Certificate

Ticor Form No. 137 Statutory Warranty Deed 8/85

91 19939

Exhibit 1

TICOR TITLE INSURANCE

196-652

STATUTORY WARRANTY DEED

ALBERT E. BITTNER — Grantor,
conveys and warrants to JAMES A. McKNIGHT AND DIANE L. McKnight
husband and wife

Grantee, the following described real property free of encumbrances except as specifically set forth herein situated in CLACKAMAS County, Oregon, to wit:

The northerly 80.00 feet of Lot 3, Block 8, RIVER CREST ADDITION TO OREGON CITY, said 80.00 feet to be cut off by a line drawn parallel with the south boundary of said Lot 3.
TOGETHER with an 8 foot utility easement along the Easterly line of the Northerly 80 feet of Lot 3, Block 8, RIVER CREST ADDITION TO OREGON CITY.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES. The said property is free from encumbrances except CONDITIONS, RESTRICTIONS, EASEMENTS AND POWERS OF SPECIAL DISTRICTS, IF ANY.

THIS DOCUMENT IS BEING RE-RECORDED TO CORRECT THE CONSIDERATION AMOUNT.

$5,000.00
The true consideration for this conveyance is $ ~~80,000.00~~ (Here comply with the requirements of ORS 93.030)

Dated this 30 day of APRIL 19 91

Albert E. Bittner
Albert E. Bittner

State of Oregon, County of Clackamas
The foregoing instrument was acknowledged before me this 30 day of April, 19 91 by Albert E. Bittner

Notary Public for Oregon
My commission expires: 11-2-93

State of Oregon, County of _____
The foregoing instrument was acknowledged before me this ____ day of _____, 19____ by _____ President and _____ Secretary of _____ a _____ corporation, on behalf of the corporation.

Notary Public for Oregon

Recorded by TICOR TITLE

WARRANTY DEED

Albert E. Bittner
James A. McKnight
GRANTOR
GRANTEE

Until a change is requested, all tax statements shall be sent to the following address:
James A. McKnight
151 Barclay Avenue
Oregon City, Oregon 97045

Escrow No. 196652E Title No. 196-652

After recording return to:
Same as above

STATE OF OREGON
County of Clackamas
I, John F. Kauffman, County Clerk, for the County of Clackamas, do hereby certify that the instrument of writing was received for recording and is the records of said county at

91 MAY -2 AM 10: 32

COUNTY OF CLACKAMAS ★ STATE OF OREGON ★

Witness my hand and seal affixed
John F. Kauffman
JOHN F. KAUFFMAN
County Clerk

Recording Certificate
CCP-R4 (rev. 12/86)

91 19939

Ticor Form No. 137 Statutory Warranty Deed 8/85

91 27448 ~~91 19939~~

County Clerk, for the County of Clackamas, do hereby certify that the instrument of writing was received and recorded in the records of said county at

PM 3:43

CLACKAMAS ★ OREGON

John F. Kauffman
JOHN F. KAUFFMAN
County Clerk

148

Exhibit B

20.00
5.00

TICOR TITLE INSURANCE

197-379

STATUTORY WARRANTY DEED

VIOLET J. ELLISON

Grantor,

conveys and warrants to JAMES A. MCKNIGHT

Grantee, the following described real property free of encumbrances except as specifically set forth herein situated in CLACKAMAS County, Oregon, to wit:

LOT 13, BLOCK 1, HAZELWOOD PARK.

Recorded by TICOR TITLE

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES. The said property is free from encumbrances except CONDITIONS, RESTRICTIONS, EASEMENTS AND POWERS OF SPECIAL DISTRICTS, IF ANY.

The true consideration for this conveyance is $ 90,000.00 (Here comply with the requirements of ORS 93.030)

Dated this 26 day of June 19 91

Violet J. Ellison
VIOLET J. ELLISON

State of Oregon, County of Clackamas
The foregoing instrument was acknowledged before me this 26 day of June, 19 91 by Violet J. Ellison

OFFICIAL SEAL
NOTARY PUBLIC - OREGON

Notary Public for Oregon
My commission expires: 11-2-93

State of Oregon, County of _____
The foregoing instrument was acknowledged before me this _____ day of _____, 19____ by _____ President and _____ Secretary of _____ a _____ corporation, on behalf of the corporation.

Notary Public for Oregon
My commission expires:

WARRANTY DEED
VIOLET J. ELLISON

JAMES A. McKNIGHT

Until a change is requested, all tax statements shall be sent to the following address:
JAMES A. McKNIGHT
161 BARCLAY AVENUE
OREGON CITY, OR 97045
Escrow No. 197-379E Title No. 197-379
After recording return to:
JAMES A. McKNIGHT
161 BARCLAY AVENUE
OREGON CITY, OR 97045

STATE OF OREGON, County of Clackamas, ss. I hereby certify that the within instrument was received and duly recorded by me in Clackamas County records
9 JUN 26 AM 10 36
Fee $ 13.00
91 30359

Ticor Form No. 137 Statutory Warranty Deed 8/85

91 30359

TICOR TITLE INSURANCE

610372

STATUTORY WARRANTY DEED

JAMES A. McKNIGHT

Grantor,

conveys and warrants to RICHARD D. FERGUSON AND JOAN N. FERGUSON, HUSBAND AND WIFE

Grantee, the following described real property free of encumbrances except as specifically set forth herein situated in CLACKAMAS County, Oregon, to wit:

LOT 13, BLOCK 1, HAZELWOOD PARK, IN THE CITY OF OREGON CITY, COUNTY OF CLACKAMAS AND STATE OF OREGON.

3 2E 06BA 04500

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930. The said property is free from encumbrances except CONDITIONS, RESTRICTIONS, EASEMENTS AND POWERS OF SPECIAL DISTRICTS, IF ANY.

WD

The true consideration for this conveyance is $ 125,500.00 (Here comply with the requirements of ORS 93.030)

Dated this 20th day of April, 19 94

James A. McKnight
JAMES A. McKNIGHT

State of Oregon, County of Clackamas
The foregoing instrument was acknowledged before me this 20th day of April, 19 94 by James A. McKnight

Notary Public for Oregon
My commission expires

State of Oregon, County of _____
The foregoing instrument was acknowledged before me this _____ day of _____, 19____ by _____, President, and _____, Secretary of _____, a _____ corporation, on behalf of the corporation.

Notary Public for Oregon
My commission expires

OFFICIAL SEAL
KATHY JENSEN
NOTARY PUBLIC-OREGON
COMMISSION NO. 028024
MY COMMISSION EXPIRES NOV 6, 1997

Recorded by TICOR TITLE

WARRANTY DEED

JAMES A. McKNIGHT — GRAN
GRAN

RICHARD D. FERGUSON JOAN N. FERGUSON

Until a change is requested, all tax statements shall be sent to the following address:

RICHARD D. FERGUSON & JOAN N. FERGUSON
105 RANDALL COURT
OREGON CITY, OR 97045 Title No 610372KJ C610372DT

After recording return to:

RICHARD D. FERGUSON & JOAN N. FERGUSON
105 RANDALL COURT
OREGON CITY, OR 97045

94 APR 28 PM 3:25

94 35952

Ticor Form No. 131 Statutory Warranty Deed # 87

94 35952

THIS SIDE FOR ASSESSOR'S USE ONLY

APPRAISAL REPORT

Year 19 97

Appeal 02
No. 06-00
03561

Field Insp House At Owner Request. House was Built in 1940 + was Total Remodeled and add to in 1975 Bring Total sq ft To 2804 No addition updating Sence That Time And some deteration Holding Down The percent good At Reappraisal To 10% over 1940 subject property Loc in one of The premier Area of Oregon City over looking park No sales This Time comps attached By owner outside Ore City and Not compairable

19 97 MARKET VALUE

Land 57190

Improvements 192350

Total 249540

RECOMMENDED MARKET VALUE

Land 57190

Improvements 192350

Total 249540

NC

Appraiser

Date

Approved JH

Date 12/10/97

Exhibit 11

142 Holmes Lane
Oregon City, OR 97045
September 12, 1999

James McKnight
161 Barclay Avenue
Oregon City, Oregon 97045

RE: Proposed resubdivision of lots in Rivercrest Addition

Dear Jim,

Thank you for providing me with a copy of the information regarding your proposed lot partition and zoning variance. As I told you yesterday when you delivered the documents, I object to the proposed partition which is contrary to the CCRs which apply to all properties in the Rivercrest Addition. You informed me you were aware of the deed restrictions when you purchased your property about thirty years ago and understood then as now that the deed restrictions ran with the land and are binding on you as well as the other property owners in Rivercrest Addition. I have previously provided Diane and you with a copy of the restrictions as recorded in the Deed Records of Clackamas County. This letter is formal notification of my objection to your proposed partition and my request that you abandon your intention to resubdivide your lot and the adjacent lot which is also subject to the CCRs.

You'll note in Clause 11 on page 2 of the document from Book 270, the covenants run with the land and are automatically extended. Clause 12 gives any landowner in Rivercrest Addition the authority to compel compliance with the obligations in the CCRs. If there is no other option, I will file the required legal action to enforce them. If you submit a petition with the City I will file an objection, hoping to avoid any further proceedings. Of course I'll provide you with a copy of anything I file. You told me you understand that I must object to any violations of the CCRs in order to retain my standing with the courts to object to future proposed or actual violations. Obviously I would prefer to resolve this issue without involving the courts, before any of us incur damaged feelings or further stress and expense.

I received my copy of these deed restrictions when the title search revealed them at the time I purchased my property in 1988, and have relied on them as contractual guarantees that the basic character of the neighborhood will remain as it was when I acquired my home. I object to any actions in violation of these CCRs, especially partition of any of the lots in the subdivision. The proposed partition violates several of the provisions in these contractual obligations which apply to all owners of property in the Rivercrest Addition.

a) Clause 1 of the Restrictions recorded in Book 270 allows only one detached single-family dwelling per lot as those lots are described at the time of original conveyance. Adding a third residence where only two can now exist **is not permissible.**

Exhibit 12-1

b) The proposed lot depth is not in conformity and harmony with the existing structures in Rivercrest, as required by Clause 3 on page 2 of the Restrictions from Book 272.

I mentioned that I have researched the case law on this issue and that I would provide you with copies of the most relevant court decisions that are binding on all Oregon circuit courts, including Clackamas County's. There are two:

a) In *Ludgate v. Somerville*, 256 P 1043 (Or 1927), the Oregon Supreme Court ruled that "the purchaser of residence property, relying on restrictive covenants, may enforce them against other lot owners, regardless of city zoning ordinance". My understanding is that this means that even if you are successful in gaining permission to proceed from the municipal planning authorities, you are still legally required to comply with the contractual deed restrictions which run with the land. Even if the zoning regulations permit an action, it is not legal if prohibited by binding CCRs.

b) In *Cadbury v. Bradshaw*, 43 Or App 33, 602 P2d 289 (1979), the Oregon Court of Appeals ruled that "where restrictive covenants in deeds required all of parcels to be used as residential parcels and prohibited building of more than one dwelling on a parcel, the restrictions prohibited resubdivision by necessary implication". Please note that the court also ruled on page 291 that even assuming resubdivision was permissible, "construction on resubdivided parcels was not permissible... [and] it would be inconsistent with these provisions for fractional parcels to be created where no residential use can occur". Even if you were to resubdivide the lots, the new owner of the property would be subject to the CCRs. My interpretation of this decision is that, under this binding Oregon appellate court precedent, any property owner in Rivercrest Addition could block construction of a residence on the new lot by compelling compliance with the CCRs. I'm pretty sure that possibility would have to be disclosed to any potential purchaser under current real estate sales regulations.

I could cite additional case law supporting my position but I hope this brief review of Oregon legal precedents is sufficient to cause you to reconsider your proposed lot partitions. I hope you are able to find other ways to fund your projects, and we can maintain cordial neighborly relations enjoying our homes as we do now.

If you have any questions or wish to discuss the matter further, please feel free to contact me.

Sincerely,

Linda Lord
657-3293

Encl.
CC: Charles Leeson

12-2

To: Oregon City Planning Commission
320 Warner Milne Road
Oregon City, OR 97045

From: Mark Reagan
141 Barclay Ave.
Oregon City, OR 97045

RECEIVED
CITY OF OREGON CITY
00 MAR 27 AM 11:55

Regarding Land Use Application Form **File # VR 99-07**

Dear Planning Commissioners.

This variance that you are considering is adjacent to my property on the south side. I strongly object to you granting this variance for several reasons.

1. If a house were to be built on this small lot it would look directly into my backyard and into the back of my house, and into that of the next 2 houses down the street. The limited depth of the lot would cause the house to be a very imposing structure in a well established neighborhood. The reason I and most of the neighbors bought in this neighborhood was due to the lot size and the privacy that it provided.

2. The lot sizes for this neighborhood were established over 50 years ago and changing that lot size to wedge a house in will be completely against the character and original intention of this neighborhood.

As the housing boom continues in the Oregon City area, please protect the established neighborhoods from becoming just another housing tract.

Thank you for your consideration of this matter.

Mark Reagan

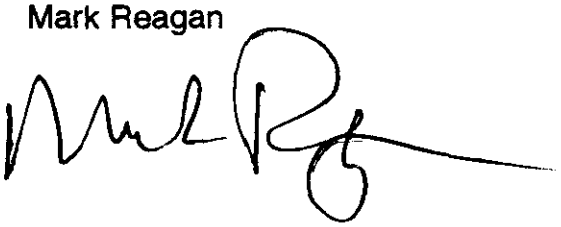
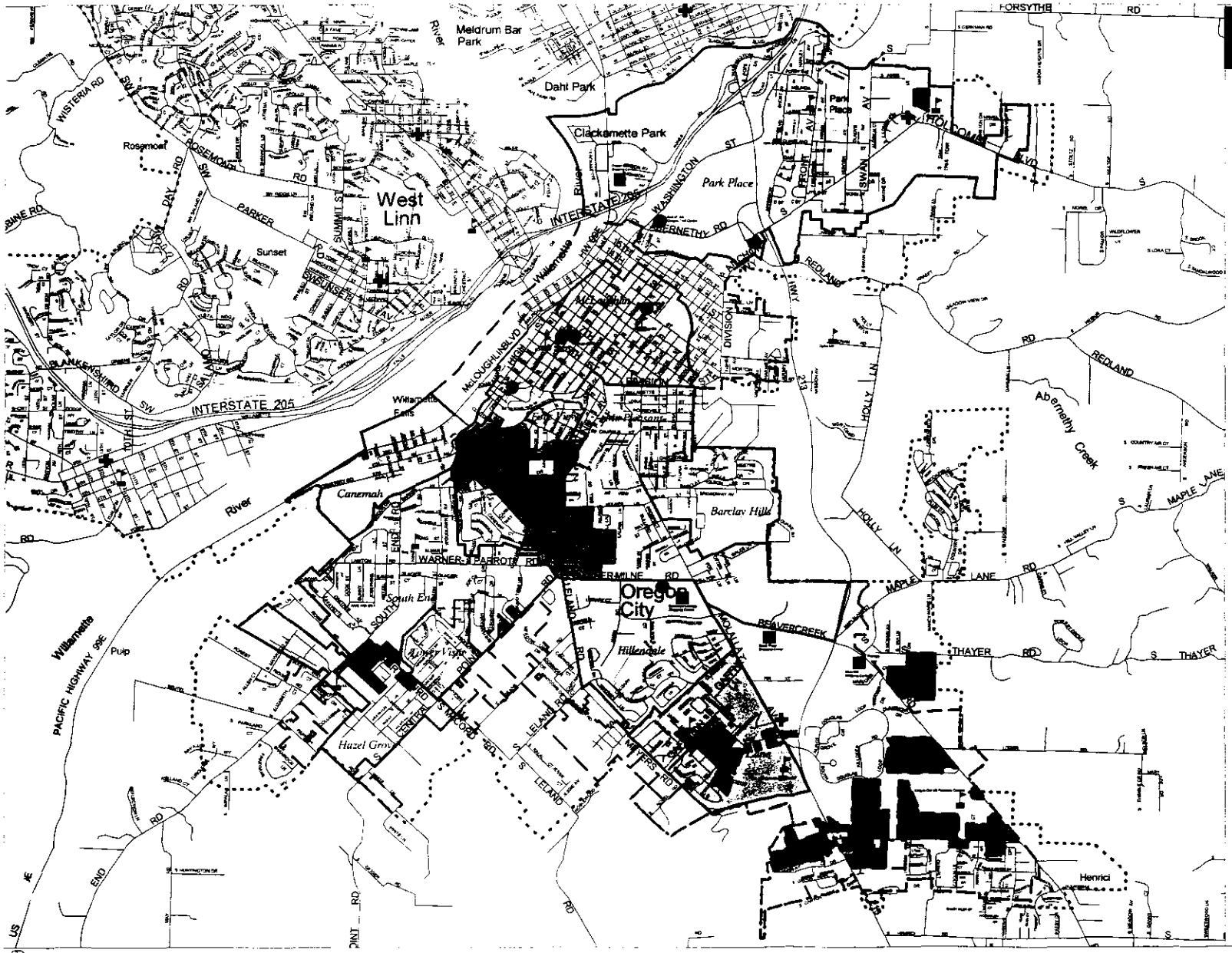


EXHIBIT K
Letter from
Mark Reagan
VR99-07



CITY OF OREGON CITY

NEIGHBORHOOD ASSOCIATIONS

NOTE: This map was prepared from the City of Oregon City digital database and may contain errors or omissions. Please contact the city for data verification. Map intended for reference only.
g:/projects/trevor neighbor apr; Plot date 7/07/99

City of Oregon City
320 Warner Milne Road | Oregon City, Oregon 97045
503 657-0891

CITY OF OREGON CITY
PLANNING COMMISSION
320 WARNER MILNE ROAD OREGON CITY, OREGON 97045
TEL 657-0891 FAX 657-7892

NOTICE OF DECISION
OREGON CITY PLANNING COMMISSION

DATE: 5/10/00

LAST DAY TO APPEAL: May 22, 2000

FILE NO: VR99-07

APPLICANT: James McKnight

PROPERTY OWNER: Same

LOCATION: The subject property is located approximately 200 feet east of the intersection of Barclay and Brighton Street.

LEGAL DESCRIPTION: Clackamas County Tax Map 2-2E-31DC, Tax Lot 5400

PRESENT ZONING: "R-10" Single Family Dwelling District

PROPOSAL: Variance to allow a reduction in the lot depth for Tax Lot 5400 from 100 feet to 80 feet (+/-).

DECISION OF PLANNING COMMISSION: Following a public hearing on April 10, 2000, the Planning Commission denied the variance request. Findings and conclusions were adopted on May 8, 2000 and are attached to this notice.

This decision is appealable to the City Commission within ten calendar days from the mailing of the Notice of Decision.

IF YOU HAVE ANY QUESTIONS ABOUT THIS APPLICATION, PLEASE CONTACT THE PLANNING DIVISION OFFICE AT 657-0891.

Attachment # 5

BEFORE THE PLANNING COMMISSION
FOR THE CITY OF OREGON CITY OREGON
May 8, 2000

In the matter of an application for variance approval for lot depth from 100 feet to 80 feet for tax lot 5400 located at 161 Barclay Avenue, Oregon City; File No.: VR99-07	)))))	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

This matter came before the Planning Commission for a final decision at a duly noticed public hearing on April 10, 2000. Following deliberations and based on all of the testimony and evidence that was presented at the public hearing, the Planning Commission voted to deny the request to reduce the required lot depth from 100 feet to 80 feet.

The Planning Commission finds that the applicant has not met the burden of proof in demonstrating that the proposed variance complies with the applicable approval criteria contained in Section 17.60.070 of the Oregon City Municipal Code (OCMC). More specifically, the variance is denied because: (1) literal application of the code will not deprive the applicant of rights commonly enjoyed by other properties; (2) there are no extraordinary circumstances that apply to this property that do not apply to other properties in the surrounding areas; (3) the applicant has not demonstrated that the variance is not likely to cause substantial damage to adjacent properties; and (4) the applicant has not demonstrated that his circumstances are not self-imposed.

I. Introduction and Background

The subject property is located approximately 200 feet east of the intersection of Barclay and Brighton Street and is further identified on Clackamas County Map Number 2-2E-31DC as Tax Lot 5400; the street address is 161 Barclay Avenue. The property is approximately 23,800 square feet in size, zoned R-10, Single-Family Dwelling District and Designated "LR" Low Density Residential in the Comprehensive Plan. The surrounding land uses are zoned R-10 and R-6, Single Family Dwelling District and RD-4 Two Family Dwelling District. The applicant is requesting a variance to allow a reduction in the lot depth for proposed lot 1 from 100 feet to 80 feet (+/-) to allow a future land partition. The future partition would divide this 23,800 square foot property two lots of 10,020 square feet (lot 1) and 13,780 square feet (lot 2). Lot 1 would have frontage and access from Charman Avenue, a lot depth of 80 feet and a width of approximately 131 feet.

The property acquired its present configuration from a lot line adjustment in 1991. That lot line adjustment, which was approved by the City of Oregon City, conveyed approximately 6,800 square feet of property from Tax Lot 5500 to the subject property, Tax Lot 5400, owned by the applicant. Essentially, the lot line adjustment transferred Tax Lot 5500's backyard to Tax Lot 5400. A record of survey for the lot line adjustment was not recorded with the County

Surveyor's office because a recording of survey documents was not required under County Ordinances until 1994.

In 1998, the applicant requested a pre-application conference, which was held on August 5, 1998, prior to the submittal of any application for a partition. At that 1998 pre-application, applicant was informed that the City was amending the Subdivision Ordinance but he was told that the changes being proposed would not affect the partition request. The applicant did not file any application for a partition after that pre-application. Subsequently, Section 16.28.080 (1994), which allowed for a partition with a minimum lot depth of 60 feet was removed in October of 1998. Without that provision, all partitions, including the one contemplated by the applicant, must automatically meet the dimensional standards of the underlying zone, which, in the R-10 zone, includes a minimum average lot depth of 100 feet. OCMC 17.08.040(C).

The applicant was informed in a subsequent pre-application conference on June 24, 1999, that a variance would be required for any partition and is the reason that this request is before the Planning Commission at this time.

II. Analysis of Approval Criteria

The variance criteria for a reduction in the minimum lot depth are found in Section 17.60.20 of the Oregon City Municipal Code ("OCMC"). We find the applicant's request does not comply with the following criteria in that section:

A. *17.60.20 (A) Literal Application of the Zoning Code Does Not Deprive the Applicant of Rights Commonly Enjoyed by Other Properties nor do Extraordinary Circumstances Apply to the Property that Do Not Apply to Other Property in the Surrounding Area.*

(1) Deprivation of Rights Commonly Enjoyed by Other Properties.

The lot depth requirements and other dimensional standards apply to all lots in a particular zone in the City. No property owner has the right to create lots that do not meet the minimum standards set out in the OCMC. The applicant does not assert that the same standards would not apply to his neighbors should they try to partition their lots.

Instead, the applicant asserts that it will be denied a right commonly enjoyed by other property owners because of the "numerous other legal substandard lots" that have a lot depth of less than 100 feet. However, as discussed in the staff report, the majority of these lots are existing non-conforming or previously existing remainder lots of the subdivisions in the Rivercrest Neighborhood. The City has no record that any of these substandard lots were created by a partition or variance request. As pointed out in the staff report, the standards for a partition changed in 1998 and the minimum lot depth in this zone was affected. Previously, the minimum lot depth could reach 60 feet and the change in 1998 effectively increased the minimum lot depth to 100 feet.

Although the change in the law deprived the applicant of certain rights, it did so only to the extent that it deprived every other property owner of those same rights. Therefore, it cannot be said that the application of the current lot depth deprives the applicant of a right "commonly enjoyed by other property owners."

(2) Extraordinary Circumstances Do Not Apply to This Property.

To satisfy this criterion, an applicant must demonstrate there are unique features on its property that make it extremely difficult or impossible to comply with the applicable criteria that apply to other properties in the City. The Planning Commission interprets this provision as requiring that the unique feature be a characteristic of the property itself or otherwise related to the physical circumstances of the property. This criterion does not address procedural circumstances nor does it address the circumstances of the property owner, unless it is specifically related to the property.

There is nothing unique about the applicant's property. Applicant's argument regarding the uniqueness of his situation has two bases: First, the 1998 pre-application in which he was told that a partition was possible without a variance and that the law would not change. Second, that he suffered a stroke that affected his ability to move forward with his planned partition.

As to the applicant's first argument, what the applicant was told in a pre-application meeting is not related to the property and therefore, that issue is not properly considered under this criterion. The same is true of the applicant's second argument; it simply is not related to the property itself and should not be considered under this criterion. Although we sympathize with the applicant, we cannot say that his extraordinary circumstances "apply to the property."

Moreover, even if the criterion does not look solely to the property, the applicant has not carried his burden of showing that this criterion has been met. If the applicant had filed his application with the City within a few months of the pre-application, the City would have been bound by the ordinances in effect at the time the application was filed. ORS 227.178(3). However, the applicant waited almost ten months after the 1998 pre-application before filing any application. The City code specifically states that:

> "Notwithstanding any representation by city staff, . . . any omission or failure by staff to recite to an applicant all relevant applicable land use requirements shall not constitute a waiver by the city of any standard or requirement." OCMC 17.50.050(D).

This is especially true in light of the fact that the relevant requirement was, in fact, not in the code at the time of the pre-application. The applicant knew that the desired partition was dependent on a particular code section in the Land Division title of the code and that a revision to that tile was eminent.

Moreover, any reference to the applicant having a "valid" pre-application is inapposite. When OCMC 17.50.050(E) speaks about a pre-application as "valid" for a period of six months, this does not mean that all statements made at the pre-application remain in force or that the OCMC cannot change during that six-month period. That view of a pre-application is belied by OCMC 17.50.050(D), discussed above. Instead, the "validity" of a pre-application addresses the requirement in 17.50.050(A) for a pre-application prior to the submittal of any form of permit. Having a "valid" pre-application simply means that a person can submit an application. A "valid" pre-application does not confer any other rights or substitute for a preliminary approval, and is simply not relevant to the issues in this variance application.

This analysis is not affected by the applicant's stroke. The applicant's memo to the Planning Commission, submitted at the public hearing, specifically notes that "it wasn't until 1998 that he was truly capable of moving forward with the partition." The Planning Commission accepts this statement as indicating that, in 1998, the applicant was no longer affected by his stoke to such a degree that he was unable to proceed with the partition. Accordingly, his circumstances were not extraordinary at the time of the 1998 pre-application and nor has he provided any evidence of incapacity at any subsequent time.

In sum, the criterion that a literal application of the code would deprive the applicant of rights commonly enjoyed in the surrounding area or that extraordinary circumstances apply to the property is not met. There is nothing unique about the applicant's property, as opposed to what the applicant was told or his personal health. There is nothing so unique about the applicant's dealings with the city in light of the lapse of time between pre-application and actual application and in light of the applicant's awareness that a major revision to the Land Division title was eminent that requires the granting of a variance.

B. ***17.60.020(B). The Proposed Variance is Likely to Cause Substantial Damage to Adjacent Property.***

Under this criterion, a variance will be denied if the applicant cannot demonstrate that the variance is not likely cause a substantial damage to neighboring properties. Mark Reagan, who owns the lot immediately adjacent to the subject property to the east, testified at the hearing. He indicated that, should the variance be approved, it would allow the construction of an additional dwelling immediately adjacent to his house, which will significantly affect and substantially damage the privacy currently enjoyed on this adjacent lot.

OCMC 17.60.020(B) specifically notes that the "substantial damage" that the Planning Commission must examine include the reduction of "light, air, safe access or other desirable or necessary qualities otherwise protected by this title." The Planning Commission notes the statement of purpose contained in OCMC 17.02.020 that "the purpose of this title is to promote public health, safety and general welfare through standards and regulations designed . . . to prevent the overcrowding of land." The Planning Commission interprets this provision regarding overcrowding to contemplate the protection of every citizen's privacy. Because the proposed variance is likely to substantially affect the adjacent property by infringing on the privacy on the lot, the Planning Commission is unable to find that this criterion has been met.

C. *17.60.020(C). The Applicant's Circumstances are Self-Imposed.*

Under this criterion, if a circumstance that gives rise to the need for a variance is self-imposed the variance will not be granted. If an applicant knew or should have known that a standard applies that will preclude a proposed development, the circumstance is self-imposed.

In April 1991, the applicant was informed by City Planning Staff that new parcels created through the partitioning process would be exempt from the minimum average width and depth requirements of the zoning code. The applicant purchased property from the adjoining parcel to add sufficient area to create a second lot at the rear of the property, under the then-current code

On August 5, 1998 the applicant was again informed by City Planning Staff that the partition was possible and that the new subdivision ordinance would not change previous partitioning rules described under Ch.16.28.080 (1994). Nevertheless, when the subdivision ordinance was adopted in October 1998, it removed this section. Removal of the provision automatically required all partitions and subdivisions to follow the lot dimension standards of the underlying zone.

The applicant argues that the circumstances are not self-imposed because he could not have been aware of the new restriction when he purchased his property. Applicant is, in part, correct; the code amendment that is causing his situation was not adopted until well after he had purchased his property. However, that alone does not exculpate the applicant. If that were so, the development of every property would be governed by the code in effect when it was purchased. This clearly cannot be the case. The City will continue to update its code, when required in the judgment of its elected officials. Every property owner is presumed to be aware of changes to the code that might affect his or her property.

As with the discussion of the "extraordinary circumstances" criterion, the analysis is not changed by the information provided at the 1998 pre-application or by the applicant's stroke. While both of these incidents were unfortunate, they do not affect the analysis as described above regarding the length of time between the 1998 pre-application and the filing of the actual application, the applicant's apparent recovery from his stroke, the provisions of OCMC 17.50.050(D) and the meaning of a "valid" pre-application.

III. Conclusion

The applicant has not demonstrated that all of the variance criteria are met, so the application is being denied. It is unfortunate that the applicant was unable to partition the lot prior to the change in the subdivision ordinance. However, he bought a piece of property that was not partitioned and that does not contain the required 100 feet of lot depth. To grant a variance under these circumstances is inconsistent with the approval criteria and would essentially "freeze" applicable standards to those in effect whenever a property owner happens to check on the standards. The requested variance is denied for all of the above reasons.

Adopted by the Oregon City Planning Commission, May 8, 2000.