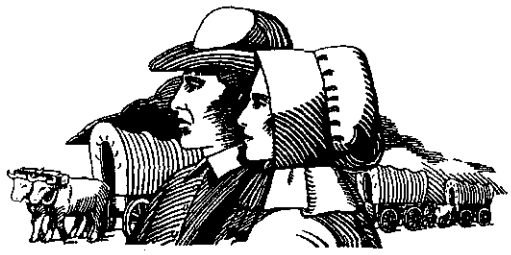
CITY OF OREGON CITY

PLANNING COMMISSION

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



AGENDA

City Commission Chambers - City Hall
July 23, 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**: *(None Available)*

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

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

7:45 p.m. 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.

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

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

A. **Staff Communications to the Commission**
1.) Articles of Note: Complete Communities Executive Summary and Tulane Environmental Law Journal Article

8:35 p.m. B. **Comments by Commissioners**

8:40 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.

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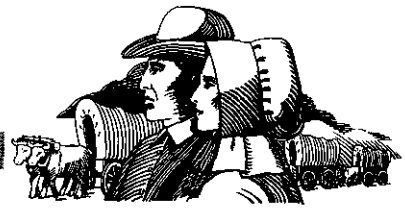

TO: Planning Commission

FROM: Sean Cook
Assistant Planner

DATE: July 16, 2001

SUBJECT: AN 01-03

Staff requests that the Planning Commission continue the hearing for the above referenced file to a date uncertain based on the attached request from the applicant.

Staff received a request for an extension of this project on July 11, 2001. The applicant is attempting to resolve several issues concerning this property prior to proceeding with the annexation. Therefore, Staff requests a continuance of the public hearing for File # AN 01-03 for the property located at 1721 Penn Lane, also identified as Clackamas County Map # 2-2E-32DC, Tax Lot 500.

Attachment

Harold L. Shultz

33144 Cascadel Heights Drive
North Fork, California 93643

Tel 559-877-7444
Fax 559-877-3704

E-Mail haroldshultz@netptc.net
Cell 559-269-1568

TRANSMITTED: FAX (503)657-7892

July 11, 2001

Maggie Collins
Planning Manager
City of Oregon City
Post Office Box 3040
320 Warner Milne Road
Oregon City, Oregon 97045-0304

RE: Proposal NO. AN 01-03 - City of Oregon City - Annexation
Property Owner, Harold L. Shultz

Dear Ms. Collins:

I am requesting a continuance of the above-referenced proposal for annexation and wish to be placed on the March ballot.

Meanwhile, I will be in the process of making the property consistent with the City Engineer and Metro requirements

Thank you for your consideration in the matter.

Sincerely,

Harold L. Shultz

CITY OF OREGON CITY

PLANNING COMMISSION

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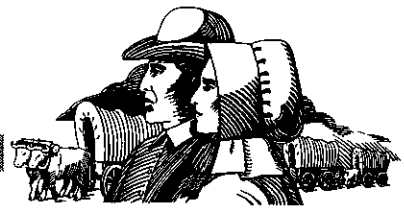
TEL (503) 657-0891 FAX (503) 657-7892



TO: Planning Commission

FROM: Sean Cook
Assistant Planner

DATE: July 16, 2001

SUBJECT: VR 99-07 Remand of LUBA 2000-125

The City Commission voted to send this project back to the Planning Commission on May 16, 2001. The attached materials are provided for background.

1.) LUBA Remand Memo dated 5/16/01
2.) LUBA Remand Memo dated 5/10/01
3.) LUBA Remand Memo dated 6/12/00
4.) VR 99-07, City Commission - Notice of Decision dated July 24, 2000
5.) VR 99-07, Planning Commission - Notice of Decision dated May 10, 2000

Attachments

MEMORANDUM

TO: Honorable Mayor and Oregon City Commission

FROM: William K. Kabeiseman

DATE: May 16, 2001

SUBJECT: Variance 99-07 - Remand from LUBA of Reagan v. City of Oregon City

The City has received a procedural objection regarding the City's consideration of this matter on remand. In particular, the objection is that OCMC 17.50.090(F) limits the scope of an appeal hearing to only those issues listed in the notice of appeal and, because LUBA's decision addressed an issue that was not in the notice of appeal, the City is required to deny the variance.

As the memorandum in your packet indicates, LUBA identified two errors in the City's decision. The errors involved inadequate findings regarding different factors in OCMC 17.62.020, factors (C) and (F). However, the Notice of Appeal filed by the applicant only raised a challenge to factors (A), (B) and (C), not factor (F). According to the objectors, that means that LUBA's conclusion that factor (F) was not adequately addressed means the City cannot address it now and the variance must be denied. The objection is incorrect.

As an initial matter, OCMC 17.50.190(F) applies only to an "appeal hearing;" this is not an appeal hearing, it is a hearing on remand. The Oregon City code does not contain any specific provisions regarding how the City will process appeal hearings; largely because each remand is unique and may require different procedures. Accordingly, the provision limiting issues is inapplicable. Even if applicable, LUBA has recognized that, where an initial decision is remanded by LUBA, a decision on remand may be required to address issues the city was not required to address in its initial decision. *Anderson v. City of Medford*, 38 Or LUBA 792 (2000).

Moreover, the Commission addressed OCMC 17.62.020(F) in its first decision, with no objection to LUBA. LUBA addressed it on appeal, because the appellant raised it as an issue. The appropriate time to raise this issue would have been to LUBA. Now that LUBA has addressed that issue, at the invitation of the appellant, the City may address the issue on remand.

WKK:wkk
cc: Jill Long (applicant's attorney)
Linda Lord
K:\26752\00002\WKK\WKK_M20JV

222 SW COLUMBIA STREET SUITE 1400 PORTLAND, OR 97201-6632 TEL: (503) 228-3200 FAX: (503) 248-9085 www.prestongates.com
Anchorage Coeur d'Alene Hong Kong Los Angeles Orange County Palo Alto Portland San Francisco Seattle Spokane Washington, DC

Preston|Gates|Ellis LLP

MEMORANDUM

TO: Oregon City Commission

FROM: William K. Kabeiseman

DATE: May 10, 2001

SUBJECT: LUBA remand of Reagan/Lord v. Oregon City

On July 19, 2000, the Commission granted a variance to James McKnight allowing for a minimum average lot depth of less than 100 feet in an R-10 zone. The decision issued by the Commission is attached to this memorandum as Exhibit 1. That decision was appealed to the Land Use Board of Appeals (LUBA) on a number of different issues. The City did not appear at LUBA and the applicant defended the City's decision. On April 18, 2001, LUBA remanded the decision to the City. That opinion is attached to this memorandum as Exhibit 2.

The LUBA opinion addresses several issues and affirms the City's decision in most respects. LUBA specifically remarked on the City's "very permissive interpretation" of the variance criteria but, under the deferential review standard it is required to apply, could not say that the City's interpretation was wrong. However, there are three specific matters that must be addressed in any decision on remand. Two of them are the areas in which LUBA concluded that the City had erred. The second involves a matter of voting.

The first issue involves the criteria at OCMC 17.60.020(C), which provides:

> "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 the site was purchased."

According to LUBA, the City's findings did not address the second prong of that criterion, that the applicant's circumstances do not "merely constitute a monetary hardship or inconvenience." LUBA noted that the City did not adopt any specific interpretation of that criterion and, held that

> "Without contrary interpretative findings, we will not assume the second prong of OCMC 17.60.020(C) is satisfied here. It is not appropriate for LUBA to assume that the city commission would exercise its discretion under *Clark* to interpret the second prong of OCMC 17.60.020(C) as being met in the circumstances

> presented in this case. It is equally possible that the city commission was simply unaware of the 'hardship criterion" in the second prong of OCMC 17.60.020(C)."

The second error identified by LUBA was a challenge to the City's findings regarding OCMC 17.60.020(F), which requires the City to find:

> "That the variance conforms to the comprehensive plan and the intent of the ordinance being varied."

The City's decision found that the variance conforms to the comprehensive plan because it "furthers plan in-fill and higher density goals in a way that does not sacrifice neighborhood quality." LUBA concluded that this was insufficient because that finding did not identify any comprehensive plan provisions that call for higher residential density or in-fill. LUBA suggested that such plan provisions may exist, but that the findings were inadequate for failing to identify the plan provisions relied upon.

Finally, petitioners challenged the City's decision because a commissioner recused himself at the first city commission hearing on the matter, but that commissioner later voted in the Commission's 5-0 vote to grant the variance. LUBA noted in a footnote that "the city's decision is being remanded for other reasons. We assume the city commissioner will not participate in any additional proceedings or decisions the city [commission] may adopt on remand." The Commissioner who recused himself from the matter is no longer on the Commission, so this assumption by LUBA should be relatively simple to comply with.

The applicant has the right, under ORS 227.781, to request that the City take final action, either approving or denying the application, within 90 days of the request. The City has not received any such request yet, but should consider how it wishes to proceed.

The Commission has at least three options. The first is to allow limited oral argument; the argument would concern only the remanded issues and would be limited to the record. After the argument, you may then close the hearing and provide direction to staff to prepare appropriate findings. Alternatively, the Commission could re-open the factual record by directing that the matter be remanded to the Planning Commission for another public hearing at which new information could be introduced. Finally, the Commission could avoid any new hearings or argument and simply reconsider the record and argument that have already been presented and then come to a decision on whether the remanded criteria have been met based solely on what has already been presented.

Regardless of the method you choose to resolve this matter, whatever decision you reach must be supported by the evidence in the record. If the evidence in the record supports findings that the remanded criteria have been met, the City may adopt new findings and re-approve the variance. If the evidence in the record does not support a conclusion that the criteria have been met, the application should be denied for failing to comply with those criteria.

We recommend that you set a date for a public hearing and, at that hearing, allow the parties to the LUBA appeal to present additional argument solely on the remanded issues. The parties may also present suggested findings at that time. After the parties have presented their argument, the Commission may then come to a determination of whether the remanded criteria have been met and instruct staff to prepare a decision making the appropriate findings.

WKK:wkk
cc: City Manager
Assistant City Manager
Jill Long
Linda Lord
K:\26752\99999\WKK\WKK_M20JM

COPY

BEFORE THE CITY COMMISSION
FOR THE CITY OF OREGON CITY OREGON
JULY 19, 2000

In the matter of an appeal of a Planning Commission denial 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 City Commission at a duly noticed public hearing on June 21, 2000 to appeal a final decision by the Planning Commission adopted on May 8, 2000. Following deliberations and based on all of the testimony and evidence that was presented at the public hearing, the City Commission voted to grant the appeal request, overturn the Planning Commission's decision and approve the variance for lot depth from 100 feet to 80 feet.

The City Commission finds that the applicant has met the burden of proof in demonstrating that the proposed variance complies with the applicable approval criteria. More specifically, the City Commission overturns the Planning Commission denial of the following three criteria: (1) literal application of the ordinance will deprive the applicant of rights commonly enjoyed by other properties and there are extraordinary circumstances that apply to this property that do not apply to other properties in the surrounding areas; (2) the applicant has demonstrated that the variance is not likely to cause substantial damage to adjacent properties; and (3) the applicant has demonstrated that the circumstances are not self-imposed. The City Commission agrees with the Planning Commission's disposition of the other variance criteria and finds that each of the variance criteria have been met.

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 into 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 Street, a lot depth of 80 feet and a width of approximately 131 feet.

EXHIBIT 1

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 on a partition application for the property, which was held on August 5, 1998. At the pre-application conference, the applicant who suffers communication and comprehension difficulties due to a stroke, actively questioned the Planning Manager about guidance for what actions he must take to proceed and complete the partition of Tax Lot 5400. In response to his questions, the applicant was informed specifically that any changes to the Oregon City Municipal Code ("OCMC") anticipated to be adopted in October 1998 would not affect him.

In October 1998, OCMC Section 16.28.080 (1994), which allowed for a partition with a minimum lot depth of 60 feet was removed. Without that provision the applicant became subject to 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 received no notice of the change in the Ordinance.

In February 1999, six months after his pre-application conference, the applicant requested a pre-application extension. The applicant did not receive any response from the City for two months. In April 1999, the Planning Division responded to his request for a pre-application extension. At that time the applicant was told by the Planning Manager that the information given at the pre-application was incorrect and he now needed a variance. The applicant filed a variance application on June 24, 1999.

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 OCMC. We find the applicant's request meets the following criteria:

A. *17.60.20 (A) (1) Literal Application of the Zoning Code Deprives the Applicant of Rights Commonly Enjoyed by Other Properties or (2) Extraordinary Circumstances Apply to the Property that Do Not Apply to Other Property in the Surrounding Area.*

To satisfy Criteria A, the applicant must meet either prong one or prong two. The City Commission finds the applicant has shown that prong two has been met.

Extraordinary Circumstances Apply to This Property.

To satisfy prong two, an applicant must demonstrate there are unique circumstances that apply to its property that do not apply to other properties in the surrounding area but are unique to the applicant's site. In the instance of this applicant's request, the City Commission interprets this prong as requiring that the unique circumstances somehow affect the property. Normally, this will relate to physical characteristics of the property, such as topography, existing development or similar characteristics. However, in very limited circumstances, other factors may be so intrinsically related to the property, such as the circumstances here, that those factors may be considered as relating to the property, and may amount to extraordinary circumstances.

The applicant's property was severely and extraordinarily affected by the misleading and inaccurate information given by the City Planning Manager in August 1998 as explained above. The instructions given to the applicant by the Planning Manager regarding the property put the property in a position where it was no longer a viable candidate for a partition without a variance. The applicant met his burden of proof by showing that the property was the subject of and therefore affected by inaccurate and misleading guidance from the Planning Manager. No other property owner submitted his property for a pre-application conference and was told that the property could be partitioned so long as the property owner followed certain procedures only later to be told that the requirements had changed and a new more difficult application procedure would be needed. This unique sequence of events surrounding the applicant's partition process on this lot amounts to extraordinary circumstances affecting the property.

B. *17.60.020(B). The Proposed Variance is Not Likely to Cause Substantial Damage to Adjacent Property.*

Under this criterion, a variance will be granted if the applicant can demonstrate that the variance is not likely to cause substantial damage to adjacent properties. The applicant met his burden of proof by demonstrating that the variance will allow him to create a new lot with substantially the same minimum lot size as existing lots in the neighborhood. Because the new lot will fit appropriately into the neighborhood under the neighborhood's R-10 zoning standards, the City Commission finds it is not likely to cause substantial damage to adjacent properties.

The Commission heard testimony in opposition from neighbors Mark Reagan and Linda Lord. Both neighbors feel the variance would cause damage to the neighborhood by not conforming to the quality and character of the lots in this "older and more established" neighborhood. Mr. Reagan as an adjacent property owner specifically claimed that the development of a new lot would directly infringe upon his privacy. The Commission has duly considered this testimony and finds that the quality and privacy provided by the Rivercrest Neighborhood will not be damaged by this variance.

Specifically, the applicant showed that the new lot will be of ample size and have ample setback so as to not infringe upon the privacy, light and air of neighboring properties. The square footage of the new lot will actually exceed the minimum 10,000 square feet requirement of the R-10 zone. The Commission found further evidence that the lot would fit into the neighborhood by recognizing that a lot could be created without a variance in the same place if

an additional twenty (20) foot lot depth were available. Even with another 20 feet in lot depth the impact on the adjacent properties would be practically the same. In fact, the impact upon the one adjacent property that was opposed to the variance request would be equal if not greater if a legal size lot with an one hundred (100) foot lot depth were to be created through a partition without a variance. The evidence in total demonstrates that the proposed lot is similar in quality and character to other lots in the neighborhood and therefore, will not cause substantial damage to adjacent properties.

Condition of Approval

The applicant volunteered to further ensure that no substantial damage will occur to adjacent properties by subjecting development of the new lot to a condition of approval. As such, the approval of the variance appeal by the City Commission is conditioned on the applicant's new lot having a twenty (20) foot buffer between any new construction and any adjacent properties.

C. *17.60.020(C). The Applicant's Circumstances are Not 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 of a standard that would preclude a proposed development, the circumstance is self-imposed.

The City Commission finds that the applicant could not have known of the circumstances that have forced the property to be subject to the need for a variance application (specifically that the guidance given by the Planning Manager turned out to be inaccurate). On August 5, 1998 the applicant was informed by City Planning Manager that the partition could move forward and that a change in the OCMC would not affect the applicant's right to pursue a partition. Nevertheless, when the OCMC was changed in October 1998 the changes prevented the applicant's ability to move forward with a partition application. Contrary to the specific information provided to the applicant, the applicant was required to follow the lot dimensional standards of the underlying zone and thus submit a variance application.

The applicant appropriately sought and relied on advice from the Planning Manager. While the inaccuracy of the Planning Manager's advice does not constitute a waiver of the new requirement, the City Commission interprets this criteria to mean that such inaccurate advice regarding a change in the OCMC can, and in this situation does, create an extraordinary circumstance that is not self-imposed by the applicant.

D. ***17.60.020(D). No practical alternatives have been identified which would accomplish the same purposes and not require a variance.***

There is no additional space available for the applicant to obtain more lot depth so that his new lot would meet the R-10 zone dimensional requirements. Therefore, no practical alternatives exist that would allow the creation of a new lot without a lot depth variance.

E. ***17.60.020(E). The variance requested is the minimum variance, which will alleviate the hardship.***

The applicant has shown that the new lot will use all of the available space so that the lot depth variance is only twenty (20) feet less than the one hundred (100) feet requirement. This twenty (20) feet difference is the minimum variance from the dimensional requirements necessary to create the new lot.

F. ***17.60.020(F). The variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.***

The variance conforms to the Comprehensive Plan by adding a new lot in a way that promotes in-fill and higher density without sacrificing neighborhood quality and character. Further the intent of the underlying R-10 zone will be met because the new lot will have the same quality and character as other lots in the neighborhood, as discussed above under Criteria B.

III. Conclusion

The applicant has demonstrated that all of the variance criteria are met. Because each criteria has been satisfied, the City Commission reverses the decision of the Planning Commission and grants the applicant's application for a variance lot depth from 100 feet to 80 feet for all of the above reasons.

John F Williams, J

John Williams Jr., Mayor

July 19, 2000

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK REAGAN and LINDA LORD,
Petitioners,

EXHIBIT 2

vs.

CITY OF OREGON CITY,
Respondent,

and

JAMES McKNIGHT,
Intervenor-Respondent.

LUBA No. 2000-125

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Mark Reagan, Oregon City and Linda Lord, Oregon City, filed the petition for review and argued on their own behalf.

No appearance by City of Oregon City.

Jill R. Long, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Foster, Pepper and Shefelman, LLP.

HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 04/18/2001

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that approves a variance.

MOTION TO INTERVENE

James A. McKnight, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioners filed a 50-page petition for review in this appeal. Intervenor filed a 21-page response br Petitioners move for permission to file a 40-page reply brief. Although the issues presented in this appeal do not warrant 90 pages of briefing by petitioners, and the reply brief clearly goes beyond responding to new issues raised in the response brief, intervenor does not object to the request.[1] Accordingly, we allow the reply brief.

FACTS

Intervenor and his adjoining neighbor to the east each own lots zoned R-10 Single-Family Dwelling District. In this opinion, we refer to intervenor's lot as Tax Lot (TL) 5400 and refer to his adjoining neighbor's lot as TL 5500. Both lots are developed with single-family residences. Prior to 1991, both lots had frontage on Charman Street to the north and Barclay Avenue to the south, although the developed driveway accesses for the houses on both lots are from Barclay Avenue to the south.

In 1991, intervenor purchased the back portion of TL 5500 with frontage on Charman Street. The lot lines between TL 5500 and TL 5400 were adjusted to add the back portion of TL 5500 to TL 5400. In 1998, intervenor initiated action to create a new parcel to be made up of the acquired property from TL 5500 and an additional portion of the rear of TL 5400 which, when added to the acquired property, would make the new parcel meet the 10,000 square foot minimum lot size in the R-10 zone.[2] The dwelling on the new parcel would be oriented toward and have driveway access to Charman Street. However, because the acquired portion of TL 5500 is only 80 feet deep and makes up the majority of the proposed parcel, the proposed new parcel would not satisfy the 100 foot minimum average lot depth requirement in the R-10 zone.

At the time of intervenor's pre-application conference in 1998, the proposed new parcel could be created with only 80 feet of depth, because Oregon City Municipal Code (OCMC) 16.28.080 (1994) provided that new parcels could be created through partitioning, notwithstanding minimum depth requirements in the zoning code, so long as the new parcel had at least 60 feet of depth.[3] During the August 5, 1998 pre-application conference, intervenor was told that legislative changes to the subdivision ordinance that were then being considered for adoption by the city would not affect intervenor's partition plans.

Contrary to the advice that intervenor received at the pre-application conference on August 5, 1998, OCMC 16.28.080 (1994) was repealed in October 1998. On April 20, 1999, intervenor was told the information that was provided to him on August 5, 1998, was erroneous and that he would be required to seek a variance in order to create a new parcel with less than the required minimum of 100 feet of depth. Intervenor requested the variance, but it was denied by the planning commission on May 8, 2000. Intervenor appealed the planning commission's decision to the city commission, which reversed the planning commission on July 19, 2000, and granted the variance. In this appeal, petitioners challenge the city commission's decision to grant the variance.

FIRST ASSIGNMENT OF ERROR

Under their first assignment of error, petitioners allege a number of subassignments of error in which they argue the city misconstrued and violated applicable approval criteria, relied on improper considerations and made a decision that is not supported by substantial evidence.

A. Improper Waiver of Criteria

Petitioners correctly point out that certainty concerning the local approval criteria that will ultimately apply to a partition proposal cannot be achieved until a complete application for the partition is actually submitted. Under ORS 227.178(3), the approval criteria that are in effect on the date an application is submitted apply even if they are later amended before final action is taken on the permit application.[4] Moreover, petitioners are correct that any assurances that an applicant may receive from planning staff in a pre-application conference about what approval criteria may apply in the future cannot be anything more than an educated guess about what those criteria *will be* on the date a completed application for permit or limited land use decision approval is submitted. OCMC 17.50.050(D) is consistent with this principle. OCMC 17.50.050(D) makes it clear that any mistaken advice that city staff may give in pre-applications conferences about applicable code requirements provides no basis for waiving such requirements:

> "Notwithstanding any representations by city staff at a pre-application conference, staff is not authorized to waive any requirements of this code, and 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."

Petitioners correctly point out that in granting the variance that is disputed in this appeal, the city relied in part on the ultimately incorrect advice that intervenor was given at the August 5, 1998 pre-application conference that his proposal to create a parcel with only 80 feet of depth would not be affected by subdivision ordinance amendments that were under consideration. However, petitioners erroneously argue that the city's reliance on that mistaken advice in the challenged decision violates OCMC 17.50.050(D). If we understand petitioners correctly, their argument under this subassignment of error is premised on their position that a variance is the same as, or indistinguishable from, the "authori[ty] to waive any requirements of this code" that is expressly prohibited under OCMC 17.50.050(D).

We reject the argument. Petitioners confuse relying on a pre-application conference mistake simply to waive or not apply the 100-foot lot depth requirement with considering a pre-application conference mistake as a relevant factor in applying the criteria that must be met to grant a variance. OCMC 17.50.050(D) prohibits the former; it does not expressly address the latter.[5]

Petitioners also allege that the record in this matter does not include substantial evidence that city planning staff in fact advised intervenor that the subdivision ordinance amendments that were pending at the time of the pre-application conference would not affect intervenor's partition plans. However, the planning staff report to planning commission in this matter includes the following:

> "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 [illegible] to that statement, [OCMC] 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." Record 196.

Petitioners argue that the staff report is hearsay. However, the city commission is not required to apply the Oregon Rules of Evidence in its land use proceedings, and it committed no error in relying on the representations in the staff report. Moreover, given the lack of any contrary evidence, we conclude that the staff report is substantial evidence, *i.e.*, evidence a reasonable decision maker could rely upon, to support its finding that intervenor was erroneously advised that the legislative subdivision ordinance amendments would not affect his partition plans.

This subassignment of error is denied.

B. Variance Criteria

OCMC 17.60.020 establishes the relevant criteria that must be met to approve a variance.[6] Petitioners challenge the city commission's findings of compliance with each of the variance criteria.

1. Extraordinary Circumstances Apply to the Property

The city found that intervenor established compliance with the second prong of OCMC 17.60.020(A), which requires that the applicant establish that "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." The city's findings concerning OCMC 17.60.020(A) rely in large part on the erroneous advice that was given to the applicant during the pre-application conference about whether the subject property would be affected by the subdivision ordinance amendments.

Petitioners are correct that the traditional "extraordinary circumstances" variance criterion has generally been interpreted to require that the circumstances relate to some physical characteristic or aspect of property. *Lovell v. Independence Planning Comm.*, 37 Or App 3, 6, 586 P2d 99 (1978); *Erickson v. City of Portland*, 9 Or App 256, 262-63, 496 P2d 726 (1972); *Thompson v. Columbia County*, 17 Or LUBA 818, 826 (1989). As that criterion has traditionally been interpreted and applied, erroneous advice to a property owner about the approval criteria that might apply to a future request to partition property, resulting in frustration of a property owner's plans to partition his property, would not be sufficient to constitute extraordinary circumstances affecting the property. *Wentland v. City of Portland*, 22 Or LUBA 15, 25 (1991); *Patzkowski v. Klamath County*, 8 Or LUBA 64, 70 (1983).

The city clearly *could* have agreed with petitioners and interpreted OCMC 17.60.020(A), in context with the "non-waiver" provisions of OCMC 17.50.050(D), to preclude consideration of the kind of erroneous advice that was given to intervenor in the pre-application conference in this case. However, most of the cases that petitioners cite and rely upon to argue the city was legally required to do so predate the Oregon Supreme Court's decision in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), which established a highly deferential standard of review that must be applied in reviewing local governing body interpretations of local land use legislation. That deferential

standard of review is now codified at ORS 197.829(1).[7] While it would be entirely appropriate for the city commission to follow the precedent stated in those cases, those cases are not binding on the city commission. *Robinson v. City of Silverton*, 37 Or LUBA 521, 527 (2000). Under the deferential standard of review that must be applied under ORS 197.829(1) and *Clark*, the question presented in this appeal is not whether the more traditional interpretation of the extraordinary circumstances criterion is correct or better than the interpretation that was adopted by the city commission. *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996). The question is whether the city commission's interpretation is reversibly wrong under ORS 197.829(1) and *Clark*. To be reversible under ORS 197.829(1) and *Clark*, the city commission's interpretation must be shown to be "clearly wrong," or "beyond all colorable defense." *deBardelaben*, 142 Or App at 324.

The city's interpretive findings concerning OCMC 17.60.020(A) are as follows:

> "To satisfy prong two, an applicant must demonstrate there are unique circumstances that apply to its property that do not apply to other properties in the surrounding area but are unique to the applicant's site. In the instance of this applicant's request, the City Commission interprets this prong as requiring that the unique circumstances somehow affect the property. Normally, this will relate to physical characteristics of the property, such as topography, existing development or similar characteristics. However, in very limited circumstances, other factors may be so intrinsically related to the property, such as the circumstances here, that those factors may be considered as relating to the property, and may amount to extraordinary circumstances.
>
> "The applicant's property was severely and extraordinarily affected by the misleading and inaccurate information given to the applicant by the Planning Manager in August 1998 as explained above. The instructions given by the City Planning Manager regarding the property put the property in a position where it was no longer a viable candidate for a partition without a variance. The applicant met his burden of proof by showing that the property was the subject of and therefore affected by inaccurate and misleading guidance from the Planning Manager. No other property owner submitted his property for a pre-application conference and was told that the property could be partitioned so long as the property owner followed certain procedures only later to be told that the requirements had changed and a new more difficult application procedure would be needed. This unique sequence of events surrounding the applicant's partition process on this lot amounts to extraordinary circumstances affecting the property." Record 5.

Although it is a relatively close question, under the deferential standard of review that LUBA is required to apply under ORS 197.829(1) and *Clark*, we believe the city's interpretation must be sustained. The city's decision expressly recognizes that its interpretation and application of the extraordinary circumstances variance criterion in this case departs from the manner in which that criterion has generally been interpreted. The city's interpretation of that criterion to allow consideration of erroneous planning staff advice about the criteria that may apply to property in the future is a significant expansion of the circumstances in which that criterion may be met. However, the question that we must answer under ORS 197.829(1) is whether that interpretation is inconsistent with the "express language" or "purpose" of OCMC 17.60.020(A). Under the Court of Appeals' formulation of the deference that required on review of the city's interpretation, that interpretation must be "clearly wrong" or "beyond all colorable defense." Although the city's interpretation is at odds with the way that criterion has historically been interpreted, petitioners do not demonstrate that there is anything about the city commission's interpretation that is inconsistent

with the express language or purpose of OCMC 17.60.020(A), or that it is clearly wrong or beyond all colorable defense. The extraordinary circumstances that the city commission relied upon technically relate to staff presentations that in turn affected intervenor's ability to subdivide the subject property, rather than to the property itself. However, we conclude the city's broader interpretation of that language to find that the identified circumstances relate to the subject property does not go so far as to constitute an inconsistency with the express language of OCMC 17.60.020(A), within the meaning of ORS 197.829(1)(a). *See* n 7.

This subassignment of error is denied.

2. The Variance is not Likely to Cause Substantial Damage to Adjoining Properties

OCMC 17.60.020(B) requires that the city find the proposed variance "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 title." *See* n 6. The city's findings addressing this criterion include the following:

> "* * * The applicant met his burden of proof [under OCMC 17.60.020(B)] by demonstrating that the variance will allow him to create a new lot with substantially the same minimum lot size as existing lots in the neighborhood. * * *
>
> "The Commission heard testimony in opposition from neighbors Mark Reagan and Linda Lord. Both neighbors feel the variance would cause damage to the neighborhood by not conforming to the quality and character of the lots in this 'older and more established' neighborhood. Mr. Reagan as an adjacent property owner specifically claimed that the development of a new lot would directly infringe upon his privacy. The Commission has duly considered this testimony and finds that the quality and privacy provided by the Rivercrest Neighborhood will not be damaged by this variance.
>
> "Specifically, the applicant showed that the new lot will be of ample size and have ample setback so as to not infringe upon the privacy, light and air of neighborhood properties. The square footage of the new lot will actually exceed the minimum 10,000 square feet requirement of the R-10 zone. The Commission found further evidence that the lot would fit into the neighborhood by recognizing that a lot could be created without a variance in the same place if an additional twenty (20) foot lot depth were available. Even with another 20 feet in lot depth the impact on the adjacent properties would be practically the same. In fact, the impact upon the one adjacent property that was opposed to the variance request would be equal if not greater if a legal size lot with a one hundred (100) foot lot depth were to be created through a partition without a variance. The evidence in total demonstrates that the proposed lot is similar in quality and character to other lots in the neighborhood and therefore, will not cause substantial damage to adjacent properties.
>
> "* * * * *
>
> "The applicant volunteered to further ensure that no substantial damage will occur to the adjacent properties by subjecting development of the new lot to a condition of approval. As such, the approval of the variance appeal by the City Commission is conditioned on the applicant's new lot having a twenty (20) foot buffer between any new construction and any adjacent properties." Record 5-6.

Petitioners argue the above findings are not supported by substantial evidence and petitioner Reagan argues is privacy will be impacted by the new dwelling.[8] However, petitioners do not directly challenge the city's finding that the lot depth variance means the dwelling on the new parcel will actually be further from petitioner Reagan's existing dwelling than would potentially be the case if the new parcel were 100 feet deep. Petitioners also argue that the city's imposition of the condition requiring a 20-foot buffer from petitioner Reagan's west property

line, rather than showing petitioner Reagan's lot will not be substantially damaged, is a tacit admission that the new dwelling will cause substantial damage to adjoining properties. We reject the argument.

The city's findings concerning 17.60.020(B) are adequate to demonstrate that the variance will not cause substantial damage to adjoining properties, and those findings are supported by substantial evidence. This subassignment of error is denied.

3. Applicant's Circumstances Must not be Self-Imposed and Must be More than Monetary Hardship or Inconvenience

OCMC 17.60.020(C) imposes the following requirement:

> "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 the site was purchased."

Although OCMC 17.60.020(C) is awkwardly written, it appears to impose a two-pronged requirement. It requires that an applicant show that his circumstances (1) are not self-imposed, and (2) do not merely constitute a monetary hardship or inconvenience.

In explaining its conclusion that the application meets the OCMC 17.60.020(C) requirement that the applicant's circumstances must not be self-imposed, the city relied on the erroneous advice that was given to the applicant in the pre-application conference. The city concluded that it was reasonable for the applicant to rely on that advice. For the same reasons we conclude above that the city commission's interpretation of OCMC 17.60.020 (A) is not reversibly wrong under *Clark* and ORS 197.829(1), we conclude that the city commission's interpretation of the first prong of OCMC 17.60.020(C) is also not reversibly wrong.

However, the second prong of OCMC 17.60.020(C) requires that the city find that the applicant's circumstances do not "merely constitute a monetary hardship or inconvenience." The city's findings do not address or interpret the second prong of OCMC 17.60.020(C). The requirement that variances be limited to situations where they are necessary to avoid hardship is a common one. In considering a differently worded "hardship" criterion, the Court of Appeals recently noted:

> "Websters' Third New Int'l Dictionary, 1033 (unabridged ed 1993) defines 'hardship' as entailing 'suffering or privation.' The facts of this case, as the hearings officer found them, aptly illustrate that a landowner can come within a condition set forth in [the variance criterion] and still come nowhere close to any related suffering or privation. [The property owner's] inability to place a pool house within the permitted setback area is the product of one of the conditions, *i.e.*, the characteristics of and improvements on the property. The consequence of that inability is that, instead of having a separate 114 square foot structure, [the property owner] and others whom he allows to use the pool must perform their ablutions in and navigate the 15-foot distance from his house to the pool. Like many consequences that might conceivably ensue from the existence of characteristics or improvements on property that are incompatible with the lawful placement of structures on it, that consequence does not come within the plain, natural and ordinary meaning of 'hardship.'
>
> "* * * * *
>
> "Variances are provided for in local legislation, as it particulars of course vary from locality

to locality. It nevertheless contains, if not constants, recurring themes. [T]he concept of 'hardship' is one of those themes. Another [theme] is that variances are an extraordinary remedy that 'should not be employed as a substitute for the normal legislative process of amending zoning regulations.' Against that background, the appearance of the term 'hardship' in the county's ordinance here cannot be regarded as a coincidence, independent of its traditional meaning * * *." *Kelley v. Clackamas County*, 158 Or App 159, 163-65, 973 P2d 916 (1999) (footnote omitted).

Given the city commission's very permissive interpretation of its other variance criteria, it may well be that the city commission similarly views the hardship criterion as imposing a substantially lighter burden than the dictionary definition of "hardship" would require. With the level of deference the city commission must be given under *Clark*, it may well be that the city could interpret the hardship criterion in OCMC 17.60.020(C) as being met because denial of the requested lot depth variance would mean that intervenor cannot use the property he acquired from TL 5500 together with some additional area from what was formerly TL 5400 to create a third buildable parcel. However, unlike the city commission's findings addressing OCMC 17.60.020(A) and the first prong of OCMC 17.60.020(C), the city failed to adopt an interpretation of the second prong of OCMC 17.60.020(C) or to expressly address that prong of the criterion at all.

Intervenor's inability to further divide TL 5400 to create an additional parcel without a lot depth variance would appear to fall within the prohibition in OCMC 17.60.020(C) against granting variances to relieve a "monetary hardship or inconvenience." That inability would certainly not qualify as a "hardship" as that concept has been applied in considering variances. In any event, without contrary interpretive findings we will not assume the second prong of OCMC 17.60.020(C) is satisfied here. It is not appropriate for LUBA to assume that the city commission would exercise its discretion under *Clark* to interpret the second prong of OCMC 17.60.020(C) as being met in the circumstances presented in this case. It is equally possible that the city commission was simply unaware of the "hardship" criterion in the second prong of OCMC 17.60.020(C).

This subassignment of error is sustained in part.

4. Minimum Variance Required to Alleviate Hardship and no Practical Alternative Exists

We consider petitioners' assignments of error concerning OCMC 17.60.020(D) and (E) together. These criteria impose the following requirements:

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

"E. That the variance requested is the minimum variance which would alleviate the hardship[.]"

The city commission's findings regarding the "practical alternatives" and "minimum variance" criteria are as follows:

"There is no additional space available for the applicant to obtain more lot depth so that his new lot would meet the R-10 zone dimensional requirements. Therefore, no practical alternatives exist that would allow the creation of a new lot without a lot depth variance.

> "The applicant has shown that the new lot will use all of the available space so that the lot depth variance is only twenty (20) feet less than the one hundred (100) feet requirement. This twenty (20) feet difference is the minimum variance from the dimensional requirements necessary to create the new lot." Record 6-7.

Petitioners and intervenor dispute whether it would be possible to extend the rear property line for the proposed parcel further south into TL 5500 without violating setback requirements measured from the swimming pool that is located on that property.[9] However, the record indicates a more fundamental problem with extending the rear property line of the new parcel further south into TL 5500. TL 5500 currently only contains 10,200 square feet. Extending the rear property line much more than an additional two feet to the south would result in TL 5500 having less than the 10,000 square feet required in the R-10 zone and could not be done without a separate variance for TL 5500. Petitioners suggest that it might be possible to (1) extend the rear property line of the new parcel south and (2) also adjust the property line between TL 5500 and TL 5400 in a way that would transfer property in other locations from TL 5400 to TL 5500, leaving TL 5500 with sufficient area and making the new parcel 100 feet deep. At the very least, petitioners argue, the needed variance could be reduced or "minim[ized]," as OCMC 17.60.020(E) requires.

The city commission's findings do not specifically address the issue that petitioners raise under these criteria. Intervenor argues that this is because petitioners never raised an issue below concerning the possibility of minimizing the needed variance or eliminating the need for the variance altogether by making the kinds of property line adjustments that petitioners now suggest may be possible. Because they failed to raise such an issue below, intervenor argues the issue is waived. ORS 197.835(3).

Under ORS 197.835(3), issues must be raised with sufficient specificity to give the local decision maker and the other parties a fair opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). An issue is waived if it is not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue. *Craven v. Jackson County*, 29 Or LUBA 125, 132, *aff'd* 135 Or App 250, 898 P2d 809 (1995). Petitioners argue that intervenor confuses the requirement that they raise an "issue" below with a requirement that they must have raised the precise "argument" they attempt to raise at LUBA. *DLCD v. Tillamook County*, 34 Or LUBA 586, 590-91 (1998); *DLCD v. Curry County*, 33 Or LUBA 728, 733 (1997). Petitioners argue that they sufficiently raised the issue of compliance with these criteria at Record 29 and 249.

Record 29 includes a reference that "all five criteria must be met in order for the variance to be given." Record 249 includes a more specific reference to the alternatives and minimum variance criteria, but no issue is raised about whether it might be possible to reconfigure the proposed parcel and TL 5400 and TL 5500 in a way that

would eliminate the need for the variance or minimize the magnitude of the variance needed.[10]

The distinction between "issues" and "arguments" does not lend itself to an easy or universally applicable mula. We agree with petitioners that ORS 197.835(3) does not require that they have made the *precise* argument below that they seek to make under these assignments of error. However, neither of the cases cited above hold that *any* argument can be advanced at LUBA so long as it has some bearing on an applicable approval criterion and general references to compliance with the criterion itself were made below. Fair notice of the issue to be raised on appeal is required under ORS 197.835(3) and *Boldt*. Here, the pages in the record cited by petitioners do not include any suggestion that could possibly have led a reasonable person to believe that petitioners believed the proposed parcel could be reconfigured to eliminate the need for the variance or reduce the size of the variance needed. That being the case, the city commission cannot be faulted for failing to address the issue in its findings, and petitioners waived their right to raise the issue at LUBA under ORS 197.835(3).

These subassignments of error are denied.

5. Variance Conforms to the Comprehensive Plan and Intent of the Ordinance Being Varied

OCMC 17.60.020(F) requires that the city find "[t]hat the variance conforms to the comprehensive plan and the intent of the ordinance being varied." The city adopted the following findings:

> "The variance conforms to the Comprehensive Plan by adding a new lot in a way that promotes in-fill and higher density without sacrificing neighborhood quality and character. Further, the intent of the underlying R-10 zone will be met because the new lot will have the same quality and character as other lots in the neighborhood, as discussed above under [OCMC 17.60.020(B)]." Record 7.

The city commission found that the variance conforms to the comprehensive plan because it furthers plan in-fill and higher density goals in a way that does not sacrifice neighborhood quality. Petitioners disagree with that finding and cite other plan policies that they believe will not be furthered by the variance.

We have no reason to question the city commission's finding that approving the variance and allowing a new parcel to be created from TL 5400 and TL 5500 would promote in-fill and higher residential density. It is also relatively clear from the city commission's brief findings that it does not interpret OCMC 17.60.020(F) to require that a particular variance must further each and every comprehensive plan goal or policy. However, the fatal problem with the city's findings concerning this portion of OCMC 17.60.020(F) is that the findings do not identify *any* comprehensive plan provision that calls for higher residential density or in-fill. There may well be such a plan provision, but the city's findings are inadequate to identify the plan provisions the city commission relied upon in inding compliance with this part of OCMC 17.60.020(F).

To address the additional requirement of OCMC 17.60.020(F) that the variance conform to the intent of the ordinance being varied (*i.e.* the 100-foot lot depth requirement), the city relied on its findings addressing OCMC 17.60.020(B). Petitioners make no direct attempt to explain why those findings are inadequate to show the variance

conforms to the intent of the lot depth requirement. We conclude that they are.

This subassignment of error is sustained in part.

The first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

Under their second assignment of error petitioners allege the city commission improperly relied on (1) intervenor's poor health, (2) the city's failure to provide intervenor notice of the subdivision ordinance amendments in 1998, (3) the city's delay in completing intervenor's pre-application conferences to approve the variance, and (4) the city commissioners' desire to encourage in-fill, increase density and thereby increase property tax revenues.

Intervenor argues the disputed variance was not approved based on the factors petitioners cite. Rather, intervenor argues, the cited factors were considered in the process of interpreting and applying the criteria that govern approval of variances and such consideration of the cited factors is not error. We agree with intervenor.[11]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

One city commissioner recused himself, stating he was "close friends with the parties." Record 22. He left the hearing room and did not participate in the contested case hearing before the city commission in this matter on June 21, 2000. However, at the July 19, 2000 city commission hearing at which the city commission adopted written decision, that same city commissioner made the motion to adopt the final written decision that granted the variance. *Id.* Petitioners argue they were thereby denied the "impartial tribunal" that parties in quasi-judicial land use proceedings are entitled to under *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973).

We agree with petitioners that the city commissioner, having recused himself, should not have participated in the adoption of the final written decision. Nevertheless, we do not agree with petitioners that this error demonstrates that they were denied their right to an impartial tribunal. The city commissioner did not participate in the evidentiary hearing in this matter. Neither did he participate in the 4-0 vote to grant the variance at the conclusion of that hearing. In the circumstances presented in this case, his participation in the vote to adopt the final written decision was harmless error.[12]

Petitioners also cite comments by the mayor and another city commissioner as demonstrating that they had prejudged this matter. The cited comments come nowhere near demonstrating bias or prejudgment.[13] Finally, following oral argument, it was discovered that the city cannot find the audiotapes of the June 21, 2000 city commission hearing in this matter. In an April 2, 2001 letter to the Board, petitioners suggest that this development warrants a conclusion that the city has "defaulted on the issue of a biased tribunal." The record includes minutes of the June 21, 2000 hearing and petitioners have prepared and attached a partial transcript of that hearing to their

petition for review. None of the arguments that petitioners make based on the minutes and partial transcript demonstrate bias or prejudgment. Neither do petitioners offer any reason to suspect that the missing tapes would ange that result.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their final assignment of error, petitioners allege that in approving the disputed variance the city commission held intervenor to an unequal and lower standard and thereby violated Article I, section 20 of the Oregon Constitution.[14] Petitioners must do more than allege unequal treatment and favoritism on the part of the city commission to prevail in an assignment of error alleging violation of Article I, section 20. Petitioners' citations under this assignment of error, and elsewhere in the petition for review, to specific comments and reasoning by individual city commissioners that were adverse to petitioners' positions similarly are insufficient to demonstrate a violation of Article I, section 20.

The fourth assignment of error is denied.

The city's decision is remanded.

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[1]OAR 661-010-0039 requires that "[a] reply brief shall be confined solely to new matters raised in the respondent's brief." Parts of petitioners' reply brief respond to arguments by intervenor that petitioners waived certain issues by failing to raise those issues during the proceedings below. A reply brief is appropriate to respond to such waiver arguments. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). The remaining parts of the reply brief are not "confined to new matters raised in the respondent's brief," within the meaning of OAR 661-010-0039. Although the scope of matters that are properly viewed as "new matters" is somewhat imprecise, the balance of the reply brief clearly exceeds responding to "new matters." *See D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 526-27, aff'd 165 Or App 1, 994 P2d 1205 (2000) (reply brief is not available to reply to arguments in respondent's brief that could have been anticipated or to embellish arguments made in the petition for review). These arguments in the reply all respond to arguments that petitioners could have anticipated in the petition for review and in many cases did anticipate and address in the petition for review. Much of the reply brief is the kind of argument that is properly reserved for oral argument.

[2]Since the new "lot" is to be created by partition, technically it would be a parcel rather than a lot. Although we refer to the new parcel as a parcel, the city commission frequently refers to the new parcel as a new lot.

[3]OCMC 16.28.080 (1994) provided as follows:

> "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."

[4]ORS 227.178(3) provides as follows:

> "If the application [for a permit, limited land use decision or zone change] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[5]The following city findings illustrate the distinction:

> "The applicant appropriately sought and relied on advice from the Planning Manager. While the inaccuracy of the Planning Manager's advice does not constitute a waiver of the new requirement, the City Commission interprets [the variance criteria] to mean that such inaccurate advice regarding a change in the OCMC can, and in this situation does, create an extraordinary circumstance that is not self-imposed by the applicant." Record 6.

As explained below, two of the variance criteria require that the applicant demonstrate that "extraordinary circumstances apply to the property" and that "applicant's circumstances are not self-imposed."

[6] OCMC 17.60.020 provides as follows:

"A variance may be granted only in the event that all of the following conditions exist:

"A. That the literal application of the provisions of this title would deprive the applicant of rights commonly enjoyed by other properties in the surrounding area under the provisions of this title; 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;

"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 title;

"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 the site was purchased;

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

"E. That the variance requested is the minimum variance which would alleviate the hardship;

"F. That the variance conforms to the comprehensive plan and the intent of the ordinance being varied."

[7] ORS 197.829(1) provides:

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[8] Petitioner Reagan owns the lot that adjoins TL 5500 and the proposed new lot to the east. Like TL 5400 and TL 5500, petitioner Reagan's lot is developed with a single-family residence on the south side of the lot with access onto Barclay Avenue. The house on the proposed lot would adjoin the west side of petitioner Reagan's back yard.

[9] There is evidence in the record that the existing swimming pool on TL 5500 is located 20 feet from the rear property line on TL 5500 and the rear property line of the proposed new parcel. Petitioners argue the required setback is established by OCMC 17.54.010(F), which requires that swimming pools be setback three feet from side and rear property lines. Intervenor argues the required setback is established by OCMC 17.08.040, which requires that rear yards be 20 feet deep. Petitioners appear to be correct that the shared rear property line for the new lot and TL 5500 could be as close as three feet from the existing pool on TL 5500.

[10] The only issues raised concerning these criteria are whether intervenor has a "legitimate hardship" or has other options to "finance home maintenance" without selling the proposed lot. Record 249.

[11] We did partially sustain petitioners' final subassignment of error under the first assignment of error where they argued that the city improperly relied on a desire to facilitate in-fill and increased density in concluding that the proposal complies with the OCMC 17.60.020 (F) requirement that the variance conform to the comprehensive plan. However, the city's error under OCMC 17.60.020(F) was in failing to identify any comprehensive plan provisions that would be furthered by such in-fill and increased density. Assuming such plan provisions are identified on remand, it follows that it would be appropriate to rely on those considerations.

[12] Even if it were not harmless error, the city's decision is being remanded for other reasons. We assume the city commissioner w not participate in any additional proceedings or decisions the city council may adopt on remand.

[13] One of the cited comments is a statement by one of the city commissioners at the beginning of the hearing where the commissioners were each considering whether to participate in the hearing or recuse themselves. The commissioner said "I hate everybody." Petition for Review Appendix E 2. The transcript indicates that statement was followed by laughter. *Id.* That comment is evidence of an attempt at humor; it does not demonstrate bias or prejudgment.

[14] Article I, section 20 of the Oregon Constitution provides:

"**Equality of privileges and immunities of citizens**. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[redacted]

TO: Honorable Mayor and City Commissioners, Oregon City

FROM: Edward J. Sullivan

DATE: June 12, 2000

SUBJECT: Appeal by Applicant Jim McKnight of Variance Denial
City File No. VR 99-07

The City Commission has before it an appeal from the order of the Planning Commission denying a variance to the applicant, Jim McKnight. These proceedings are "on the record" made before the City Planning Commission, so the City Commission may not consider matters either in the appeal materials, nor in the presentations made before it, unless these facts or arguments were presented to the Planning Commission.

The staff report contains the basic facts and staff recommendations, while the Planning Commission's final order contains the Planning Commission's decision and reasons therefor. Under OCMC 17.50.190, the Commission considers appeals based on the issues presented by the appellant. The grounds for appeal track the bases on which the Planning Commission denied the application, so that the issues are joined adequately.

Below is my analysis of the appeal grounds. It is important to state that in this case, it is the Commission that is given wide deference in interpreting its own code under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) and ORS 197.829(1).[1]

---

[1] The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

222 SW COLUMBIA STREET SUITE 1400 PORTLAND, OR 97201-6632 TEL: (503) 228-3200 FAX: (503) 248-9085 www.prestongates.com
Anchorage Coeur d'Alene Hong Kong Los Angeles Orange County Palo Alto Portland San Francisco Seattle Spokane Washington, DC

The City Code provides the following requirements if a variance is to be approved:

A variance may be granted only in the event that all of the following conditions exist:

A. That the literal application of the provisions of this title would deprive the applicant of rights commonly enjoyed by other properties in the surrounding area under the provisions of this title; 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;

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 title;

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 the site was purchased;

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

E. That the variance requested is the minimum variance which would alleviate the hardship;

F. That the variance conforms to the comprehensive plan and the intent of the ordinance being varied.

The staff report indicated that grounds (A), (C), (D), and (E) were not met. The Planning Commission Final Order determined that grounds (A), (B), and (C) were not met and did not address the remaining criteria. The applicant has appealed each of the grounds on which the Planning Commission rendered an adverse decision to him.

What follows is my advice on applying the three criteria that are the subject of this appeal:

A. That the literal application of the provisions of this title would deprive the applicant of rights commonly enjoyed by other properties in the surrounding area under the provisions of this title; 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

There are two alternative bases for this criterion, i.e., the "deprivation of rights commonly enjoyed by other properties in the surrounding area" basis and the "extraordinary circumstances" basis.

1. Deprivation of Rights Commonly Held by others in the Area -- The first basis requires significant interpretation by the Commission. Is construction of a house on an undersized lot a right commonly enjoyed by others in the area? Moreover, what is the "area" under consideration?

The applicant states, correctly, that the lot depth and dimensional standards apply "to all lots in a particular zone in the City." He also states that he does not assert that these same standards would not apply to "his neighbors" should they attempt partition of their lots. If the inference is that each of these lots may be further divided, the applicant misses the point of the variance procedure. That process is generally available to deal with unique situations, such as not being able to build at all on a lot because of being undersized or lacking dimensions required of the code. If those conditions were preexisting, the applicant could request the variance so that he or she could share the same right to build, as those possessed by others. Historically, a variance is not generally available so as to allow construction of two houses on a lot that can accommodate one. The Commission is free to interpret its code otherwise, but is not required to do so.

The applicant has presented a chart of other substandard lots in the area. The chart does not indicate the zoning classification or origin of the lots listed. It is possible that many of these lots have houses on them, assuming they are in a zoning district that allows single family homes, under the "lot of record" provisions similar to OCMC 17.08.050,[2] which applies in the R-10 zone.[3] There is no right commonly enjoyed under the City's zoning regulations to build a second house on a double lot that is slightly undersized regarding dimensional requirements[4].

As to the "area," there are three different zones in this vicinity mentioned in the staff report. Two of them have dimensional standards different from the R-10 zone in which the applicant's property is located and have densities different from that in the R-10 zone as well. The Commission should consider this in determining the "area" of consideration. The Commission may determine the "area" to be the vicinity of the site (as suggested by the applicant at p. 23 of Exhibit A). That analysis includes the three zones set forth in the staff report, the R-10 zone generally or in a certain radius of the site, or the River Crest subdivision. Depending on the analysis of the "rights commonly held," however, there may not be much difference in the result of these analyses.

---

2 An existing lot of record with a minimum lot size of five thousand square feet may only be occupied by a single-family dwelling, providing that yard requirements are met. An existing lot with an area of less than five thousand square feet is subject to variance procedures, pursuant to Chapter 17.60 of this title. If the variance is granted, the only permitted use of the lot is a single-family dwelling.

3 See OCMC 17.12.050 (R-6 zones) and 17.16.050 (RD-4 zones) which are similar.

4 The applicant suggests the rights commonly enjoyed must apply to the zoning ordinance as a whole and not to its variance provisions. The Commission must decide which "rights" are referred to in this section. I suggest it is the right to build one single family home in this zone, as by its terms, there is no "right" to a variance.

2. Extraordinary Circumstances Which Do Not Apply to Other Properties in the Surrounding Area But Are Unique to the Applicant's Site -- The applicant frames his appeal in terms of the personal circumstances of the property owner, rather than of conditions of the site itself. I recommend the Commission not take this approach, particularly in the light of the wording of this alternative basis for approval, as the words are framed in terms of the site itself. Variances generally deal with odd property configurations that do not meet zoning dimensional standards and were not created by the applicant or the applicant's predecessors in title. They allow for the right to construct a use, otherwise generally available to other property owners, on that lot or parcel and usually are limited to the dimensions of the property, rather than the circumstances of the property owner.

Taking this approach, which is the standard approach in variance cases and that taken by the Planning Commission in this case, avoids the issues of personalities and who said what to whom in past conversations. I recommend this approach. Even assuming that the Commission wishes to deal with the circumstances raised in the appeal, there are adequate grounds for rejecting them:

a. It is true that the August, 1998 preapplication conference dealt with this site and that at this conference the staff gave its best judgment and predictions as to what the Planning Commission and City Commission would do in considering revisions to the City's subdivision and partitioning regulations. However, that judgment and those predictions do not bind the City if the City decides to take another approach. Even if the City staff were to leave out or misstate a criterion during a preapplication conference, an applicant would be no better off during the hearing or on appeal if the issue were properly raised. Further, Ms. DeRidder did not, as may be inferred from the appeal, mislead the applicant. She gave the applicant what she knew about the staff draft of the ordinance then before the City for consideration. She could not predict the outcome of the public process and could not thus give "assurances to the contrary." Moreover, the applicant could have solidified his position at any time before the new regulations became effective by simply filing an application, but did not do so.

b. As indicated in the Planning Commission Final Order, the regrettable nature of the applicant's stroke over the years he held the subject property does not improve, nor detract from, his position. Again, this is a personal matter unrelated to the land use issues of this case.

c. The fact that the City staff determined after seven weeks that the applicant was not able to extend his preapplication conference was not a staff judgment. The City's code made that determination and the time had already expired. Staff did, however, waive the fee for a new preapplication conference. Moreover, the preapplication conference, if extended, would have no effect on the new standards the City had adopted, nor the variance application now before the Commission.

d. Finally, there is no right by staff or the Planning Commission to waive the applicable ordinance criteria, even if the applicant had all the assurances in the world.

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 title**

The staff found no such substantial damage in preparing its report; however, the Planning Commission determined, based on the testimony of adjacent property owner Mark Reagan that there would be such damage. The appeal states that there will be no diminishment of the privacy of neighbors. This is a judgment call of fact and law to be made by the City Commission on the basis of the record before it. The Commission should read Mr. Reagan's letter, the applicant's response, the Planning Commission Final Order and the appeal on this issue. The Commission should be aware it might also impose conditions to assure that this standard is met.

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 the site was purchased**

The staff and Planning Commission both emphasized the "self-imposed" standard. I would be more hesitant in doing so, because I do not believe that there is a "hardship" occasioned by the denial of building of two houses on a tract of land. The Commission need not get to whether this is self-imposed. I would suggest that the Commission not reach that issue for another reason as well, i.e., that there is no self-created hardship by failing to act. The term "self-imposed hardship" is usually reserved for a situation in which the applicant or the applicant's predecessor in title affirmatively creates the problem. For example, if the applicant sells off a portion of a lot and makes it undersized under the current regulations, the applicant may not ask for relief through the variance process. The approach of the staff and Planning Commission appears to place a premium on what the applicant knew or could have known as a personal circumstance. It is far more appropriate to deal with the circumstances of the property than the applicant's personal circumstances.

Because the alternative ground under this standard, i.e., a monetary hardship or inconvenience, is not raised in this appeal, I do not recommend that the Commission reach it. However, this may be a more difficult ground for the applicant to overcome, given that the applicant has a right to build one (but not two) houses on this land.

A final order consistent with the above will be available to the Commission if it decides to affirm the Planning Commission decision. If the Commission decides to grant the appeal and the variance, it should hear from the applicant as to an extension of the 120 day time limitation being requested and request the applicant to draft findings for Commission adoption.

Staff and counsel are available to the Commission if it has any questions.

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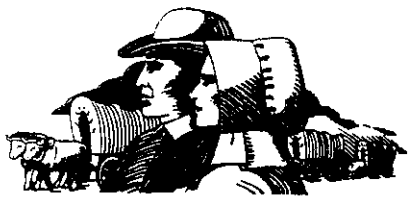
CITY OF OREGON CITY

COMMUNITY DEVELOPMENT

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



NOTICE OF DECISION
OREGON CITY – CITY COMMISSION

DATE: July 24, 2000

FILE NO: VR99-07

APPLICANT: James McKnight

REQUEST: Appeal of findings applied to the denial of quasi-judicial land use decision; VR99-07. Variance to allow a 20 ft. reduction in the lot depth for Tax Lot 5400 at 161 Barcaly Avenue in the R-10 Single Family Dwelling District.

DECISION OF THE CITY COMMISSION:

The City Commission voted unanimously to overturn the Planning Commission's decision found in VR99-07.

A copy of the adopted revised findings are attached. Background material may be obtained from the Planning Division, 320 Warner Milne Road, Oregon City, Oregon or by calling (503) 657-0891.

This decision is appealable to the Land Use Board of Appeals within 21 calendar days from the date of mailing of this notice.

Maggie Collins
Planning Manager

cc. Affected Property owners
City Engineering Department
City Building Department
File AP00-03
File VR99-07
City Attorney

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Attachment # 4

COPY

BEFORE THE CITY COMMISSION
FOR THE CITY OF OREGON CITY OREGON
JULY 19, 2000

In the matter of an appeal of a Planning Commission denial 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 City Commission at a duly noticed public hearing on June 21, 2000 to appeal a final decision by the Planning Commission adopted on May 8, 2000. Following deliberations and based on all of the testimony and evidence that was presented at the public hearing, the City Commission voted to grant the appeal request, overturn the Planning Commission's decision and approve the variance for lot depth from 100 feet to 80 feet.

The City Commission finds that the applicant has met the burden of proof in demonstrating that the proposed variance complies with the applicable approval criteria. More specifically, the City Commission overturns the Planning Commission denial of the following three criteria: (1) literal application of the ordinance will deprive the applicant of rights commonly enjoyed by other properties and there are extraordinary circumstances that apply to this property that do not apply to other properties in the surrounding areas; (2) the applicant has demonstrated that the variance is not likely to cause substantial damage to adjacent properties; and (3) the applicant has demonstrated that the circumstances are not self-imposed. The City Commission agrees with the Planning Commission's disposition of the other variance criteria and finds that each of the variance criteria have been met.

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 into 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 Street, a lot depth of 80 feet and a width of approximately 131 feet.

Exhibit A

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 on a partition application for the property, which was held on August 5, 1998. At the pre-application conference, the applicant who suffers communication and comprehension difficulties due to a stroke, actively questioned the Planning Manager about guidance for what actions he must take to proceed and complete the partition of Tax Lot 5400. In response to his questions, the applicant was informed specifically that any changes to the Oregon City Municipal Code ("OCMC") anticipated to be adopted in October 1998 would not affect him.

In October 1998, OCMC Section 16.28.080 (1994), which allowed for a partition with a minimum lot depth of 60 feet was removed. Without that provision the applicant became subject to 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 received no notice of the change in the Ordinance.

In February 1999, six months after his pre-application conference, the applicant requested a pre-application extension. The applicant did not receive any response from the City for two months. In April 1999, the Planning Division responded to his request for a pre-application extension. At that time the applicant was told by the Planning Manager that the information given at the pre-application was incorrect and he now needed a variance. The applicant filed a variance application on June 24, 1999.

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 OCMC. We find the applicant's request meets the following criteria:

A. ***17.60.20 (A) (1) Literal Application of the Zoning Code Deprives the Applicant of Rights Commonly Enjoyed by Other Properties or (2) Extraordinary Circumstances Apply to the Property that Do Not Apply to Other Property in the Surrounding Area.***

To satisfy Criteria A, the applicant must meet either prong one or prong two. The City Commission finds the applicant has shown that prong two has been met.

Extraordinary Circumstances Apply to This Property.

To satisfy prong two, an applicant must demonstrate there are unique circumstances that apply to its property that do not apply to other properties in the surrounding area but are unique to the applicant's site. In the instance of this applicant's request, the City Commission interprets this prong as requiring that the unique circumstances somehow affect the property. Normally, this will relate to physical characteristics of the property, such as topography, existing development or similar characteristics. However, in very limited circumstances, other factors may be so intrinsically related to the property, such as the circumstances here, that those factors may be considered as relating to the property, and may amount to extraordinary circumstances.

The applicant's property was severely and extraordinarily affected by the misleading and inaccurate information given by the City Planning Manager in August 1998 as explained above. The instructions given to the applicant by the Planning Manager regarding the property put the property in a position where it was no longer a viable candidate for a partition without a variance. The applicant met his burden of proof by showing that the property was the subject of and therefore affected by inaccurate and misleading guidance from the Planning Manager. No other property owner submitted his property for a pre-application conference and was told that the property could be partitioned so long as the property owner followed certain procedures only later to be told that the requirements had changed and a new more difficult application procedure would be needed. This unique sequence of events surrounding the applicant's partition process on this lot amounts to extraordinary circumstances affecting the property.

B. ***17.60.020(B). The Proposed Variance is Not Likely to Cause Substantial Damage to Adjacent Property.***

Under this criterion, a variance will be granted if the applicant can demonstrate that the variance is not likely to cause substantial damage to adjacent properties. The applicant met his burden of proof by demonstrating that the variance will allow him to create a new lot with substantially the same minimum lot size as existing lots in the neighborhood. Because the new lot will fit appropriately into the neighborhood under the neighborhood's R-10 zoning standards, the City Commission finds it is not likely to cause substantial damage to adjacent properties.

The Commission heard testimony in opposition from neighbors Mark Reagan and Linda Lord. Both neighbors feel the variance would cause damage to the neighborhood by not conforming to the quality and character of the lots in this "older and more established" neighborhood. Mr. Reagan as an adjacent property owner specifically claimed that the development of a new lot would directly infringe upon his privacy. The Commission has duly considered this testimony and finds that the quality and privacy provided by the Rivercrest Neighborhood will not be damaged by this variance.

Specifically, the applicant showed that the new lot will be of ample size and have ample setback so as to not infringe upon the privacy, light and air of neighboring properties. The square footage of the new lot will actually exceed the minimum 10,000 square feet requirement of the R-10 zone. The Commission found further evidence that the lot would fit into the neighborhood by recognizing that a lot could be created without a variance in the same place if

an additional twenty (20) foot lot depth were available. Even with another 20 feet in lot depth the impact on the adjacent properties would be practically the same. In fact, the impact upon the one adjacent property that was opposed to the variance request would be equal if not greater if a legal size lot with an one hundred (100) foot lot depth were to be created through a partition without a variance. The evidence in total demonstrates that the proposed lot is similar in quality and character to other lots in the neighborhood and therefore, will not cause substantial damage to adjacent properties.

Condition of Approval

The applicant volunteered to further ensure that no substantial damage will occur to adjacent properties by subjecting development of the new lot to a condition of approval. As such, the approval of the variance appeal by the City Commission is conditioned on the applicant's new lot having a twenty (20) foot buffer between any new construction and any adjacent properties.

C. *17.60.020(C). The Applicant's Circumstances are Not 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 of a standard that would preclude a proposed development, the circumstance is self-imposed.

The City Commission finds that the applicant could not have known of the circumstances that have forced the property to be subject to the need for a variance application (specifically that the guidance given by the Planning Manager turned out to be inaccurate). On August 5, 1998 the applicant was informed by City Planning Manager that the partition could move forward and that a change in the OCMC would not affect the applicant's right to pursue a partition. Nevertheless, when the OCMC was changed in October 1998 the changes prevented the applicant's ability to move forward with a partition application. Contrary to the specific information provided to the applicant, the applicant was required to follow the lot dimensional standards of the underlying zone and thus submit a variance application.

The applicant appropriately sought and relied on advice from the Planning Manager. While the inaccuracy of the Planning Manager's advice does not constitute a waiver of the new requirement, the City Commission interprets this criteria to mean that such inaccurate advice regarding a change in the OCMC can, and in this situation does, create an extraordinary circumstance that is not self-imposed by the applicant.

D. 17.60.020(D). No practical alternatives have been identified which would accomplish the same purposes and not require a variance.

There is no additional space available for the applicant to obtain more lot depth so that his new lot would meet the R-10 zone dimensional requirements. Therefore, no practical alternatives exist that would allow the creation of a new lot without a lot depth variance.

E. ***17.60.020(E). The variance requested is the minimum variance, which will alleviate the hardship.***

The applicant has shown that the new lot will use all of the available space so that the lot depth variance is only twenty (20) feet less than the one hundred (100) feet requirement. This twenty (20) feet difference is the minimum variance from the dimensional requirements necessary to create the new lot.

F. ***17.60.020(F). The variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.***

The variance conforms to the Comprehensive Plan by adding a new lot in a way that promotes in-fill and higher density without sacrificing neighborhood quality and character. Further the intent of the underlying R-10 zone will be met because the new lot will have the same quality and character as other lots in the neighborhood, as discussed above under Criteria B.

III. Conclusion

The applicant has demonstrated that all of the variance criteria are met. Because each criteria has been satisfied, the City Commission reverses the decision of the Planning Commission and grants the applicant's application for a variance lot depth from 100 feet to 80 feet for all of the above reasons.

John F Williams, J

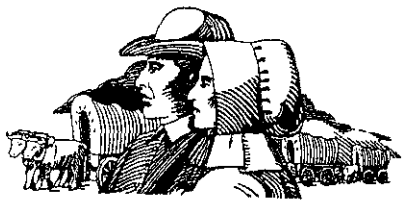
John Williams Jr., Mayor

July 19, 2000

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

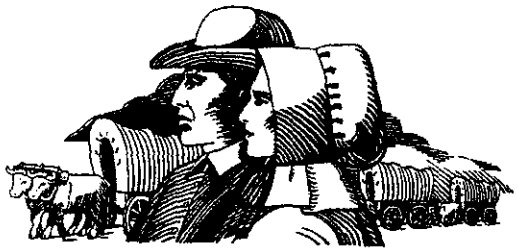
The applicant has not demonstrated that all of the variance criteria are met, so the application is being denied. It is unfortunate that the applicant was unable to partition the lot prior to the change in the subdivision ordinance. However, he bought a piece of property that was not partitioned and 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.

CITY OF OREGON CITY

PLANNING COMMISSION

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



Staff Report
April 24, 2000

FILE NO.: VR 99-07

HEARING DATE: Monday, April 10, 2000

FINDINGS ADOPTION DATE: Monday, May 8, 2000

BACKGROUND:

The attached document are draft Findings of Fact, Conclusions of Law and Final Order concerning the Planning Commission denial of a variance request, File No. VR 99-07, at a duly noticed public hearing on April 10, 2000.

Upon adoption of the attached, the appeal period governing this file shall be in effect. The applicant may obtain appeal information from the Planning Division by contacting staff at 657-0891.

Attachment: Draft Findings, VR 99-07

DRAFT

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

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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.

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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.

Complete Communities

FOR CLACKAMAS COUNTY

Executive Summary

March, 2001

Complete Communities
FOR CLACKAMAS COUNTY

The purpose of Complete Communities for Clackamas County is to:

Work together to define our common and unique community values, identify the diverse attributes of Complete Communities, and guide future policy decisions and actions.

Between January, 2000 and February, 2001, meetings and events were held in every area in the County to discuss the qualities that make Clackamas County, and their communities, complete.

Citizens developed draft recommendations about the most frequently mentioned issues at the first Complete Communities Congress, October 28th. Public meetings to review these recommendations took place in January and February, 2001. At the Second Complete Community Congress on February 24, 2001, citizens identified the recommendations that have the most far reaching effect; are the easiest to carry out; and are the most important to their area of the County. This information, and recommended action items, are included in this final report and were submitted to the Board of County Commissioners in May, 2001.

Additional information is available at www.co.clackamas.or.us/community or by contacting Donna Peterson, Assistant to the County Administrator 655-8581; e-mail: donnap@co.clackamas.or.us.

Citizen Volunteers

Complete Communities appreciates the valuable contributions of Steering Committee members and other citizen volunteers.

Mark Adcock, Sparkle Anderson, Norm Andreen, Peter Angstadt, Mayor Robert Austin, Bruce Barton, Victoria Boettcher, Mike Bondi, David Bradley, Bill Brandon, Phyllis Brinkley, Barry Broonham, Judy Buckle-Ganoe, Marc Burnham, Denise Carey, Michael Carlson, Jody Carson, Steve Chrisman, Hee-Kyung Chung, Barbara Coles, Dave Connor, Judy DeRoss, Richard DeRoss, Bev Dolittle, Dorothy Douglas, Dan Drentlaw, Randy Early, Alice Ericksen, Judith Ervin, Matt Finnigan, Sherry Finnigan, Kevin Frostad, Grant Fulmore, James Garrett, Theonie Gilmore, Mayor Eugene Grant, Elizabeth Graser Lindsey, Mayor Gene Green, Michelle Gregory, Thelma Haggenmiller, Mike Halloran, John Hepler, Reverend Stan Hoobing, Karen Hubbard, Cheryl Hunker, Dan Hunker, Mark Hylland, Lorie James, Jim Johnston, Michael P. Jones, Olga Kalashnakov, Rob Kappa, Barbara Kemper, John Keyser, Marcia Kies, Brian Kennedy, Judy Kolias, Edwin Kosel, Bill La Crosse, Eldon Lampson, Maurice Larsen, Bud Luft, Diane Luther, Chuck Lyons, David Mansfield, Wilber Mars, Carol Mastonarde, Don Mench, George Mitchener, Oscar Monteblanco, Darrin Nash, Patrick Nesbitt, Bob and Gretchen O'Brien, Dan O'Dell, Silvia Milne, Aydria Morrow and Troop No. 912 - Girls Scouts Columbia River Council, Allie Neslon, Mary Palmer, Wilda Parks, Kay Pearson, Chuck Petersen, Dave Porter, Paul Rogers, Sheri Sawyer, Charles Serface, Cathy Shroyer, Gwen Simpson, Richard Stamm, Debra Stevens, Tammy Stevens, Ginger Taylor, Scott Taylor, Mayor Carolyn Tomei, Jacqueline Tommas, Chris Utterback, Mayor Lulu Walling, Peggy Watters Marc Williams, Gay Wilson and Paul Xanthall.

Project Team:

Clackamas County

Commissioner Michael Jordan
Commissioner Bill Kennemer
Commissioner Larry Sowa
County Administrator Stephen Rhodes
Assistant to the Administrator Donna Peterson
Public Affairs: Ron Oberg and Greg Parker
Information Services: Felipé Morales

Consultants

Cogan Owens Cogan, LLC
Converge Communications
The Performance Center
Otak, Inc.
Riley Research Associates
The Iris Group

Complete Communities
FOR CLACKAMAS COUNTY

EXECUTIVE SUMMARY

What is a Complete Community? How can we make our communities more "complete?" Between January, 2000 and March, 2001, in their living rooms and local libraries, grange halls and community centers, schools, summer fairs and festivals—anywhere people gather—thousands of Clackamas County residents considered these profound questions.

Initiated by the Board of County Commissioners, Complete Communities successfully fulfilled its mission to *engage the greatest number of County residents in defining our common and unique community values; identifying the diverse attributes of complete communities; and guiding future policy decisions and actions.*

Remarkably, in such a large and diverse county, there are more similarities than differences between urban and rural areas, long-time residents and newcomers, young and old. The results from discussions and meetings, self-administered questionnaires, a random-sample telephone survey, focus groups, responses to the Web site, and the variety of other means used to connect with County residents, show they care about their communities, like to live here, and want to preserve and improve their quality of life. To most participants, a Complete Community in Clackamas County has these attributes:

- *engaged citizenry*
- *cultural diversity*
- *variety of cultural opportunities*
- *excellent and well-funded educational system*
- *range of employment options*
- *environmental health*
- *strong growth management and land use planning*
- *network of health and social services*
- *variety of housing choices for all residents*
- *sufficient parks and recreation*
- *assurance of public safety*
- *transportation system with a range of travel options*

Common Themes

Clackamas County has a long and proud agricultural history and is still one of the most productive counties in the state. It is, however, facing unprecedented growth pressures. While recognizing these problems, both urban and rural residents believe it is important to preserve and improve the quality of their communities.

Complete Communities discussion in Welches

The following were most often expressed.

Engagement: County residents value living in a community where people are involved in civic life and know and help each other. Many want greater opportunities to participate in decisions that affect them. To encourage participation by ethnic minorities, the lessons learned through Complete Communities, in particular, the importance of providing interpreters, transportation and childcare, merit attention. Young people also want opportunities for continued involvement.

Adequacy: Whether addressing the need for land for all types of housing and employment opportunities, or funding for schools, parks, public safety and other services, citizens want to explore a range of options to ensure sufficient resources.

Preservation: Many rural residents value the "incompleteness" of their communities, agreeing that living away from urban amenities may in itself be an amenity. They are in general agreement with their suburban and urban neighbors that the proximity to the magnificent outdoors and the integrity of the natural environment be preserved and enhanced for all.

Fairness: As the County continues to face growth and change, residents support equitable distribution of its impacts and the cost of services.

Connectivity: Getting there and back—affordable, efficient and effective transportation that links communities, jobs, housing and services must serve drivers, bicyclists, pedestrians and public transit users.

County-Wide Recommendations

The recommendations under each heading were rated most effective (E) and easiest to carry out (C) by a majority of those who participated in the second Community Congress.

Citizen Involvement

- Give citizens a stronger voice in planning and decision making, at the County and local levels. This is a repeated and strongly supported recommendation.

Cultural Diversity

- Improve affordable public transportation among jobs, housing and services; promote alternatives. (E)
- Create and promote a network of educational and informational resources that is accessible to every citizen. (C)

Cultural Opportunities

- Support libraries, arts and cultural activities. (E)
- Educate and raise awareness of libraries, arts, heritage resources and cultural activities. (C)

Economy/Employment

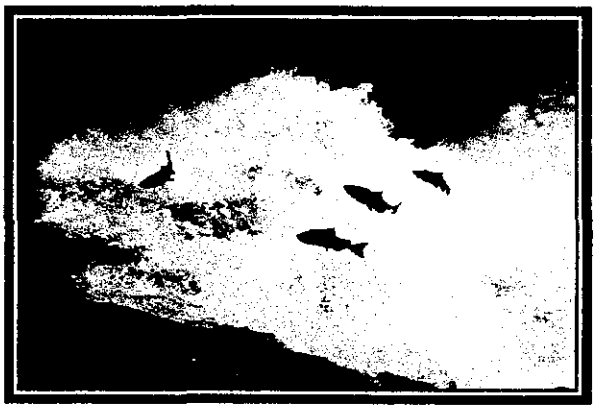
- Develop a proactive strategy with benefits throughout the County to attract family wage jobs. (E) (C)

Education

- Create a Countywide teen advisory board with representation from all the high schools in the County. (E)
- Guarantee stable/adequate funding for schools. (C)

Environmental Quality

- Enforce environmental quality standards that provide good air, water and land use. (E)
- Establish a County-wide tree-planting and preservation goal. (C)



Protection of the natural environment is important to County residents

Growth and Land Use

- Adopt policies to require new development to pay for its impact. (E)
- Increase efforts to include citizens earlier in the land use process. (C)

Health and Social Services

- Provide programs and services that assist citizens to remain in their own homes. (E)
- Educate the community about available services. (C)

Housing Choices

- Address housing, transportation, employment, environment and education issues and programs as comprehensive and interdependent. (E)
- Create a County-wide citizen advisory group to advise the County on affordable housing concerns and needs. (C)

Parks, Open Space and Recreation

- Adopt requirements for open space set-asides to accompany growth and development. (E)
- Support citizen-based councils and/or steering committees that advise parks departments. (C)

Public Safety

- Provide fair and adequate funding for adult and juvenile corrections, police, fire, ambulance and communications. (E)
- Define roles and prioritize functions of the fire and police departments through specific guidelines. (C)

Transportation

- Improve public transportation so that it is affordable, efficient, effective and interconnected. (E)
- Educate the public about alternative modes of transit and their benefits. (C)

Next Steps

Through the inclusive and extensive Complete Communities effort, thousands of Clackamas County residents have been re-engaged and energized. The Board of County Commissioners is well aware of the importance of taking steps that recognize efforts. In that spirit, the Commissioners have agreed to the following actions:

- Establish task forces of citizens and affected County staff to identify specific short and long term actions and programs to implement Complete Communities recommendations in key issue areas.
- Work with representatives of the separate communities in the County on ways to implement Complete Communities recommendations applicable to their areas.
- Issue report on progress no later than September 1, 2001.
- Continue to consider Complete Communities as a framework for policy discussions.
- Report progress periodically to the public through the *Citizen News* and other media.

Tulane Environmental Law Journal

Winter, 2000

14 Tul. Envtl. L.J. 171

LENGTH: 11725 words

ARTICLE: Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement

Paul J. Boudreaux*

* Visiting Associate Professor of Law, Tulane Law School. B.A., J.D., University of Virginia; LL.M. Georgetown University.

SUMMARY: ... "Sprawl" is the ogre of land use and urban policy at the turn of the new century. ... Without too much exaggeration, there would seem to be no greater issue of social policy, even though land use law remains stubbornly a local issue in the first decade of "the suburban century. ... As the history of land use shows, local government decisionmaking has too often been crafted to serve the desires of affluent citizens alone. ... The revival of the city remains the most exciting, and one of the wisest, phenomena of land use law and policy. ... The genesis, or at least a suburban-centric sixth day of creation, of the recognition of suburbs as the goal of land use law was Village of Euclid v. Ambler Realty Co., a Supreme Court decision in 1926. ... First, they arise when a local government appears to treat one or a handful of landowners unequally from others, because of expediency or the serendipities of ad hoc land use decisions. ... Before adopting antisprawl initiatives, decisionmakers should answer questions about the potential drawbacks of land use regulation - something that urban land use law has done all too rarely over the past century. ...

TEXT: [*172]

I. Introduction

"Sprawl" is the ogre of land use and urban policy at the turn of the new century. While fostering suburbia was once a guiding principle, suburban "sprawl" is now blamed for a spectrum of harms, from environmental disasters such as the depletion of wilderness and the pollution of water, to urban maladies such as the creation of the ethnic underclass and the prostration of city governments. <=2> n1 Without too much exaggeration, there would seem to be no greater issue of social policy, even though land use law remains stubbornly a local issue in the first decade of "the suburban century." <=3> n2

Many commentators on urban and environmental policy have blamed sprawl on misguided governmental policies, and have proposed techniques for extricating America from the scourge of sprawl. In this Essay, by contrast, I argue that a number of the fundamental reasons for sprawl, such as the automobile-based lifestyle and the residential desire for single-family homeownership, are deeply ingrained aspects of the modern American psyche. <=4> n3 These causes should give us pause in battling it. Engaging the ogre of sprawl may step on some very sensitive toes. Indeed, any serious effort to battle these causes means challenging some of the most deep-seated American notions about how we want to live.

Finally, a whatever-means-necessary approach to battling sprawl means allowing local jurisdictions to adopt their own antisprawl measures, which are touted as battling "excessive growth" for that jurisdiction. Such uncoordinated restrictions hold the potential for regional protectionism. This may simply shift growth elsewhere and may duplicate many of the various problems of governmental "fragmentation" that metropolitan critics so deplore. <=5> n4 Most disturb-ingly, some anti-"sprawl" efforts may be pretexts for social and, inevitably, racial exclusion. Ironically, this phenomenon holds eerie parallels to the twentieth-century zoning laws that have been one of the chief causes of sprawl. <=6> n5

Rose Kob provides a welcome contribution to the literature of sprawl, pointing out many of the benefits of democratizing land use [*173] decisions. <=7> n6 As the history of land use shows, local government decisionmaking has too often been crafted to serve the desires of affluent citizens alone. <=8> n7 This preferential treatment has been especially galling when it goes beyond the power that affluence buys in the free market, and enlists the coercive power of government to take from the poor and give to the rich.

But the rhetoric of the antisprawl movement needs to answer some tough questions about the causes of sprawl and the alternatives to sprawl before its policy prescriptions should be unleashed, and before they can hope to succeed. On the one hand, efforts to combat sprawl through the redevelopment of the central city avoid much of the criticism inherent in this critique. The revival of the city remains the most exciting, and one of the wisest, phenomena of land use law and policy.

Such "pro-city" efforts, however wise, are not likely to achieve as much success in combating sprawl as are more direct "antisuburb" initiatives. The market pressures in favor of sprawl are simply too great to stop it with enticements from the central city alone. These antisuburban ideas, often called "controlled growth" or "smart growth" solutions, raise most directly the questions posed in this Essay. <=9> n8 Advocates, planners, and politicians would be wise to answer all of the questions posed herein before forging ahead with plans to try to stop the ogre of "sprawl."

II. A Brief History of Suburban Law

"Sprawl" refers to the expansion of the boundaries of a metropolitan area, typically at a rate faster than its population growth, into areas that were rural. <=10> n9 The dominant land use is single-family houses and their spreading lawns, accompanied, at appropriate intervals, by shopping malls and other accouterments of the automobile-based culture. <=11> n10 In other words, "sprawl" means the rapid [*174] growth of low-density suburbs. <=12> n11 There is no doubt that sprawl exists. Not only do most Americans live in suburbs, suburban residents greatly outnumber central city residents in nearly every large metropolitan area in the United States. <=13> n12

Understanding of the issue is often clouded, however, by rhetoric. <=14> n13 The deconstructionists tell us that our choice of words influences, at the get-go, how we think about an issue. <=15> n14 And so it does with a vengeance when we talk of "sprawl" and its accompanying vocabulary. What we now call the undesirable spread of "sprawl" was seen almost universally, until the latter half of the twentieth century, as the welcome development of a "suburban" lifestyle for the previously huddled masses of the American city. <=16> n15 What critics of pro-suburban land use policy call the "fragmentation" <=17> n16 of suburban governments might be called a "flowering" or "diversity" by free-market supporters. <=18> n17 What was [*175] called a "sanctuary" <=19> n18 for suburbanites is now chastised as an unjust "exclusion." <=20> n19 What for some is a suburb to cultivate "family values" <=21> n20 may be to another a "crabgrass frontier." <=22> n21

It can be argued that the encouragement of suburbs arose out of the apparently sincere belief that one of the essential roles of government was to place as many citizens as possible in single-family houses, and that these houses should exist in neighborhoods of like houses, without the annoyance of industry, commerce or apartment buildings. The genesis, or at least a suburban-centric sixth day of creation, of the recognition of suburbs as the goal of land use law was Village of Euclid v. Ambler Realty Co., a Supreme Court decision in 1926. <=23> n22 In this famous case, the Court ruled that the affluent and fairly new suburb outside of Cleveland (in other words, sprawl, Model-T style) had the authority under its police power to zone out undesirable land uses such as industry, in order to ensure the tranquility of the nascent suburban lifestyle for its residents. <=24> n23 Emboldened with such zoning power, most suburban jurisdictions adopted zoning laws ensuring that the vast majority of land use outside the central city was legally restricted to single-family houses, [*176] often including minimum lot sizes. <=25> n24 Further government support, in the form of the mortgage-interest tax deduction and highway construction subsidies, added to the boom. <=26> n25 So the suburbs, while already born, were assured of a healthy and growing adolescence and adulthood in the twentieth century.

Whereas the battles in the days of Euclid primarily concerned the unwanted noises and smells of industry, the suburban preference shifted more often to keeping out that other noxious land use, apartments, <=27> n26 and other residential land uses that were not as ideal as the single-family and single-detached house. <=28> n27 It is remarkable to recall that it was as recently as 1973 that Justice William Douglas, the famous social liberal, wrote for the United States Supreme Court to uphold the power of local governments to discriminate in favor of single-family occupancy of

houses. <=29> n28 In Village of Belle Terre v. Borras, a "village" on Long Island, New York, was sued over an ordinance that prohibited any residential land use other than single-family houses (no apartments, no townhouses, no group houses). <=30> n29 A group of college students rented a house but soon found themselves subject to village action to terminate their residency. <=31> n30 Although the district court (and, it should be mentioned, liberal Supreme Court Justices Brennan and Marshall) concluded that the ordinance was unconstitutional, Justice Douglas echoed the Euclid thinking that it was perfectly legitimate for suburbs to enforce the preservation of the single-family home suburban ideal, to the exclusion of other residential land uses. <=32> n31 In a remarkable passage, Justice Douglas wrote for the Court:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker [346 U.S. 26 (1954)]*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. <=34> n32

[*177] The idea that suburbanization was so desirable that government should restrict free-market forces to ensure it was a fundamental article of faith throughout much of the twentieth century. <=35> n33 Indeed, the anti-apartment bias remains popular among local governments today, and most suburban jurisdictions vigilantly continue to zone out apartments over the bulk of their land. <=36> n34

Progressive commentators on land use and urban policy today, however, shake their heads in shame at the pro-suburban law and policy from Euclid through Village of Belle Terre. Justice Douglas saw discrimination in favor of the single-family house as an enlightened policy of fostering middle-class happiness and providing "sanctuary for people." <=37> n35 Today, however, such discrimination is seen as a disastrous social effort to subsidize suburban, middle-class values at the expense of others. <=38> n36 By fostering suburbanization through "Euclidean" zoning, highway subsidies, government support of mortgages, interest deductions, and a host of other efforts, government has helped create "sprawl." <=39> n37 The land use principles behind Euclid and Village of Belle Terre seem to have been, today's land use and urban critics charge, a terrible mistake. <=40> n38

What are the effects of sprawl, according to the critics? First, sprawl harms the environment, by destroying nature, landscapes, natural resources, and open space. It "gobbles up farmland," with potentially dangerous consequences. <=41> n39 Second, sprawl undermines the beleaguered central cities. The movement of affluent and middle-class residents, businesses, and industry from the central city exacerbates unemployment, with all of its accompanying social problems, and impoverishes the finances of the central cities, leaving them politically prostrate. <=42> n40 Third, sprawl is bad for the suburban governments themselves, as it places impossible strains on suburban finances that must provide the costly services (new roads, schools, [*178] sewers, police, etc.) that sprawl hungrily demands. <=43> n41 Fourth, sprawl is sensually and aesthetically displeasing, as it replaces the rhythm and excitement of the city with ugly and unfocused landscapes of strip malls, gas stations, and "McMansions." <=44> n42 Fifth, sprawl is seen as destructive to the sense of community. <=45> n43 Instead of interacting in the high density of the cities, suburbanites live cocoon-like existences, removed not only from different social classes, but also from their neighbors across the manicured lawns and hedges. <=46> n44 Sprawl is thus exclusionary, both socially and racially.

III. Holding the Line on the Crabgrass Frontier

Criticism of "sprawl" has spread from academic and intellectual circles. Environmental organizations such as the Sierra Club have made the issue a focal point of their agendas. <=47> n45 States such as Maryland and Rhode Island and the metro areas of Portland, Oregon, and the Twin Cities of Minnesota have taken the lead in enacting laws to stop low-density suburban growth at the fringes of the area; they encourage growth, instead, within the boundary of the already-built-up area. <=48> n46

Most significantly, an aversion to "sprawl" has led local jurisdictions across the nation to rethink their "growth" policies, and to consider using local power to limit further development of suburbs. <=49> n47 Because it is accomplished at a jurisdiction-by-jurisdiction level, such efforts typically do not garner headlines in the national

"sprawl" debate. Nonetheless, these local land use measures are currently affecting in important ways how Americans live.

It is ironic that local jurisdictions are taking the lead in trying to limit sprawl. Much of the antisprawl rhetoric calls for the removal of land use decisions from "fragmented" localities and the replacement of such power in the hands of metro-wide, or even broader, [*179] authorities. <=50> n48 Such skepticism of local ability to stop sprawl is in many ways justified. Only metro-wide coordination can hope to reverse the flow of resources from the impoverished central city and older suburbs. <=51> n49

Yet the skepticism of a locality-by-locality solution to sprawl should extend beyond the doubt that a metro-wide problem can be achieved at less than a metro-wide level. Allowing localities to follow their own course of development permits them to subvert metro-wide needs. This possibility is especially likely when a locality raises a banner of enacting ordinances for the public good. The Village of Belle Terre convinced Justice Douglas that it was only acting to ensure the quality of life for its middle-class homeowning families, but it did little for those, such as college students, poor persons, and others, who did not fit the mold of the suburban ideal. <=52> n50 Like laws to foster the suburban lifestyle, antisprawl laws hold the potential for social and racial exclusion.

IV. Some Tough Questions for the Antisprawl Movement

Because sprawl is perceived to have so many deleterious effects, why not forge ahead with regulation? Why hesitate? True, some antisprawl measures, particularly incentives to bring resources and residents back to the central city and to older, high-density suburbs, do not raise the concerns that this Essay seeks to highlight. Such "carrots" include increased spending on public transportation, <=53> n51 better design of urban spaces, and greater flexibility in zoning laws to allow for dynamic, multiple uses in high-density areas. <=54> n52

Of concern here are the "sticks" of sprawl regulation. Restrictions on development in the outer suburbs impose costs, and it is essential for regulators to assess whether the benefits will match these costs. It is unwise to impose costly regulations if antisprawl efforts will be stymied by factors outside the reach (or the will) of the regulators. Moreover, regulators and citizens should scrutinize antisprawl regulations for the possibility of social and racial exclusion (whether intentional or not). Accordingly, before forging ahead with [*180] antisprawl initiatives, decisionmakers might consider the following tough questions for the antisprawl movement.

A. Questions About the Environmental Harms of Sprawl

1. Why Preserve "Open Space"?

There is no doubt that sprawl gobbles up certain resources, particularly land, in a manner that high-density development does not. This is a truism. But this "use" of land typically does not involve the rape of pristine wilderness: there have been few, if any, cul-de-sac subdivisions carved out of land that was formerly designated under the Wilderness Act of 1964. <=55> n53[su' ']True, in the Western United States, sprawl sometimes occurs on land that was previously not noticeably "used" by humans - land that was formerly desert, brush, or, less often, forest. East of the Mississippi, however, it seems reasonable to assert that most sprawl occurs on land that has already been touched by humans - most often, farmland. This is why the antisprawl movement does not make the argument that sprawl typically destroys wilderness - it does not. Rather, the most commonly-uttered phrase is that sprawl destroys "open space." <=56> n54

Antisprawl advocates need to articulate why it is so beneficial to preserve "open space" from the developer's shovel, when such open space consists of farmland or other private property. Under the American system of the right to completely exclude trespassers, most farms do not serve any community, recreational, or social needs of the metro area. While large expanses of farmland sometimes serve as visual pleasures, development of farmlands into housing might indeed offer more opportunities for the creation of public open space - parks, public lakes, etc.

Indeed, the desire to preserve "open space" for its own sake, even if it is private open space, raises the question of whether some "open space" advocates use the term as pretty packaging for more parochial desires. Just as Justice Douglas's reliance on "family values" may now be seen as a misplaced cover for the exclusion of persons who did not fit the middle-class suburban ideal, the appeal to "open space" may, in some instances, serve to hide a locality's simple

[*181] desire to keep others out. <=57> n55 This desire for exclusion, especially when it occurs within the rough boundaries of already-built-up urban areas, should be anathema to the goals of the antisprawl movement.

2. Is Housing Sprawl Really Worse for the Environment than Agriculture (Or, Are McMansions Worse than Old McDonald)?

The most recent generation of environmental science has assigned much environmental blame to residential housing patterns. Most notable are the costs of increased automobile use - more air pollution, more vehicles, and more energy consumption. <=58> n56 Because sprawl by definition spreads people out from their destinations, these auto-related harms would appear to be undeniable environmental consequences of sprawl. <=59> n57

But some critics of sprawl go much further. Some have asserted that the land use of a typical suburban development - with its heavy use of asphalt and lawn-grass monoculture - leads to excessive run-off of pollutants into the surface water supply. <=60> n58 But is it clear that such pollutants are worse than what they typically replace, the modern American farm? Most environmental scientists point to agriculture and its attendant use of fertilizers and pesticides as the leading source of water pollution in the United States. <=61> n59 While the comparison of pollution from sprawling suburbs versus pollution from agriculture will no doubt vary from place to place, antisprawl advocates need to explain thoroughly why certain water bodies near metro areas would be served worse by suburban development than by intensive agriculture.

Relatedly, some critics have asserted that because sprawl gobbles up farmland, it threatens America's food production. Is this possible? [*182] To be sure, sprawl has pushed out some farming industries - Orange County, California, no longer produces many oranges, as it has been turned over to housing developments. <=62> n60 But is sprawl a threat to food production on more than a de minimis scale across the nation?

Leading statistics do not bear out the assertion that the nation's farmland is seriously threatened by sprawl. Despite the explosion of sprawl in the past half-century, the total acreage of land devoted to agriculture in the United States still dwarfs the amount of "developed" land. <=63> n61 Moreover, the United States is suffering a shortage neither of farmland nor of farm production. The amount of cropland, for example, has remained close to steady over the past sixty years, <=64> n62 while production of most farm products has increased steadily over the past twenty years. <=65> n63 While there is no guarantee that past trends will continue, critics of sprawl may need to rely on arguments other than that of threatened farmland.

3. Whose Land Is It, Anyway?

Advocates of land use restrictions to battle sprawl might rejoin: why question local land use laws? Localities have always had nearly unfettered power to regulate land use for their citizens' benefit. <=66> n64 Euclid is, for the most part, still good law. <=67> n65 If the good citizens of a particular suburb want to restrict sprawl to preserve their own way of life, should they not be able to?

Critics from both right and left say "no." On the right, property rights advocates raise the banner of the Fifth Amendment's proscription against the taking of property without just compensation, and maintain that property belongs to the landowner, not to the [*183] government. <=68> n66 Local governments that "go too far" with land regulation should run afoul of the right to private property. <=69> n67

Critics from the left also condemn the notion that local governments hold the exclusive interest in land use regulation. Restrictions on residential development are not only a parochial concern of each locality, but of an entire metro area or an entire state. Under this conception of government, each local jurisdiction holds a moral or a legal responsibility to consider the effects of its action on other communities, especially in matters of class and race. "Fair share" housing laws require that each locality think beyond its own borders, consider a region-wide housing market, and provide a fair share of low-cost housing, despite the objections of the locality's residents. <=70> n68

The idea that local actions hold wider repercussions is a foundation for activist national government in the modern, post-New Deal era. <=71> n69 It is also a fundamental principle behind natural ecology and activist regulation of the environmental harms - that processes are linked in multifarious ways. <=72> n70 Accordingly, the simple answer of

"the local citizens and their government should be able to regulate land the way they see fit," does not answer fully the question of whose interests are at stake in land use regulation.

B. Questions About City-Suburb Relations

One of the most significant effects of the "metropolitanism" movement has been to slow down governmental subsidization of suburbs at the expense of the central city and, sometimes, to shift the balance in the other direction. Instead of spending the bulk of transportation dollars on new highways on the edges of the area, metropolitanism argues for money to increase public transportation in [*184] the already-built-up areas and to help city residents reach jobs in the suburbs. <=73> n71 Instead of zoning laws that starkly segregate land uses, metropolitanism allows for multiple uses to foster friendly and self-sufficient urban spaces. <=74> n72 Instead of discouraging developments on urban "brownfields," give tax incentives to new job growth in the city. <=75> n73 Instead of letting affluent suburban jurisdictions dominate state and metro politics, build coalitions of the central city and older suburbs to bring back money and power to the core. <=76> n74

Most of these laudable steps are in the "carrot" category of antisprawl efforts. But what about "sticks"? The two biggest potential sticks raise two of the biggest questions.

1. Will Americans Relinquish the Subsidy of the Single-Family Home?

Talking up the benefits of "density" is all well and good, and so is making cities more livable and more pleasant. But for urban areas to become more "dense," it is axiomatic that fewer people will get to live in single-family houses with big lawns and a fair space between them and their neighbors. This is what earlier generations called (and folks such as Fannie Mae still call) "the American Dream." A large majority of Americans still view the suburban environment as their preferred choice of living. <=77> n75 Homeownership is at an all-time high. <=78> n76 Can the antisprawl movement hope to succeed when it runs against this current?

One of the most commonly cited "incentives" to sprawl is the government's subsidy of home ownership through the mortgage interest and property tax deductions. <=79> n77 Through these deductions, along with support of the mortgage markets, government actively encourages single-family houses and the exchange of small houses for [*185] large ones. Government subsidizes sprawl. <=80> n78 It is conceivable that the removal of these subsidies could be one of the most potent weapons in combating sprawl.

Do we have the stomach for it? Has any political leader in the past half-century stood up for a revocation of the mortgage interest deduction (and garnered any votes in the next election)? It may be that active government intervention to support single-family houses is here to stay. While giving lip service to combating sprawl, it may be that Americans will not consider - in significant enough numbers, in most times, and in most places - any real sacrifices of their ideal of the low-density single-family home community.

If elimination of these subsidies could be a key to combating sprawl, but elimination of the subsidies is off-limits as a matter of debate, <=81> n79 what does this say about America's ability to take sprawl-fighting seriously?

2. Will Americans Accept Restrictions on Automobile Use?

Where there's a suburbanite, there's not only a house, there's also a car, or two or three - or, these days, a truck or van. As many have noted, the essence of the sprawling suburb is the automobile and the massive dependence on the auto for many of life's activities. <=82> n80 Some critics of "sprawl" argue that one of their goals is to break Americans' addiction to automobile travel. <=83> n81

While the use of "carrots" to encourage public transportation may be useful, or at least fairly harmless, it is doubtful whether Americans are willing to accept "sticks" against their use of the private internal combustion engine. As with the mortgage-interest deduction, politicians are silent as to changing policies to affirmatively discourage automobile use. In 1991, the United States went to war for the first time in nearly a generation, in large part to [*186] protect low oil and gasoline prices. <=84> n82 In the year 2000, the most environmentally oriented presidential candidate since Theodore Roosevelt responded to a potential rise in gasoline prices by calling for a release of oil supplies from the national

petroleum reserve, thereby ensuring that oil and gasoline usage would not be impaired, despite the fact that many environmental economists have for years called for higher gasoline prices. <=85> n83

As with the American ideal of homeownership, is any antisprawl policy idea that depends on a reduction in automobile use doomed to fail?

C. Questions About the Financial Costs of Sprawl

While environmental effects and city-suburb relations are issues of interest for suburban jurisdictions, what truly grabs the attention of local authorities is the assertion that sprawl imposes tremendous financial costs. <=86> n84 With developers expanding the boundaries of the built-up area, once-rural jurisdictions find themselves faced with the enormity of having to provide new roads, sewers, schools, expanded police and fire departments, and a host of other costly government services. <=87> n85 Because these local jurisdictions must, in many instances, duplicate the services that are already provided in the city and in closer-in suburbs, these costs are wasteful. "Smart growth" would foster new development within preexisting boundaries of service districts. <=88> n86

1. Why Can't Impact Fees Solve the Problem of Fiscal Costs for Local Governments?

One obvious potential solution to the cost problems for local governments is to charge the new development for the governmental costs that it engenders. The land use term is "impact fees." <=89> n87 The concept is simple: because development costs the suburban govern-ment, the development should have to pay for it. The costs are [*187] "internalized" by the developer. <=90> n88 If the development cannot pay for itself, considering the total costs that it would impose, it does not go forward. If, on the other hand, the developer and the government can pass much of the costs on to new residents, the residents "internalize" the cost and make their housing choice based on the total social cost of the new development. <=91> n89

If local governments have the political will and the legal authority to impose them, impact fees appear to be a dispositive solution to the financial costs of sprawl for local governments. After all, semi-monopolists usually do not worry about a growth in business, as long as they are able to fully recoup their costs through charges to consumers. We typically have not heard local phone companies and cable television providers complain that they are getting too much new business from sprawl; why shouldn't governments act in the same fashion? <=92> n90

Some commentators have raised the specter that certain impact fees could be considered unconstitutional "takings" of property, in violation of the Fifth Amendment. <=93> n91 From my perspective, local governments should have little worry that impact fees might be considered a "taking," as long as these fees are applied fairly and evenly to all new developers according to a standard procedure. Unconstitutional takings problems arise most often under two problematic scenarios. First, they arise when a local government appears to treat one or a handful of landowners unequally from others, because of expediency or the serendipities of ad hoc land use decisions. <=94> n92 Second, they arise when a government imposes a large burden (especially a prohibition) on one or a few landowners, when such costs would appear to be more equitably borne by the taxpayers at large, through the Fifth Amendment's "just compensation" [*188] requirement. <=95> n93 If done correctly, impact fees do not raise these problems. They may be imposed evenly on all new development, while the class of persons who will ultimately pay for the bulk of the fees - the new residents who will pay somewhat higher housing prices - will coincide fairly well with the group of taxpayers who benefit from the new services. When a government acts like a rational business and charges the users of its services for the costs of these services, the government is unlikely to incur the wrath of a property-rights judge.

So why are "impact fees" not a solution to the fiscal problems of local governments associated with sprawl? A large budget, with large revenues and expenditures, is not necessarily any harder to balance than a small budget. Perhaps the difficulty lies in mustering up the political will or administrative skill to impose them on developers. But if our policy choices are between impact fees or no development at all, any rational developer would choose the former. To the extent that a fiscal problem is a reason to consider limitations on developments, the antisprawl movement needs to explain why impact fees, if done right, would not solve the fiscal problem just as effectively.

2. What Effect Do Antisprawl Laws Have on Housing Costs?

One of the more surprising assertions is that sprawl raises the costs of housing. <=96> n94 To the extent that pro-suburban laws restrict high-density, low-cost housing construction, such as zoning against apartments, restrictive laws undoubtedly do increase the cost of housing. But a corollary of the antisprawl argument appears to be that laws to restrict sprawl would decrease housing costs. Such an argument appears to be deeply flawed. Whenever government restricts by law the supply of a good or service (such as the provision of housing), simple economics suggests that the price of the good or service will rise. <=97> n95 To the extent that a metropolitan area were to place a geographic boundary beyond which no further development were permitted, demand would increase in the limited-supply area inside [*189] the boundary, thus increasing the costs of such housing. Accordingly, antisprawl laws should be expected, as a general matter, to increase the cost of housing, not to decrease it.

It is true that in areas in which the suburban lifestyle is more popular, people buy bigger houses. Accordingly, the amount that an average household spends on housing may be greater in a suburban-heavy metro area than it would be in an area in which most households live in smaller, lower-cost housing. <=98> n96 But one should not confuse cause and effect. The availability of sprawl does not make any particular housing unit more expensive; rather, expanding suburbanization enables citizens to choose the higher-cost housing options that they would not have under a restricted regime.

Indeed, antisprawl advocates need to take seriously the possibility that restrictions will raise significantly the costs of housing. In many metropolitan areas, sprawl is taking the form of new moderate-cost housing on the outskirts of the region, where land prices are cheap. <=99> n97 Through this phenomenon, many metro regions are beginning to resemble the pattern of European cities such as Paris and London, in which desirable and high-cost urban sectors are often surrounded by poorer suburbs. <=100> n98 By restricting development at the fringes, antisprawl efforts may make low-cost housing even more difficult to obtain for the less affluent. The "stick" of restricting development needs to be accompanied by the "carrot" of greater construction of low-cost housing in the central city and close-in suburbs, in order to avoid adverse consequences to poorer citizens.

D. A Question on the Aesthetics of Sprawl: Is the Antisprawl Movement Elitist? (Or, What's Wrong with Strip Malls?)

One commonly heard complaint about sprawl is that it is ugly. <=101> n99 Endless tracts of look-alike mini-mansions, surrounded by meticu-lously trimmed lawns, are punctuated only by tacky, auto-oriented strip malls filled with the same impersonal chain stores found in every other strip mall. None of the excitement, spontaneity, and surprises that cities have to offer is found in planned suburbs. One of the most eloquent critics of the appearance of suburban sprawl is James Howard Kunstler, whose book The Geography of Nowhere has [*190] prompted much discussion about how our communities are constructed and how they look. <=102> n100

As a policy matter, what are we to make of this aesthetic criticism? Is this critique made by the actual residents of suburbia, as opposed to intellectuals and writers? In short, is this criticism of sprawl elitist, or, at least, just a matter of taste?

To be sure, the aesthetic critics of sprawl do offer some straightforward potential solutions that raise few complaints. A school of urban design called "new urbanism" seeks to improve both the look and the feel of development by employing more old-fashioned urban-oriented design techniques. <=103> n101 Houses are placed closer together and are separated by picket fences; front porches are built to encourage social interaction; streets are narrow and sidewalks are wide; small, nicely designed stores are permitted on street corners instead of zoned out to strip malls. <=104> n102 The notion is to encourage pedestrian movement and to foster the sense of community pride that existed (at least in our memory) in the small but compact towns of the nineteenth century.

Putting aside the difficult questions of whether Americans want to be able to walk to the corner store, or whether they want to say hello to their neighbors on the front porch, aestheticians appear to pre-suppose that appearance is an important aspect of what makes Americans happy with their community. While such considerations may be important to educated designers and to some intellectuals, are they important for the typical suburbanite? It may be the case that design and attractiveness are of far less significance than practical matters of convenience and cost. <=105> n103 In other words, most suburbanites may not really care that their local shopping center is within walking distance, contains a variety of architectural styles, and is pleasing to the eye. What suburbanites may really care about is whether there is ample parking, whether the store holds a good selection, and how much things cost. <=106> n104

[*191] Again, the importance of the question may depend on "carrots" and "sticks." Suburbanites' relative indifference to design may be unimportant when regulations are merely carrots, such as the encouragement of a more detailed and pedestrian-friendly design of shopping malls. When, however, antisprawl regulations work as sticks to disrupt housing and consuming preferences, they risk the label of elitism, as well as undermining how Americans want to live. <=107> n105

E. Questions About Community and Exclusion

Perhaps the weightiest questions concern the issues of community and exclusion. To be sure, the antisprawl movement maintains that a revival of the central city and high-density living is likely to dissolve some social and racial barriers. <=108> n106 This may be true. But dissolution of these barriers will be achieved only if antisprawl laws are done right. Indeed, the experience of Euclid and zoning laws favoring the suburban lifestyle have shown that regulations appearing to be in the public interest may actually disserve the public interest. A public interest rationale may serve to mask a local desire for protectionism from lifestyles or persons that do not fit the mold of the majority.

1. Will White Americans Accept Racial Housing Integration?

While American law has placed particular emphasis on efforts to achieve racial integration in education <=109> n107 and in employment, <=110> n108 achieving racial integration in residential patterns has lagged behind. It is telling to note that while the landmark Civil Rights Act of 1964 outlawed discrimination in employment, public accommodations and restaurants, and programs that receive federal assistance, racial discrimination in housing was not touched. <=111> n109 Although the Fair [*192] Housing Act of 1968 <=112> n110 did outlaw discrimination in the housing industry, American metropolitan areas remain largely segregated by race. <=113> n111 It is notable that segregation has been repeated in the suburbs as African Americans have been moving out of many major cities in large numbers since 1968. <=114> n112

Because they appear to discourage interaction among persons of dissimilar backgrounds and classes, suburbs and sprawl have been criticized for fostering segregation. <=115> n113 But it is unclear whether laws to encourage higher density living will achieve much success in integrating Americans by race. I have argued that factors of individual racism are market preferences that ensure racial segregation in many geographic areas, regardless of the effectiveness of laws to prohibit discrimination by developers, lenders, and real estate agents. <=116> n114 Urban centers such as Chicago, Washington, D.C., and Philadelphia remain highly segregated by race, despite the high density of residential housing and the fact that city residents are likely to encounter (if not interact with) persons of other races and classes in going about their employment and other city activities. <=117> n115 To the extent that fighting sprawl is seen as a potential solution to segregation, it may be an illusion.

2. Do Local Antisprawl Laws Foster Exclusion?

Some of the most contentious litigation in the nation over the past few decades has alleged exclusionary zoning, the idea that local land use rules have the effect - intentionally or not, and very often it is plainly intentional - of excluding poor and nonwhite persons. <=118> n116 The most famous litigation saga was that of Mount Laurel, New Jersey, which fought for years against civil rights advocates who wanted the town, an affluent outer suburb of Philadelphia, to allow low-cost apartment housing. <=119> n117 The New Jersey courts eventually [*193] ordered, and Mount Laurel finally accepted, the principle that each locality must provide for a "fair share" of low-cost housing. <=120> n118

Locality-by-locality antisprawl measures hold the potential for masking exclusion. This process parallels the exclusion that resulted from "Euclidean" zoning. <=121> n119 Under the Euclid/Belle Terre/Mount Laurel models, a locality adopts strict zoning measures against land uses that are not single-family houses, under the banner of seeking to foster the comforts of the single-family suburban lifestyle. Years later, these laws are criticized because the undesirable uses include things that we find to be important for social justice, such as low-cost housing. <=122> n120 Using this pattern as a lesson, we see that allowing localities to enforce any and all land use restrictions in the name of stopping "sprawl" may permit these localities to enforce exclusion. <=123> n121

When suburban localities are permitted to adopt residential land use laws, they hold an incentive to preserve the lifestyle of their current, established residents, regardless of the interests of others. This is the lesson of Euclid, Belle

Terre, and Mount Laurel. The banner of "sprawl" can provide a locality with a convenient mask for restrictions on all sorts of "growth," even when such growth might actually serve the antisprawl efforts, such as through high-density development and in-fill. In addition, the effect of a single jurisdiction's restriction on growth may be simply to push the pressures for development further out to the far fringes of the metro area. <=124> n122 Finally, a suburban government might use the banner of "sprawl" to restrict growth of a particular kind of housing, even though a mix of housing types, especially apartments and townhouses, [*194] represents precisely the types of high-density development that, on a region-wide basis, are an antidote to sprawl. <=125> n123 Just as some critics of applying federalism to social welfare laws argue that states will "race to the bottom" to attract business, <=126> n124 allowing separate localities to follow their own path in combating "sprawl" may result in the adoption of rules that favor the traditional suburban ideal of single-family homes in a low-density setting and a homogenous, exclusionary society.

Perhaps the only means of avoiding the incentive of localities to follow the traditional path is to remove the power to set their own agenda. Such removal engenders arguments that localities are deprived of their sovereignty, and that local residents are deprived of their right to choose how to construct their own communities. The rejoinder to this complaint is, of course, that local land use decisions affect the entire region, and that such decisions should be made at a metro-wide level. It is the old argument in favor of high-level government decisionmaking: widespread problems must be addressed by blanket laws.

It is no surprise, therefore, that the vanguard of successful sprawl-fighting is Portland, Oregon, which has adopted a region-wide approach to land use decisions. <=127> n125 In addition to useful carrots to encourage the vigor of the central city, a single metropolitan service district enforces a fairly strict "growth boundary" that encourages in-fill, discourages jockeying between separate suburban jurisdictions, and makes development outside the boundary fairly difficult. <=128> n126 As a result, Portland has succeeded in fighting sprawl better than virtually any other American city. <=129> n127 This success raises a final question: are Portland's restrictions on sprawl, which have raised metropolitan housing prices and have contributed to Portland's reputation as a city of educated, affluent citizens, many of whom work in the burgeoning high-tech industry, themselves a form of metro-wide exclusion? Is one of the effects of Portland's effort "not to be like Los Angeles" <=130> n128 that Portland does not offer immigrants, the poor, and people of color the same opportunities that the sprawl of Los Angeles affords?

[*195]

V. Conclusion

The battle against sprawl encompasses many exciting ideas for restructuring urban and land use law, particularly in regard to the "carrots" of making central cities and higher-density suburbs more attractive and more livable. Laws and expenditures that bent the free market in favor of outer suburban growth are in some places being abandoned in favor of aiding the older and poorer regions of metro areas.

But not all antisprawl ideas offer such clear benefits. The apparent inability of American politics to explicitly entertain the ideas that automobile use might be discouraged or that single-family, detached homeownership should not be encouraged stands as a sobering roadblock to the success of antisprawl efforts. Finally, the multiplicity of "sticks" that may be used to restrict sprawl should raise questions as to their effectiveness, their fairness, and their potential for exclusion. Before adopting antisprawl initiatives, decisionmakers should answer questions about the potential drawbacks of land use regulation - something that urban land use law has done all too rarely over the past century.

FOOTNOTES:

n1. I use "sprawl" with quotation marks when I refer to the rhetorical concept, and sprawl without the marks to refer to the land use phenomenon alone.

n2. See generally Robert W. Burchell & Naveed A. Shad, The Evolution of the Sprawl Debate in the United States, 5 Hastings W.-Nw. J. Envtl. L. & Pol'y 137 (1997).

n3. See id. at 141.

n4. See Paul J. Boudreaux, E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons, 5 Va. J. Soc. Pol'y & L. 471, 491 (1998).

n5. See id. at 478-79.

n6. See Rose A. Kob, Riding the Momentum of Smart Growth: The Promise of Eco-Development and Environmental Democracy, 14 Tul. Envtl. L.J. 139 (2000)

n7. See Burchell & Shad, supra note 2, at 137.

n8. See id. (discussing evolution of "smart growth initiatives").

n9. See Robert H. Freilich & Bruce G. Peshoff, The Social Costs of Sprawl, *29 Urb. Law. 183, 184 (1997)* (offering a definition and some attributes of "sprawl"); see also Chesapeake Bay Foundation, Growth, Sprawl, and the Chesapeake Bay: Facts About Growth and Land Use, at http://www.cbf.org/resources/facts/sprawl/htm.

n10. See Boudreaux, supra note 4, at 533.

n11. Unlike the traditional use of the term as a verb, land use "sprawl" is more often a noun, meaning either, most commonly, the spread of suburbs, and, less commonly, the suburbs themselves.

n12. See Burchell & Shad, supra note 2, at 139. These figures grossly underestimate the true numbers of Americans who live in a suburban environment. A "suburban" resident is defined, in census terms, as one who lives within a metropolitan area but outside a central city. While this makes some sense for metropolitan areas with a confined central city, as is the case with most Eastern cities, the distinction ignores the fact that many cities (typically in the West) have "sprawling" boundaries, in which a resident of the San Fernando Valley of Los Angeles or the Galleria District of Houston lives in a quintessential suburban landscape, but who technically lives within the expansive central city boundary. See Joel Garreau, Edge City: Life on the New Frontier 3-15 (1991) (defining the concept of "edge cities" as those urban areas sprawling outward from the city core but retaining a suburban character). Thus, the number of Americans who live outside of what we typically think of as a "city," high-density construction with people living very close together, is far lower than typically cited as the "urban" population. See generally David Rusk, Cities Without Suburbs (2d ed. 1995) (discussing the ability of some cities to swallow their suburbs).

n13. One common critical assessment of sprawl is that it is undesirable because it is "unplanned" or "poorly planned." See, e.g., Carl Pope, Solving Sprawl, 1999 Sierra Club Sprawl Report, at http://www.sierraclub.org/sprawl/report99/intro.asp. The question remains whether "planned" communities provide the amenities that critics say are missing from sprawling communities. Journalist Joel Garreau has suggested that "planning" in urban matters, as in many aspects of life, does not necessarily lead to desirable communities. See Garreau, supra note 12, at 228.

n14. See, e.g., Stanley Fish, An Exchange on the Mature Legal Theory, *37 San Diego L. Rev. 761, 768 (2000)* (discussing deconstruction and language in law).

n15. See Freilich & Peshoff, supra note 9, at 183-84.

n16. See, e.g., Burchell & Shad, supra note 2, at 141 (discussing "fragmented" metropolises); see also Gregory A. Weiher, The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation 5, 6 (1991).

n17. The camp of urban economist Charles Tiebout argues that the variety of local governments is "efficient" because it provides a spectrum of potential governmental choices to a prospective resident, who acts like a shopper in a supermarket filled with governments. See generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 416-24 (1956). If a resident desires low taxes above all else, he'll choose such a jurisdiction as a place to live. If another resident wants extensive government services, she'll choose another government. If a third resident wants, above all, a large city park, she is free to search through the market for the locality that provides this benefit. <lbfn>This idea of a free market for governments is undercut when a government seeks to act contrary to the pressures of the free market, which it is doing when it provides services to the poor. See Boudreaux, supra note 4, at 504-06

(arguing that efforts to help the poor are by their nature antimarket and thus should not be subject to all the pressures of the market). Whenever government seeks to act contrary to the free market of governments, it is likely to spark a market response by the movement of money, services, and residents away from such "inefficient" regulation. Many suburban residents avoid such high-tax localities, making it difficult for poor jurisdictions to provide services for their poorer citizens. In specific matters such as the control of pollution or the requiring of health benefits for employees, states often have an incentive to offer as little regulation as possible, in order to attract business, which may be (but is not always) more mobile than residents. This latter phenomenon is called the "race to the bottom," which in turn is used to justify national regulation, that is, replacing the market for government with a monopoly. See Kirsten Engel, State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?, *48 Hastings L.J. 271, 278 (1997).*

n18. See *Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1973).* This case is discussed infra at p. 176.

n19. For a discussion of the issue of "exclusionary zoning," see generally Bernard K. Ham, Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine, 7 Seton Hall Const. L.J. 577 (1997).

n20. See *Village of Belle Terre, 416 U.S. at 9.*

n21. See generally Kenneth Jackson, Crabgrass Frontier 3-11 (1985).

n22. *272 U.S. 365 (1926).*

n23. See *id. at 387.*

n24. See Burchell & Shad, supra note 2, at 141; see also Jackson, supra note 21, at 241-43 (discussing zoning and minimum lot sizes).

n25. See Burchell & Shad, supra note 2, at 140.

n26. *Village of Euclid, 272 U.S. at 394* (referring to apartments as "parasites").

n27. See generally *Village of Belle Terre v. Borras, 416 U.S. 1 (1973).*

n28. See *id. at 9-10.*

n29. See *id. at 3-4.*

n30. See *id. at 1.*

n31. See *id. at 9.*

n32. Id.

n33. See, e.g., Burchell & Shad, supra note 2, at 138-40 (discussing political and sociological encouragement for people to move to the suburbs).

n34. See Jackson, supra note 21, at 241-43 (discussing the popularity of restrictive residential zoning).

n35. See *Village of Belle Terre, 416 U.S. at 9.*

n36. See Ham, supra note 19, at 577-79.

n37. See Jackson, supra note 21, at 190-91.

n38. See generally Ham, supra note 19.

n39. See D.W. Miller, Searching for Common Ground in the Debate Over Urban Sprawl, Chron. Higher Educ., May 21, 1999, at A15.

n40. See generally Paul Kantor, The Dependent City 172-73 (1988) (arguing that with the loss of wealth and power, cities have become unhappily dependent on attracting industry and business).

n41. See Burchell & Shad, supra note 2, at 138, 142, 151-52; see also Pope, supra note 13.

n42. See James Howard Kunstler, Home from Nowhere 81-86 (1995).

n43. See William A. Shutkin, The Land that Could Be 77 (2000).

n44. See Jerry Frug, The Geography of Community, *48 Stan. L. Rev. 1047, 1081-83 (1996).*

n45. See Pope, supra note 13.

n46. See, e.g., Burchell & Shad, supra note 2, at 158 (discussing state initiatives); Bruce Katz & Jennifer Bradley, Divided We Sprawl, Atlantic Monthly, Dec. 1999, at 38 (discussing Portland, Oregon); Phillip Langdon, How Portland Does It, Atlantic Monthly, Nov. 1992, at 139.

n47. See Burchell & Shad, supra note 2, at 158.

n48. See Katz & Bradley, supra note 46, at 38-39 (discussing the primacy of "metropolitanism," the making and enforcing decisions at a metro-wide level in combating sprawl).

n49. See, e.g., id. at 40-41; see also Boudreaux, supra note 4, at 530-33 (discussing the benefits of metropolitanism in antipoverty efforts).

n50. See *Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1973).*

n51. See Katz & Bradley, supra note 46, at 38.

n52. See Kunstler, supra note 42, at 109-49 (discussing potential improvements in zoning and design).

n53. See Wilderness Act, *16 U.S.C. 1133*(b) (1964) (requiring protections for federally designated wilderness areas); see also id. 3 (conservation for national parks); *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412-13 (1971)* (discussing hurdles to highway construction in municipal parks).

n54. See, e.g., Pope, supra note 13.

n55. See *Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1973).*

n56. See Garreau, supra note 12, at 125-26.

n57. A possible alternative theory could be that, in a fully suburbanized and decentralized society, most everyone might be able to live fairly close to their suburban jobs, thus decreasing the amount of commuting distance traveled, compared with a centralized metropolis. To an extent, this is already happening in the massive Los Angeles area, where the influx of jobs to, say, Orange County allows Orange County residents not to have to travel to the central city. If an Orange County resident is transferred or gets a new job in, say, Santa Monica, on the other side of the metro area, the commuter is likely to move closer to the new job. What this shows, of course, is that the notion of a single "Los Angeles area" is actually false, in terms of home-to-work commuting. See Garreau, supra note 12, at 270-95 (discussing the effects of Southern California sprawl, inter alia, Orange County).

n58. See Chesapeake Bay Foundation, supra note 9 ("Sprawl produces from five to seven times the sediment and phosphorus as a forest and nearly twice as much as sediment and nitrogen as compact development.").

n59. See, e.g., Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 545 (1998) (discussing agriculture as the leading source of water pollution).

n60. See John McPhee, Oranges 9-10 (1968).

n61. As of 1992, cropland covered 382.3 million acres of land, while "developed" land accounted for only 92.4 million acres. U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1999, at 240 (119th ed. 1999).

n62. The 382.3 million acres of cropland in 1992 compares with the 399 million acres of cropland that existed in 1940. See id.; U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1970, at 590 (91st ed. 1970).

n63. See U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1999, at 684 (119th ed. 1999) (showing growth or stability in most categories of farm production since 1980, with the exception of tobacco).

n64. See Burchell & Shad, supra note 2, at 137.

n65. See *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

n66. See, e.g., *Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)* (restricting government's ability to proscribe development of land when the proscription takes away the entire value of the property).

n67. See *Pa. Coal v. Mahon, 260 U.S. 393 (1922); Nolan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).*

n68. See *S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975)* (setting forth "fair share" principles).

n69. See, e.g., Thomas McAffee, The Federal System as Bill of Rights: Original Misunderstandings, Modern Misreadings, *43 Vill. L. Rev. 17, 154 (1998)* (noting mistrust of states as sources of oppression); *Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1055 (D.C. Cir. 1997)* (developing the argument that states will compete with each other, destructively, for lower levels of environmental protection).

n70. The famous quotation from John Muir, turn-of-the-last-century environmentalist and founder of the Sierra Club, is "when we try to pick out anything by itself, we find it hitched to everything else in the universe." John Muir, My First Summer in the Sierra 211 (1911).

n71. See Katz & Bradley, supra note 46, at 38-39.

n72. See Kunstler, supra note 42, at 109-49.

n73. See Pope, supra note 13.

n74. See Myron Orfield, Metropolitics 12-14 (1996) (discussing the building of such a coalition in the Twin Cites of Minnesota).

n75. See Burchell & Shad, supra note 2, at 149.

n76. According to the Census Bureau, 67.7% of American households owned their home in the year 2000, the highest percentage on record. See U.S. Census Bureau, Housing Vacancy and Homeownership Survey, at http://www.census.gov/hhes/www/housing/hvs/9300tab4.html (last visited Nov. 18, 2000). Of course, homeownership is not synonymous with suburbia. Urban condominium owners who live twenty stories above the ground in Chicago are homeowners, while suburban single-family home renters are not.

n77. See Freilich & Peshoff, supra note 9, at 187.

n78. See id. The sprawl critique is not the only criticism of these subsidies. Both free-market advocates and supporters of the poor might well ask why government tinkers with the market in order to provide a subsidy only to, on the whole, a wealthier class of citizens.

n79. See Kathryn Moore, Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities & Lower-Income Workers, *65 Mo. L. Rev. 341, 403 (2000).* Such an issue is sometimes called a "third-rail" issue by those who are familiar with central city rail transit. If you touch the third, electrified rail, you die.

n80. See Burchell & Shad, supra note 2, at 141; Garreau, supra note 12, at 117. After studying American habits, especially in the suburbs, Garreau suggested a "law" that states, "an American will not walk more than 600 feet before getting into her car." Id. at 119. Garreau further argues that a primary reason for automobile use is the convenience and time-saving that it generates. Id. at 127. Americans also hold an almost visceral dislike of buses, he argues. Id. at 130.

n81. See Pope, supra note 13.

n82. Recall the statement of then-Secretary of State James Baker, that a primary reason for the war was to protect Mideast oil supplies. See Duane Chapman & Neha Khanna, World Oil: *The Growing Case for International Policy, Contemp. Econ. Pol'y 1 (Jan. 1. 2000), 2000 WL 12922248.*

n83. See Mike Allen, Gore Urges Use of Oil Reserve, Wash. Post, Sept. 22, 2000, at A1.

n84. See Burchell & Shad, supra note 2, at 138.

n85. See id. (asserting that "cost" is the leading concern with sprawl).

n86. See id. at 158.

n87. See id. at 151 (discussing impact fee ideas).

n88. The idea of forcing complete "internalization" of the costs of an action is a fundamental principle of the economic analysis of costs, and is used to support strict liability in tort and taxes of pollution. See Guido Calabresi, The Cost of Accidents 103-04, 114-19, 150 (1970) (analyzing different subgoals of "Accident Law" including the theory that general deterrence of accidents "will occur only if all individuals are made to pay the costs of the accidents they "cause' and are able to estimate accurately the risk before an accident occurs," which can also be accomplished by the taxation of accident-causing activities).

n89. See Burchell & Shad, supra note 2, at 151.

n90. See id.

n91. See id. at 151-52.

n92. See *Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987);* see also Paul Boudreaux, The Quintessential Best Case for "Takings' Compensation, *34 San Diego L. Rev. 193, 214-18 (1997)* (arguing that ad hoc land use decisions that engender a sense of unequal treatment often form the strongest case for an unconstitutional taking).

n93. See *Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-19 (1992)* (holding that the state's restriction on new construction near the seacoast was an unconstitutional taking).

n94. See Freilich & Peshoff, supra note 9, at 191.

n95. See, e.g., Garreau, supra note 12, at 88 (reporting that suburban development restrictions push cheaper housing and denser housing further out). In the 2000 election, two "high-profile" local antisprawl initiatives were defeated, in

part because of opposition from "advocates of affordable housing, who expressed concern that sharp growth limits would drive up housing costs." Sprawl on the Ballot, Wash. Post, Nov. 10, 2000, at A44.

n96. See Freilich & Peshoff, supra note 9, at 191 (appearing to make the argument that sprawl raises housing costs by encouraging the purchase of more expensive suburban housing).

n97. See Garreau, supra note 12, at 88.

n98. See id. at 234.

n99. See Kunstler, supra note 42, at 81-86.

n100. See James Howard Kunstler, The Geography of Nowhere 10-11 (1993).

n101. See Burchell & Shad, supra note 2, at 152.

n102. See id. at 152-53.

n103. See Harold Carter, The Study of Urban Geography 82 (4th ed. 1995) (arguing that selection and convenience are more important than appearance of shopping areas); Garreau, supra note 12, at 222 (arguing that builders, not theorists, understand what Americans truly want).

n104. Desire for these quotidian conveniences explains the massive popularity of Wal-Mart, despite the disdain of designers, intellectuals, and urban planners. See Garreau, supra note 12, at 222 (discussing the lack of understanding by theorists).

n105. For example, banning large chain stores might encourage more pedestrians and might encourage the development of more local businesses, but at the cost of higher consumer prices and making the average consumer slightly less happy about his or her apparent consumer choices.

n106. See Frug, supra note 44, at 1089-94 (discussing the goals of new urbanism).

n107. During the middle third of the twentieth century, most litigation efforts in the field of racial integration focused on education. See *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).*

n108. Perhaps the most commonly applied racial rights law is Title VII of the Civil Rights Act of 1964, see *42 U.S.C. 2000e*-2000e-17 (1994).

n109. See id. (employment); 2000a-2000a(o) (public accommodations and restaurants); 2000d-2000d-4a (programs).

n110. See id. 3601-3631.

n111. See Douglas A. Massey & Nancy A. Denton, American Apartheid 61 (1993).

n112. See Paul Boudreaux, An Individual Preference Approach to Suburban Racial Segregation, *27 Fordham L. Rev. 533, 535-39 (1999)* (citing census figures).

n113. See Frug, supra note 44, at 1088-89; Jackson, supra note 21, at 133.

n114. See Boudreaux, supra note 112, at 534-35.

n115. See Massey & Denton, supra note 111, at 67-74.

n116. Not only are nonwhite persons more likely to be poor, and thus are more likely to seek out low-cost housing, but, as I have shown elsewhere, a correlation between apartment-dwelling and African American residency is likely to be far stronger in the suburbs than it is in an accompanying central city. See Boudreaux, supra note **4**, at 514.

n117. See *S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 718-24 (1975);* Ronald Smothers, Ending Battle, Suburb Allows Homes for Poor, N.Y. Times, Apr. 12, 1997, at 21.

n118. See *S. Burlington County NAACP, 336 A.2d at 732-33* (requiring, as a matter of New Jersey law, certain suburban jurisdictions to take steps to permit migration of a "fair share" of the region's low-income persons). More than two decades after the litigation began, the township of Mount Laurel finally approved the construction of low-cost housing in 1997. See Smothers, supra note 117, at 21.

n119. See Ham, supra note 19, at 577-79.

n120. See Boudreaux, supra note 4, at 511-12.

n121. For example, some localities have attempted to slow "growth" with the time-tested method of requiring larger minimum lot sizes for residences, an approach that does nothing to retain forests or public spaces, but which excludes less affluent residents. See, e.g., Michael Laris & Maria Gold, New Plan Would Tighten Rural Home Building, Wash. Post, Nov. 16, 2000, at V1 (restriction of Loudon County, Va.). Other localities restrict townhouses, in the name of stopping sprawl. See Jackie Spinner, Growing Anxious About Town Houses: Officials in Charles County Look for Ways to Restrict High-Density Development, Wash. Post, Jan. 27, 1996, at C3 (restriction of Charles County, Md.). Townhouses are, of course, a type of high-density living, which is the antidote to sprawl. Such restrictions also work to exclude less affluent persons, who cannot afford detached single-family houses, with the accompanying social and racial exclusionary effects that always accompany restrictions on lower-cost housing.

n122. See Garreau, supra note 12, at 88 (arguing that inner-suburban restrictions push new high-density development further out).

n123. See Spinner, supra note 121, at C3; Garreau, supra note 12, at 88 (discussing "snob" zoning).

n124. See, e.g., Engel, supra note 17, at 271.

n125. See Langdon, supra note 46, at 134, 139.

n126. Id. at 139.

n127. Id.

n128. Id.

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. Lord, 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