

BEFORE THE CITY COUNCIL OF THE CITY OF MILWAUKIE
COUNTY OF CLACKAMAS, STATE OF OREGON

In the appeal of an application to
approve a zoning map amendment
request for Northwest Housing
Alternatives

File Nos. AP-14-01 (appeal), ZA-13-02
(proceedings below)

LAND USE ORDER

I. INTRODUCTION AND PROJECT BACKGROUND

These proceedings arose on application of Northwest Housing Alternatives, Incorporated (“Applicant”) to rezone approximately 1.83 acres of land from a medium-density residential zone (R-2), to a high-density mixed use residential zone (R-1-B). Applicant is in the business of developing and operating units of affordable housing. Applicant currently operates a campus on the project site, consisting of a homeless shelter, nine units of affordable housing, and two office buildings.

Applicant sought this rezone in service of a larger development plan. Under this plan, Applicant would demolish its current campus and replace it with improved offices and expanded housing facilities

II. HEARINGS AND PROCESS

The City of Milwaukie (“City”) set the application for a March 11, 2014, public hearing before the Planning Commission (“Commission”). At the hearing, the Commission received oral and written testimony from the Applicant, other supporters of the application, and from persons opposed to the application. The Commission continued the hearing to March 25, and approved the application on a vote of 4 members in support, 2 opposed.

On April 10, 2014, the Historic Milwaukie neighborhood district association filed a notice of appeal. Thereafter, the City Council took up the application and promulgated notice of a public hearing. On May 20, 2014, the City Council conducted a public hearing and designated a record. At the end of the hearing, Council tentatively decided to sustain the appeal and deny the rezone application, subject to preparation of a final written decision. This Order is the City's final written decision.

III. LIMITATIONS ON EVIDENCE

Under the City Council's standard of review for its appeal hearing, parties were limited to the evidence presented to the Planning Commission, though they were free to make new arguments to Council regarding this evidence.

Applicant proffered a slide presentation, with materials dated May 20, 2014. Council determined that this document contained illustrations with maps from a City ordinance, which by itself would have been acceptable. But, Council determined that the images of the maps had been amplified with additional colors and other markings. The City Council evaluated these augmentations as new evidence because the markings changed the meaning of a document. City Council, through the City Attorney, specifically rejected pages of the document containing new information and requested that the Applicant withhold this information from its presentation, and the Applicant agreed to do so. The Council admitted the balance of this exhibit into the record.

Certain opponent testimony also contained new facts. The City's land use planner identified these facts for Council and the City Attorney instructed Council to disregard them. The City Council did not rely on these facts in making its decision.

IV. APPLICABLE CRITERIA AND FINDINGS

Subsection 19.902.6.B of the Milwaukie Municipal Code (herein "MMC" or "Code") contains eight approval criteria for a zoning map amendment. An applicant bears the burden of proof on all criteria, and all criteria must be met to approve an application.

The City Council finds the applicant failed to sustain its burden of proof as to the following criteria.

Criterion 1. The proposed amendment is compatible with the surrounding area based on the following factors:

To apply any part of this criterion the City Council must make two code interpretations. First, Council must define the term "compatible." Second, Council must define the "area" surrounding the site of the land use application.

Interpretation of “compatible”

As to the meaning of “compatible,” the City Council finds the term connotes a state of being among two or more things, wherein things coexist without undesirable problems or conflicts.

This definition takes on additional meaning from legislative statements embodied within the City’s medium and high density residential zoning districts. The City Council intends for these districts to “create and maintain higher density residential neighborhoods that blend a range of housing types with a limited mix of neighborhood-scale commercial, office, and institutional uses.” MMC19.302.1.

Council finds that these meanings, taken together, indicate that to be or become “compatible,” the proposed rezone must:

- promote a mix of housing types;
- stimulate development of residential and nonresidential structures and uses at a size, mass, and density that echo or reflect the neighborhood within which they exist;
- accomplish these ends without discord or conflicts that impair the coexistence of residential and nonresidential uses; and
- assure that any office or commercial uses are a limited part of any development proposal.

Interpretation of surrounding “area”

The Code does not define the term “area,” which is used throughout this criterion. Thus, to apply the criterion Council must define the term. The area could, on the one hand, be as large as the entire Historic Milwaukie neighborhood. That seems too large, since it would define an area where uses in one corner of the neighborhood would have limited impact on uses in another corner.

On the other hand, Council could define the “area” as the premises immediately adjacent to the project area. That seems too small. It would ignore the influence of single-family residential uses to the east of the site, and would ignore the relationship of the project site to Downtown Milwaukie land uses. Moreover, in the area adjacent to the site, single family residential uses predominate, such that designating a too-small “area” would create an artificial view of the area.

Council finds that a reasonable definition of the surrounding area includes those premises located within a quarter mile of the project site. This is the distance included in the city staff’s analysis and on exhibits in the record and presented at

the appeal hearing. This distance captures the blend of uses that exist within the Historic Milwaukie neighborhood; designating a smaller area would not capture this blend, and designating a larger area would not significantly expand upon the blend. This area also reflects the City's intent to realize a blended development pattern within this zone, as expressed in the zoning code. Finally, the Applicant did not contest Council's evaluating the application under this view.

a. Site location and character of the area.

As with other terms within the criteria, to evaluate the facts of this application requires Council to define the term "character" in this criterion. Council finds that "character" of an area refers to one or more qualities that are shared by many elements of a group, such that the shared quality defines some aspect of the group.

Council finds development in the area is characterized by at least two key features. First, the predominant uses in the area are single family residences, consisting of detached houses located on lots that support one house each, and institutional uses that are typically located in residential areas. Second, the area is characterized by a mix of residential uses that have been built at a single-family residential scale. Most buildings are one-, two-, or two-and-a-half stories in height, and reflect building characteristics and detailing typically found on single-family homes, i.e. eaves, porches, front doors, parking in garages, etc.

There are several ways the proposed rezone is incompatible in the proposed location, and with respect to characteristics within the area. The site is located adjacent to single-family residential, low-density multifamily, and institutional uses. The rezone would permit outright development of standalone office uses on the site, which would introduce significant non-residential activity that is incompatible with the single-family residences within the immediate vicinity. In addition, the Code does not contain design standards for non-residential development in this area, and visual compatibility and appropriate scale of new office development is not guaranteed. Furthermore, the prevalence of residential zoning in the area would prevent the development of adjacent or nearby commercial uses that could complement or support office development on the site.

b. Predominant land use pattern and density of the area.

Though the area features a blend of uses, single family uses predominate. A shared characteristic of such uses is the presence of detached housing on lots that measure less than a quarter acre for the most part. Existing residential density in the area ranges from uses with 0 density at Milwaukie High School on the one hand, to residential densities of 37 dwelling units per acre (du/acre). The current density of the project site is around 12 du/acre.

The zoning district requested by the applicant would disturb the land use pattern in two crucial respects. First, the requested district is R-1-B, in which office uses are permitted outright. What is more, all developable area on the site could be devoted to an office use and its associated parking. That means it would be lawful to construct one or more three-story office buildings upon the 1.83-acre site; such development could result in a mass of buildings and paved surfaces over a footprint the size of ten residential lots. Council finds that an office development of this size would dwarf the existing land use pattern, residential or otherwise, since existing buildings are predominantly detached houses. A vast difference in scale is evidence of incompatibility because intensification of the site with larger office buildings and associated paved parking area has a negative effect on adjoining residential uses by bringing more vehicle trips and people to the site thereby reducing the expected level of solitude that neighbors have come to expect in their homes.

c. Expected changes in the development pattern for the area.

With the arrival of light rail in 2015, it is expected that there will be increased pressure for redevelopment in the area. However, the City Council finds that this fact, in and of itself, is not sufficient to justify a rezone to a zone that, at this point in time, is not compatible with the surrounding area.

Criterion 3. The availability is shown of suitable alternative areas with the same or similar zoning designation.

The City Council interprets this criterion to mean that if land uses allowed under the proposed zoning, could be proposed elsewhere within the City, that the rezone should not be allowed if the desired or similar zoning is available elsewhere in the City.

There are three principal reasons the application failed to meet this criterion. First, the zoning already on the site resembles the requested zoning in several ways. Both zones allow a similar mix of housing types (single family homes, duplexes, apartments, attached rowhouses, cottage cluster, and attached multifamily). In addition, office uses are conditionally allowed in the R-2 zone.

The similarity of these standards takes on added importance in this case because there was evidence that Applicant would propose to construct housing to serve the same function, and to serve the same population, as exists under current zoning. In other words, the existing site has existing, R-2 zoning, which is a "similar zoning designation" in relation to the housing type to be constructed by Applicant. Because the existing zoning can support the desired housing type, the existing zoning is "suitable" for the Applicant's purpose. It is true that the present zoning allows less density, but affordable housing and related services already operate on this site, along with mixed office uses that support the Applicant's organization.

The second reason the application fails this criterion is because City Council did not see credible evidence that the applicant analyzed the development potential of same or similar zoning on alternative sites. For instance, there was no evidence the Applicant analyzed the availability of land zoned R-1. The omission matters: the City's R-1 zone is a high density zone and would allow the Applicant to construct both its residential facilities and, with conditional use approval, its office facilities.

Council also saw no evidence that Applicant analyzed suitability or availability of other property zoned R-1-B. While applicant pointed out that other parcels existed, no pertinent details were presented. To illustrate, there was no evidence comparing size of such other parcels, to the project area. There was no evidence analyzing any other parcels in their totality, for example for a total acreage, or for a total amount of lot coverage. Without this kind of information, Council could not conclude there was evidence about availability of such parcels one way or the other.

There was a similar lack of evidence about the suitability of such parcels for development. Applicant mentioned that "natural resources" existed on some of this other property, but applicant did not support this statement with evidence, and for want of such evidence City Council could not see how the presence of a resource impacted the site. For instance, there was no evidence that specifically identified or characterized the resource, no evidence concerning the amount of developable land available on sites, and no evidence of potential entitlements or conditions of approval that could overcome perceived impediments. Thus, Applicant's statements about the availability of other property were at best conclusory. Because conclusions do not constitute evidence, and certainly not substantial evidence, the City Council could not rely on the statements.

The final reason the application fails this criterion is because other suitably-zoned premises exist in Milwaukie. There is other redevelopable land, in Milwaukie, appropriate for high-density housing. Indeed, some of this land is zoned R-1-B. There was testimony provided that the applicant could have purchased land in the R-1-B zone for redevelopment rather than propose it in the subject R-2 zoned area. Also, locations of developable property could be identified through a project known as "Moving Forward Milwaukie." The alternative areas include premises within downtown and central Milwaukie. Existing zoning in those locations supports development characteristics that blend well with residential uses, such as pedestrian-friendly environments, and mixed-use development (that is, development comprising residential and commercial uses). Testimony also indicated that the Applicant has also shown an ability to discuss development on parcels adjacent to the project site. A tendency for Applicant to develop on parcels other than the project site diminishes the rationale for approving this application.

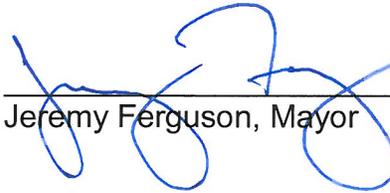
V. CONCLUSION

In sum, Applicant was required to meet all the criteria. The application failed to satisfy criteria 1 and 3, thus the City must deny the application. In doing so, the City did not need to review the remaining criteria.

VI. ORDER

Based upon the findings set forth above, Council sustains appeal AP-14-01, reverses the contrary decision of the Planning Commission, and denies the application embodied in File No. ZA-13-02.

DATED this 22nd day of May, 2014.



Jeremy Ferguson, Mayor

ATTEST



Bill Monahan, City Manager

APPROVED AS TO FORM:
Jordan Ramis PC



Tim Ramis
City Attorney