CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Milwaukie City Hall
10722 SE Main Street
TUESDAY, June 29, 2010
6:30 PM

COMMISSIONERS PRESENT
Jeff Klein, Chair
Nick Harris, Vice Chair
Teresa Bresaw
Chris Wilson
Mark Gamba

STAFF PRESENT
Katie Mangle, Planning Director
Brett Kelver, Associate Planner
Brad Albert, Civil Engineer
Bill Monahan, City Attorney

COMMISSIONERS ABSENT
Lisa Batey
Scott Churchill

1.0 Call to Order – Procedural Matters
Chair Klein called the meeting to order at 6:31 p.m. and read the conduct of meeting format into the record.

2.0 Planning Commission Minutes
2.1 April 27, 2010 –*continued from June 22, 2010*

Vice Chair Harris moved to approve the April 27, 2010 Planning Commission meeting minutes as presented. Commissioner Wilson seconded the motion, which passed 3 to 0 to 2 with Chair Klein and Commissioner Gamba abstaining.

3.0 Information Items—None

4.0 Audience Participation —This is an opportunity for the public to comment on any item not on the agenda. There was none.

5.0 Public Hearings
5.1 Summary: 19th Ave Replat and Duplex – *continued from June 22, 2010*
Applicant/Owner: Gary Michael and Carolyn Tomei
File: WG-10-01, WQR-10-01, VR-10-02, R-10-01
Staff Person: Brett Kelver

Chair Klein called the hearing to order and read the conduct of minor quasi-legislative hearing format into the record.

Brett Kelver, Associate Planner, cited the applicable approval criteria of the Milwaukie Municipal Code as found in 5.1 on Page 10 of the packet, which was entered into the record. Copies of the report were made available at the sign-in table.

Chair Klein asked if any Commissioners wished to abstain. None did, but Commissioner Batey sent a written comment.

Katie Mangle, Planning Director, announced that Commissioner Batey was out of town tonight, but had asked that the record reflect that she intended to recuse herself from the meeting because she lived across the street from the subject property. Commissioner Batey did submit comments for the record.

Chair Klein, Vice Chair Harris, and Commissioners Bresaw and Gamba declared for the record that they had visited the site. No Commissioners, however, declared a conflict of interest, bias, or conclusion from a site visit. No Commissioners abstained and no Commissioner's participation was challenged by any member of the audience.

Chair Klein asked if any Commissioners had any ex parte contacts to declare.

Commissioner Gamba stated that he introduced himself to the Applicants when visiting the site and asked questions about the trees. He agreed to disclose during the meeting any information he had learned about the trees if the information was not mentioned in the staff or Applicants' presentation.

Chair Klein noted after the last Commission meeting that he, along with Commissioners Wilson and Gamba, and Ms. Mangle discussed questions about variances and setbacks in general, although not specific to the application.

Ms. Mangle confirmed the discussion regarded setbacks in general and did not regard the application.

Commissioner Bresaw stated that she had known the Applicants for a number of years, but believed she could make a fair and impartial decision with no conflict of interest.

Chair Klein stated that he had also known the Applicant, Carolyn Tomei, for 7 years, but also would be able to make a decision without bias.

Mr. Kelver presented the staff report via PowerPoint, noting key issues of the complex application. The site was on the Willamette River in Island Station, close to the Kellogg Creek Sewer Treatment Plant and had several overlays, including the Habitat Conservation Area (HCA). The Applicants wanted to replat the 5 underlying subdivision lots to create 2 parcels. One parcel would encompass the existing house to the north and a duplex was proposed to be built on the second parcel to the south. Staff recommended approvable with the exception of the request for the reduced front yard setback, given only 2 of the 3 criteria were assessed as being met. He responded to questions and comments from the Commission as follows:

- The overall building footprint was approximately 2,000 sq ft. The total floor area of both stories was roughly calculated at 2,600 sq ft with an additional 500 sq ft deck area.
- The height of the building was measured from the grade at the front of the building to the median point of the roof, not the peak of the roof. This varied with roof style, but was appropriate for the proposed roof style. From the side the structure looked very tall, but because of the slope and measuring at the front of the building, the height was actually less than it appeared.
    - **Commissioner Gamba** requested that future projects include roof peak indicators when the Commission had to make a judgment call about views.
    - **Chair Klein** noted that it was important to understand that certain photos provided by staff were taken from an elevated porch and the second story of nearby houses on the street.

- Depending on the position from which one looked, some new trees planted to the north of the proposed duplex could impact the view corridor. There might be more impact looking from farther north on 19th Ave, when looking straight down. He deferred to the Applicants to address the issue in more detail, adding that if the Commission felt strongly, a condition could be added to have the required plantings located outside what was perceived as a view corridor.
- A density review is triggered when a decision about creating units of land requires Commission review. Density calculations were made when determining how many units of land could be achieved from a larger parcel. Density was based on units per net acre, defined as everything on the property except right-of-way, slopes over 25%, flood plain area, and natural resource designations. For this application, the entire parcel was covered with a resource designation, making the net acreage zero, which technically did not allow any development. However, there was an existing house and the property was actually comprised of several underlying platted lots, which would allow some development to occur by right. Technically, a variance was required, but staff felt it was reasonable to allow some development, especially when other Code sections, such as Water Quality Resource (WQR) and HCA rules, clearly accommodate development and address disturbance and development on sensitive areas, with mitigation.
- Setbacks have an aesthetic function to some degree, providing some buffering at the property boundary for a transition of private ownership to public ownership. Setbacks also provide a cushion of separation between a structure and adjacent uses. Denser zones have smaller setbacks, so as density increases, setbacks decrease. A front yard setback provided separation from items in the right-of-way and automobile traffic, and allowed for some infrastructure to be installed.
- The City did not presently have a plan to develop all the way to the edge of the right-of-way at the Applicants' property. There was 35 ft from the new edge of the proposed pavement to the actual property line.
    - Setbacks allow for some potential future development, such as a new idea about what should happen in the right-of-way.
- **Brad Albert, Civil Engineer**, clarified that the sewer line was an 8-inch main that could handle an additional duplex. The property was at the end of that line, which ran into the force main further south. He would review calculations for the bioswale at the time of building permit. The sewer main would be sized accordingly for the impervious square footage going to the swale. The preliminary drawings looked fine and indicated the size was roughly proportional to what was needed to handle the proposed duplex. The Applicants would submit an infiltration test to make sure that infiltrating water could be handled and treated without overflow.
- The hearing had been originally scheduled for the previous meeting. The posted public notice sign at the site had last week's date, but the Code did not require that the signs be updated because other means of notice were available about the continuance, including notice on the webpage. A general notice was not sent out, but staff did notify everyone who had submitted comments. Staff handled it the same way as when a hearing was continued to another date. They did not normally post the sign again because the process had actually started. Anyone who would have shown up last week would have been informed of the date change.

Chair Klein asked if any further correspondence had been received other than that included in the meeting packet.

Mr. Kelver noted that the following people sent comments that were received by staff after the staff report was completed:

- Eric Perkins, 11908 SE 19th Ave, received notice of the application as the Island Station Neighborhood District Association (NDA) Chair. His comments were received June 15th.
- JoAnne Bird, 12312 SE River Rd, sent comments that were received on June 17th.
- Lisa Batey, 11912 19th Ave, sent 2 comments received on June 21st and June 29th.
- Richard and Alicia Hamilton, 11921 SE 19th Ave, sent comment received on June 22nd.
- Deanna Taylor, 12111 SE 19th Ave, sent comment that was received June 29th.

Chair Klein confirmed that the Commissioners had read all the submitted comments and then called for the Applicants' testimony.

Carolyn Tomei, Applicant, reviewed her family's history in Milwaukie, describing their involvement in the community and interest and concern about the environment. The existing house on the property was built almost 100 years ago as a summer cottage and abutted the street because it was built before the streets were platted and before setbacks. The family had discussed ideas that would allow their sons to live on the Willamette River and came up with the idea of building the duplex that allowed both sons to live on the river. The family believed now was the best time to pursue the project.

Gary Michael, Applicant, distributed photos of a locust tree located below the proposed duplex that had turkey vultures in it. He stated eagles and osprey also rested in the tree. He then continued with the following comments:

- He stated the project had been interesting and challenging, especially given the uniqueness of the property, street, and neighborhood. The topography of the property sloped to the river, the right-of-way was wider than a typical local street, and proximity to the river created serious issues regarding flooding and environmental concerns. As an architect for 40 years, the property was one of the most challenging he had worked with. Challenges included staying above the flood plain, saving trees on the site and in the right-of-way, observing the regulations, striving for compactness, energy efficiency and economy, respecting design of the nearby older houses, and taking maximum advantage of the river and island views without adversely impacting views from their house, the Hamilton's house, and the street.
- He described the sequence of events regarding the application, which formally began with the pre-application conference on September 17th, 2009. Initially, everyone believed the entire 250 ft of street would need to be improved, which would have been extremely costly. The front yard setback was needed to allow for widening of the street and creating a separate pedestrian and bike path.
    - Because the parcel was platted into 5 lots, street improvements were required only for the new, smaller lot for the duplex. However, after NDA meetings, it was clear that residents on the street liked the street as it was and did not want a 20-ft street with sidewalks and bike path. The street had very little traffic and people walked safely in the street. The City acknowledged in a letter that the neighbors did not want street improvements, so the Applicants could pay a fee in lieu of construction instead.
    - The Applicants hired a planning consultant, surveyor, and structural engineer to work in earnest on the project. The application was submitted March 16th. An incompleteness letter was received from staff on April 8th. The Applicants learned that the fee in lieu of construction was required along with widening the street by 4 ft, to which they agreed. The application was resubmitted on April 22nd.
    - On April 29th they learned a second variance was required for the 11-ft front yard setback. Prior to that, they believed the averaging regulation would be used to determine

a 7-ft front yard setback. By then, a lot of design work had already been completed and construction documents were almost done.
    - He emphasized that it was 7 months after the application was submitted, that the Applicants learned that the front yard setback requirement was 11-ft instead of 7-ft as they had originally been told. Their planning consultant, surveyor, and structural engineer had completed all of the design work based on 7-ft setback. If they had known the 11-ft setback was required from the start, the house could have been designed 5-ft wider, although this would have impacted the view corridor to the river.
- He quoted the applicable ordinance from the pre-application report found on 5.1 Page 43 of packet, "*Yard width shall be equal to two-thirds the height of the principal structure."* He challenged the applicability of that regulation to the front yard. Staff admitted it was unclear.
    - In his years of designing projects in different jurisdictions, he had never seen the word width used to mean the front yard depth. Width was used in ordinances in reference to lot width while depth was used in reference to lot and front yard depth. The dictionary definition of width is, "Extent from side to side, breadth or wideness." Depth is defined as, "Distance measured from front to back as of a shelf, et cetera."
    - He questioned why staff would refer him to the averaging regulation MCC Subsections 19.401.2.b for front yard setbacks and 19.602.1 for the side yard setback. He was told that for a Conditional Use (CU), the greater side yard width was intended to help retain view corridors, such as to the river, in a Willamette Greenway (WG) project. This was confirmed in the pre-application meeting.
    - He believed the advice given to the Applicants before and during the pre-application was correct, but that the interpretation over 7 months later was at best, a huge stretch of the common use of the language. The interpretation and timing of it did not seem logical to the Applicants.
    - He believed MCC 19.602.1 needed to be rewritten. If the original intent was for the two-thirds height dimension to apply to all yards, then the word 'width' should be removed. If not, then make it absolutely clear that it applied only to side yards.
- The Applicants requested the two variances because they were necessary to save some trees west of the proposed house.
- For expert advice, Lisa Batey referred the Applicants to Master Arborist Jim Wentworth-Plato, who recently visited the site and stated, "Best management practices are to provide 1 ft of radius for every inch of tree diameter for a root protection zone, soil compaction, grading, and materials clean out should not be allowed in this area to ensure tree health. The 2 lower trees are already showing signs of stress and you want to minimize the stress to the vascular system and maximize the safety of the building by maintaining the largest distance. These trees provide good habitat." Mr. Wentworth-Plato's report continued, "Locusts are tough, and both the one being saved near the driveway and the double tree near the house are black locusts."
    - Because of his advice, the Applicants were narrowing and swerving the driveway to accommodate the nearby locust tree, as indicated on drawings in the packet.
    - It was not possible to stay 25 ft away from any of the trees, but to move the house closer than originally planned would certainly increase the risk to the trees.
- The City report from Engineering Director Gary Parkin stated that the neighborhood needed a transportation improvements plan, but there was no money to do that. The problem is that the street is very unusual topographically and difficult to widen. The neighbors did not want the street widened if it would increase traffic or speed. He knew of no accidents over the 44 years he and his wife had lived in the neighborhood.
- He responded to written questions from Lisa Batey as follows:

- Increasing the street width to 20 ft did not acknowledge the topography of the site, the environmental zones, or the 2 trees they hoped to save. Houses on the street were located as they were because of the river and flooding in past years. Referring to Exhibit 2A Neighborhood Map, he believed the Perkins house was the only one on their block with a 20-ft front yard because it was the most recently built. All other houses in the neighborhood were built before zoning ordinances were created and had various setback issues by today's standards, but they were built where they needed to in order to be above the floodwaters if possible.
  - If the street was widened by 4 ft, the pavement would still be 42 ft from the edge of the new street paving to the closest, most eastern projection of the new house and 53 ft to the front of the garage. He believed this was more front yard than most houses in Milwaukie.
  - He suggested that in the future the City vacate 5 ft on each side of the right-of-way, creating a 50-ft right-of-way, which was standard for local streets and would solve many problems. The three houses on the east side would then conform to a 20-ft front yard. The Hamilton house would be 18-ft from the property line, and the Applicant's house would not cross the property line into the right-of-way. The proposed duplex would be 23 ft to the garage and 12 ft at the closest to the property line, which was more than the current 11 ft requirement.
- Ms. Batey's written comments stated that it was disappointing that the project was going forward without street improvements and that Logus Rd should be a model. However, the Applicant felt that that did not conform to the neighbors' desires. The neighbors believed that the streetscape worked as it was, and that street improvements were costly and seen as a detriment. The neighbors believed Logus Rd was great where it was located with a school and more traffic, but that was very different from their neighborhood.
- Ms. Batey also mentioned 22nd Ave and River Rd, which had a lot of traffic, relatively flatter topography, school buses, and was not at all similar to 19th Ave. The NDA supported sidewalks and good streets where appropriate, but they were not appropriate on 19th Ave.
  - The Applicants were working with Mr. Albert regarding stormwater along the front of the property. Mr. Albert requested that the little bump along the edge of the street be removed and a little bump be placed at the end of the driveway so street water did not come down the driveway.
  - The Applicants did not use chemicals on the property and hoped their neighbors did not either.
- Regarding cars backing out of the proposed driveway, he noted the Perkins across the street from the Applicants backed out of their driveway and had not hit the Applicants' cars, which were always parked in front.

- Tree mitigation included small Oregon Ash, which was on the Oregon plant list. If asked, the Applicants were glad to find another location for them. He did not believe they would have much of an impact on the view corridor from the street, because they were close to the house. Most of the view corridor was on the Applicants' side of the property line, with 26 ft from the end of the existing house to the new property line, plus 11 ft to the new house, providing a large gap. The Applicants believed the view corridor was important.
- The Applicants believed that the front yard variance was the only feasible alternative, in spite of the fact that they did not know a front yard variance was needed until 7½ months after the pre-application conference. It was not feasible to build a single-family residence. The property was so valuable that it would take a large house or duplex for anyone to afford the property taxes. It was not feasible to unnecessarily endanger the 2 important trees, nor

to compromise the functionality of the floor plan or unnecessarily build farther into the flood plain.

- It was possible to move the structure 4 ft to the west, but it would be farther out over the water and 6 inches lower, although still comfortably above the flood plain. It was not feasible to unnecessarily build closer to the WQR area. It was about 9 months too late to redesign the project after spending a huge amount of time and money on consultants, permits, meetings, and applications.
- If the front yard variance was denied, the house would be moved 4 ft, but no one gained from that change and it was a lose-lose solution. If the front yard variance was granted, nobody would lose and the environment would win.

Commissioner Bresaw asked for the interior square footage.

- **Mr. Michael** responded that footprint width was 48 ft, footprint depth at the garage was 37 ft, at the entry it was 40 ft, at the north edge it was 48 ft for basically a square with a chunk carved out for parking in front of the garage. Each dwelling unit, not including the shared space, was 1,884 sq ft and with common areas the total building was 4,561 sq ft. The shared garage was 473 sq ft, with shared shop, mechanical, and storage room under the garage that was also 473 sq ft. The entry and stairway were shared. It would look like a single-family house with one front door and an interior stair to serve the three levels.

Commissioner Gamba understood the 11 ft setback for the front and side yards were to preserve view corridors.

- **Mr. Kelver** replied that Mr. Michael had referred to that in his presentation.

Chair Klein:

- Commented that the Commission would return to that.
- Understood the process began a year ago and the pre-application was in September. He asked if the Applicants already had the building design completed by September 2009.
  - **Mr. Michael** responded 'no,' the design evolved further after September, but was pretty well set by the time the application was submitted in March 2010. He redesigned the unit to have one front door so it appeared to be a single-family residence, which was appropriate for the zone and made the unit as compact and efficient as possible. The initial front yard setback at the time of the pre-application was approximately 9 ft, but not as much as 11 ft. The averaging formula for setbacks seemed very appropriate.
- Understood the neighborhood desire to retain the character of the street, but the use of streets changes over time. Although the street had been the same way for a very long time, he believed the street would probably go through some changes relatively soon. The development of the Riverfront Park and Trolley Trail would probably bring pedestrian and bicycle traffic right to the property.
  - **Mr. Michael** responded that if traffic headed toward a destination, it could be heading toward Elk Rock Island. The Trolley Trail was located 4 or 5 blocks east of his property. The street was only 4 blocks long and served only the 15 or 20 houses on it for mail delivery, garbage pick up, et cetera. There was very little traffic. Cars did go slow, watching out for kids, dogs, and people who walked down the middle of the street. Bicycles usually turned east on Bluebird St because 19th Ave was steeper.
  - There was not much room for new development on the street. Street improvements completed to the 70-ft section in front of his property would be piecemeal, unlike the improvements on Logus Rd where a grant was obtained to do the whole street.

    - The neighborhood was kind of funky with the railroad and sewage treatment plant, but the river and trees made the area worthwhile. It was an HCA because of the tree canopy.
- Asked the distance from the front of the duplex to the base of the 2 locust trees in the backyard and for the information from the arborist regarding how much distance was required per inch of tree diameter to preserve the trees.
    - **Mr. Michael** responded that the distance from the trees to the footings supporting the deck was approximately 11 ft. The arborist said that ideally, for a 24-in tree, there should be no soil compaction or dumping of debris within 24 ft. This was not possible for this application. He was concerned that the City wanted to widen the street within 4 ft of the big maple trees.
- Believed that after talking with Mr. Parkin, the widening of the street was not realistic. The house would exist longer than the trees. Houses tended to have permanence, while trees, although of great value, were living things that eventually died. He was concerned about the distance to the trees, but the lot line was moving in. He wondered if there were other options available other than the variance. The front of the house could be brought in 4 ft, reducing the front side of the house and still keeping 11 ft in the rear. The width of the house could also be expanded. He understood that the Applicants spent a lot of time and money to get to this point, but other options were available.
    - **Mr. Michael** responded that they did not deny that, but it was not feasible for them to redesign the house. He believed Ms. Batey would strongly object if the house was wider. With a 20 ft front yard, the house would be 10 ft wider than depicted. The size of the house could not be reduced. His sons owned very nice houses now, but wanted to return to their neighborhood. He believed the only option without the variance was to move the house 4 ft toward the river, although that made no sense.
- Commented that the 5,000 sq ft structure was large, even though a duplex. The Hamilton house was smaller than that.
    - **Mr. Michael** replied it was not as big as his own house or Ms. Batey's house. He suggested looking across the river at Dunthorpe, where houses were three or four times larger than his own house. The proposed duplex was not an overly large house. They were maintaining the view corridors and being responsible in placement of the house so it was compatible with houses in the neighborhood. They were doing their best for the environment.
    - The trees would not survive as long as the house. The arborist said there was already evidence of stress because it was bare on top, but that they were tough trees so he could not predict how long the tree would live. One locust tree was lost in the 1996 flood. The 2 remaining locust trees were an important aesthetic feature, as well as important for the habitat. They would provide some shade for house.
    - **Ms. Tomei** asked if Chair Klein was concerned that the Applicants were not doing everything they could to protect the tree since the distance was 11 ft from the tree to the footing instead of 24 ft as recommended by the arborist.
- Clarified that if the arborist recommended 24 ft and the tree was bare on top due to stress, that moving the footing closer would further jeopardize it. Perhaps some design changes could help, such as wrapping around the tree. He believed that at this point the problem was not so much the tree but redesigning the house. Other options were available, but had not really been addressed because the Applicants did not find them feasible.
    - **Mr. Michael** clarified that the footings within 11 ft were the few footings that supported the deck. Those had been pulled back to be within about 3 ft from the edge of the deck. The house footings were 17 ft from the tree.

- The arborist also said that soil compaction and pollution could be more dangerous than footings unless you hit a big root. Barriers would be erected along the edge of the footing excavation to keep equipment away from the root zone. Everything would be done to protect the trees, but no one could guarantee how long the trees would live. If the house was moved 4 ft closer to the trees, they were less likely to survive.

Commissioner Gamba:

- Asked how big each pillar footing was for the deck that was located 11 ft from the trees.
  - **Mr. Michael** replied they were 2 ft square concrete footings supporting 6x6 posts. They were actually pulled back under the deck to the centerline of the spiral stair and farther from the trees.
- Indicated other footings for pillars and asked the distance from the trees.
  - **Mr. Michael** replied the pier footings were about 17 ft from the trees and were used to allow floodwaters in the flood plain. They probably projected out from the house about 1 ft to 1½ ft. The first full footing that would cut a root was back another 18 to 20 ft.
- Believed that the distance from the trees to the actual stem wall at the bottom of the house appeared to be 18 to 20 ft away from the tree.
  - **Mr. Kelver** responded that he did not bring a scale, so could not answer the question.
  - **Mr. Michael** believed the distance was about 30 ft from the tree to the stem wall. There were 4 or 5 piers along the west face of the house.
  - **Mr. Kelver** clarified that the dashed line on Exhibits 3 and 4 indicated the stem wall.

No further questions for the Applicants. The Commission took a brief recess and reconvened at 8:27 p.m.

Chair Klein called for public testimony in favor of, opposed, and neutral to the application.

Richard Hamilton, 11921 SE 19th St, stated that he was not looking forward to development on the property, but it was perfectly appropriate since they owned the property. He supported the variance for the front yard setback. Mr. Michael's arguments were exactly what he wanted to reiterate to the Commission. He believed precedent was set for granting the variance and the impact to the street would be minimal without compromising anything that could happen in the neighborhood for years.

- He believed it was reasonable to utilize average setbacks of the adjacent houses because as originally planned, they allowed for some uniformity of the existing buildings. Neighbors would like the uniformity to stay as is. Although he had two small children, he preferred to keep the street narrow with no sidewalks because it was safer and would keep the traffic speed down.
- The street was 42 ft from the front edge of the house, which was twice the 20-ft setback required in any other neighborhood. There was precedent in the Code that would allow the variance.

- More importantly was the nature of the property and location. The trees were important habitat for bald eagles, osprey, and turkey vultures. It was difficult to live in the neighborhood and watch someone push the house against the trees, moving the house 4 ft out to maintain a 42-ft buffer from the existing street instead of protecting the habitat. Just moving the house closer to the river or widening the house would impact the people with view corridors to the side. Moving the house 4 ft closer to the trees may impact views, which was not really addressed, but was not enough for him to have a problem with the development. Moving the house more into the flood plain was counterintuitive to the habitat overlay. Any protection that could be given the trees was very important.

Chair Klein asked the square footage of Mr. Hamilton's house.

- **Mr. Hamilton** replied that his house was 2,600 sq ft.

Steve Gerken, 12114 SE 19th Ave, stated that he was substantially opposed to the project, but concurred with the Applicants about their attitude toward the village nature of the street. The preference was to retain the width and character of the pavement itself.

- In his experience, bicyclists do continue down 19th Ave and there was more bicycle traffic on the street than automotive traffic. The street's existing character was well suited to pedestrian, bicycle, and automotive shared use. He did not believe street improvements would serve any valid purpose for use and safety in the neighborhood.
- Regarding the proposed development, there was a HCA overlaying the property that reduced the maximum density to zero. This was called a technicality, but he pointed out that if a variance was allowed every time an HCA became an inconvenience, then the City no longer had an HCA. If a variance was allowed every time someone wanted to do a development when an existing greenway put constrictions on the development, then the community was only paying lip service, which was not in the best interests of the spirit of the HCA.
- A house located one block south of the Applicants' property on the river side of the street was remodeled several years ago. When the remodel was started, the owners requested adding another story because the height of the structure as viewed from the street was considerably less than the 35-ft limit for height. The City's response at that time was that the height of the structure was measured as the maximum height of the structure, which on that property and on the Applicants' property was the river side. The owner's request was denied and they raised the house up 3 ft while still remaining under 35 ft.
  - This established precedent in the neighborhood that the height of a structure was measured from the rear not the front. In light of this, if 2/3 the height of the structure was used to establish a yard setback, then the height of the entire proposed structure had to be considered, not the front elevation. It would not be fair to previous permit requests if different rules were applied to the Applicants.
- Per the calculation on 5.1 Page 9 of the packet, the square footage of the proposed development did not appear to include the disturbance required to put in the required extensive piping system required for the heat pump. The heat pump area appeared on some diagrams, but the apparent square footage of the building envelope and driveway seemed to account for the entire 3,130 sq ft reported in the application. The additional piping system for the heat pump would require ground disturbance for installation, but was not included in the calculation. It was not clear to him whether the development would come in under the 4,710 sq ft of disturbance allowed if the additional area was included.
- He was concerned about the effect of the sewer line on the root systems of the existing trees.

- He confirmed he lived about 2 blocks south of the Applicants' property on the inland side of the street.

Commissioner Bresaw recalled that the other house that was raised in the past because the basement's ceiling was very low.

Chair Klein believed that the height requirement was for an existing structure, not new construction. That project occurred about 6 years ago.

Ms. Mangle stated that project occurred before she came to the City. However, another application on 19th Ave involved the height issue, but she believed the Lynn Welsh application was different than that referred to by Mr. Gerken.

Mr. Gerken summarized his points as follows:
- Granting a variance to maximum density did not honor the spirit of the HCA.
- Calculations regarding the total disturbance did not include the disturbance required to install heat pump piping.
- The language of MMC 19.602.1 and the previous application of it in the neighborhood calculated total height of the principal structure as the total height, not the front elevation height, which affected the setback considerably.

The Commission took a brief recess and reconvened at 8:54 p.m.

Chair Klein called for additional comments from staff.

Mr. Kelver addressed the Applicants' questions and comments as follows:
- The Code's definition of yard did not indicate or use of either the word "depth" or "width," which led to the staff interpretation of the CU setback standard as applying to all yards. There were more CUs than just those within the WG zone. It seemed reasonable to expect that there may be situations where the Commission could consider all the yards in terms of having additional setbacks.
- The language of MMC 19.602.1 indicated that the Commission could establish additional setbacks on top of the 2/3 height requirement. This was the basis of the understanding of "yard."
- He appreciated the Applicants' recounting of the timeline and noted that staff tried to provide all information they could as accurately as possible in pre-application conferences, but there were times when delving into the actual hardcore details and review of an application that they came across clarifications. This CU standard was one of those times.
  - **Ms. Mangle** added that she had asked Mr. Kelver to describe this interpretation because it was within the purview of the Commission to interpret the Code differently. Keep in mind, however, we would apply the same interpretation in all applications**.**
- Regarding the relationship of CU setback standards of view corridors, he clarified that the word "corridor" suggested a little bit of a side arrangement, but it was also fair to consider, again, the impact a change in a front yard setback could have on the view corridor that might be possible over a roof. As mentioned, there was at least one past case involving questions about raising a roof. In some situations changing the roof height could make a big difference in the view available. On the low side of 19th Ave, the changes in height would be less significant than if on the high side. Staff wanted to keep the interpretation of view corridor open not only to the sides of the house but also to possibly the view over the house.

    - He clarified that the 11-ft setback requirement was from the CU part of the Code, which applied because language in the WG overlay stated that development in the WG was a CU.
    - **Mr. Kelver** added that one criterion for WG discussed protecting views to and from the river, which led to the discussion of what were the view corridors and how were they maintained or affected by development.
- Characterizing the variance related to density as a technicality was a fair consideration. The inclusion of a natural resource designation in the calculation of net acreage was complicated by the rules for some of the natural resources such as WQR and HCAs. Neither section of Code discussed prohibiting development, but regulating it, and then provided some means for evaluating proposed development and ensuring that impacts were mitigated according to the rules.
    - Considering the 5 underlying subdivision lots and their possibilities, the Applicants could decide to remove their existing house and develop the 5 lots under the standards of the R5 zone and the WG review.
    - Any existing house in the R5 zone could convert from a single-family residence to a duplex without triggering this requirement because a duplex was allowed outright in the R5 zone. There appeared to be some degree of conflict between the strict application of the definition of net acreage and zero density with respect to natural resource regulations that would unreasonably deprive the owner of some development use of the property.
    - **Mr. Monahan** agreed with Mr. Kelver's assessment. The intent of the overlays was not to take away all rights to develop property in the existing lots.
- He was not familiar with the case Mr. Gerken mentioned regarding how height was considered and measured. The Hamilton and Lynn Welsh WG reviews were done in 2006 and at that time, staff looked at how height was evaluated. Because 19th Ave had a high side and low side, staff studied where height was measured because it did make a difference depending on the side of the street. His understood that whatever action taken by staff in the past, at least as part of the Lynn Welsh decision, staff set a practice of evaluating height according to the definition in the Code, which was that height is measured from the front of the building.
- He acknowledged that HCAs were a new part of the Code and staff still had to consider how to implement them. The Code referenced definitions of permanent and temporary development, but staff had to determine if an allowable disturbance area included the locations where equipment was staged, delivery vehicles drove, and whether it was temporary or permanent.
- He was interested in identifying what parts of the property within the HCA would be permanently altered. He viewed the geothermal area as a disturbance that, like the sewer connection, would be restored; no permanent development would exist so it would not count against the Applicants.
    - Although shown on the site plan, once the application review process began the Applicants indicated they were no longer sure the geothermal unit would be feasible. He did not think about it as disturbed area. In the findings, he referred to the actual footprint of the duplex plus the driveway and paved areas on the side as being permanently disturbed. However, temporary disturbance could be problematic. The existing driveway on the site would be removed. In being very broad as to what is considered a disturbance, that driveway area was being disturbed, even though it was being removed and restored.
- The impacts of sewer connections to tree roots were not part of the analysis that he did or the Applicants provided. The representations of the sewer connection location were largely

guesswork. If there was a high degree of concern, a condition could be made to be specific about locating the sewer connection as much as practical away from tree roots.

Mr. Gerken believed an area filled with underground piping for geothermal or a septic field might permanently restrict the future viability of tree planting or habitat.

Chair Klein clarified that staff stated geothermal was potentially removed from the application, however because it was still in the application, it needed to be considered.

Chair Klein called for the Applicants' rebuttal.

Mr. Michael stated that at the time of the pre-application conference, the front yard setback was 9 ft because at the time a 20-ft deep parking space was required. Since then, the parking regulations have changed to require an 18-ft parking space, so the building was able to be in front of the garage with 18 ft to the property line, making the setback 7 ft instead of 9 ft. The Applicants took advantage of that; they were told it was a risk because they were in the middle of finalizing the design when the City was in the middle of approving parking Code changes. Now, the 2 parking spaces were no longer required, although the Applicants would use them.

- He emphasized that they would never have designed the project to require a front yard variance. They believed they should be able to rely on the advice of staff early on, not 7½ months after the pre-application design was submitted. There was too much at stake, whether it had to do with the height definition or the front yard regulations, they were relying on staff. Maybe they misunderstood but do not think so.

Ms. Tomei stated the Applicants were withdrawing geothermal from the application.

Mr. Michael clarified that they were still interested in geothermal, but there was not enough room without disturbing the WQR buffer area.

- He clarified that the Applicants' drawing showed the sewer line skirting the drip line south of the trees. He believed it was important to avoid disturbing roots at the drip line. The stormwater sewer lines from the driveway and roof would skirt the drip line of the trees as far as possible and divert water to the rain garden.

Chair Klein asked staff why the additional 4-ft wide strip of pavement was not also required along the other property. He believed when the property was divided, 2 new properties were created, even though one had an existing structure.

Mr. Kelver replied that in a replat, the Chapter19.1400 Public Facility Improvements did not require street improvements in front of a parcel with existing development. The replat itself actually did not require street improvements for either parcel, but the development proposed on the second parcel was triggering street improvements.

Mr. Albert clarified that it was because the City saw the project as 5 underlying lots that were replatting to 2 lots. According to the Code, if the parcel is replatted without increasing the number of developable lots, then Chapter 19.1400 did not apply and therefore street improvements did not apply. In this case, the development of the new duplex triggered street improvements in front of that property only, not the entire parcel.

Commissioner Gamba said that the Applicants' house and Hamilton's house would not be redeveloped, so the pretty street would have a 4-ft bump out of fresh pavement for 70 ft.

- **Mr. Albert** replied that the minimum street width required by Code was 16 ft, so the intersection at the Hamilton house was wider and would allow for 16 ft, making it match up to what the Applicants were required to improve. There would be tapers in and out so it was not a rectilinear jog.

Chair Klein asked about parking on the rest of the street because the 4-ft strip was not that much for parking if there was a party at the duplex.

Ms. Mangle responded that a 16-ft wide street did not include on-street parking.

Chair Klein closed the public testimony portion of the hearing at 9:18 p.m.

Planning Commission Discussion

Commissioner Wilson stated that he was on the fence so would not comment yet.

Commissioner Bresaw believed it was a beautiful piece of property and walking down the road was nice and the view was nice even though the trees blocked the view. It was a shame the property would be developed, but she knew it would be developed. She liked the single-family design from the front of the duplex, but it was important to keep the roofline as low as possible. The view corridors were very important so she wanted to be sure there was a good view on the sides. The 11-ft setback on the sides was important to keep without enlarging the structure. The house size was reasonable for a duplex with 5 bedrooms, 2 recreation rooms, and a shop, but it could be made smaller although that was not for her to say. The front yard setback was very hard because the houses were very close. Her first choice was an 11-ft setback, but she suggested that a compromise might be 9 ft.

Commissioner Gamba stated that they were dealing with 2 opposing regulations regarding setback, so it came down to a judgment call. All the reasons for setbacks did not really apply on the Applicants' property because of the steep topography, lack of sidewalks, and no one could foresee a street built up to the front of the existing house. It did not seem logical to push the house back 4 ft into the trees. The argument could be made that the house could be 4 ft smaller, but then the Applicants had the right to build it wider, blocking the existing view corridor. Worrying about the 11-ft setback on the south side was pointless because it was currently a large hedge that blocked the view corridor anyway. On the north side, more view corridor was better for the neighborhood. He was stuck on the zero allowable acreage, but it was difficult because it was private property and the owner should be able to do what they please to some degree. However, if the law was ignored, then what was the point of making laws.

Commissioner Harris stated the decision was difficult. Based on his understanding of the Code and what staff had presented, the front yard setback was not discretionary and had to be applied because it was a CU. The applicable Code required an 11-ft setback, but he would like to step around that requirement gracefully. The zero allowable acreage concept was confusing, but as staff pointed out, the replatting was from 5 lots to 2 lots, which was a better compromise. He hated to see the habitat disturbed, but moving the project back to allow an 11-ft setback would have to be required. He did not believe the tree would survive the move, or if it did survive it would be a hazard to the completed structure.

Commissioner Wilson believed the family had done a good job answering the Commission's questions and designing the house for their sons and grandchildren. He did not see why the variance should not be granted, so he would vote for the application. He noted that in previous decisions such ado was made about building sidewalks and preserving trees, yet they were not doing that with this application after denying other applications and causing property owners to give the rights of their trees over to the City so that they could build; that was a bargaining point. But that was not being done in this case. He did not believe it should, but it was amazing that it had not come up. The family had served the City, and was well liked in their neighborhood. Maybe in the future such things could be considered for other property owners of less means and popularity, so that when they wanted to do something to their property, the City did not add on a sidewalk and take over their trees from their properties in order for them to do something on their own property. He planned to vote yes on the application.

Chair Klein stated that this street did not have the capability to build sidewalks. There was minimal vehicular and pedestrian traffic, but a year ago there was potentially one less house than what would be there a year from now. How a street transformed was set by the rules and regulations that the City looked at at any particular time. Sitting here now, it did not fit that there **was a street there now**, but potentially there could be a different type of traffic going through. He did not believe vehicular traffic would be the mainstay through there, but there would be a significant increase in pedestrian traffic because of the Trolley Trail connection with the waterfront.

- He agreed with everything submitted and the Applicants did a fantastic job, but everything hinged on the variance for the setback. A rule had been devised to determine that setback, and sometimes the City's own Code tripped the Commission up. He considered the Code now in preparation for where the City was going in the future. He was happy the Applicants were replatting from 5 lots to 2 lots, reducing the potential of something happening in the future, but development could still come. For example, Ms. Batey had a piece of property that she could develop. The increases did not look that dramatic in the beginning, but subtle changes could happen. Existing houses in the neighborhood could be converted to duplexes, so it all came down to the variance.
- The variance requirement was simple and included 3 rules: unusual condition, no feasible alternatives, and mitigation of impacts. It was a frustrating point to be at, but he believed feasible alternatives existed, such as a smaller structure, redesigning around the tree, redesigning the deck, or other things. He liked every aspect of the proposal, and agreed that the single-family appearance of the structure was fantastic. However, he had to agree with staff's recommended 11-ft setback.

Ms. Mangle stated that she wanted to clarify strongly and clearly for the record that staff was not applying different rules and standards to this application than it did others. If some aspect or finding was missed by staff, that could be discussed, but in no way was staff treating these Applicants differently for any reason. Regarding the frontage improvement issue, the Applicants

were being required to contribute $5,000 to public improvements, so the requirements were being met.

Commissioner Wilson clarified that was not what he implied, and thanked Ms. Mangle for bringing it up.

Chair Klein reviewed Commissioner Wilson's comments that the Applicants' design plan was okay and that he would vote against staff's recommendation.

Commission Wilson clarified that the property belonged to the Applicants and they should be able to do their project.

Vice Chair Harris supported staff's recommendation.

Commissioner Gamba said he was somewhat on the fence, but would support the Applicants if the vote was called right now.

Commissioner Bresaw stated she was slightly on the fence, hoping for the 9-ft compromise, because that was what the Applicants originally planned.

Chair Klein supported staff's recommendation.

Mr. Monahan pointed out that to get to 9 ft, the Commission needed to determine that the variance was approvable and the criteria needed to be applied. To approve the variance, the Commission needed to determine that all of the criteria for the variance were met. To deny the variance, they had to find that one element of the criteria was not met.

Mr. Kelver confirmed that the recommended findings presented that 2 of the criteria were met: criterion number 1 there were unusual conditions (MCC 19.702.1.i), and criterion number 3 any impacts were being mitigated (MCC 19.702.1.ii).

Ms. Mangle read the second criterion on 5.1 Page 30, MMC 19.702.1.ii, stating, "That there are no feasible alternatives to the variance and that the variance is the minimum variance necessary to allow the Applicant the use of his or her property in a manner substantially the same as others in the surrounding area."

Chair Klein said he might be putting words in the Applicants' mouth, but he believed that 9 ft might as well be 11 ft because it still required a change of design. He confirmed with the Applicants that he was correct.

Commissioner Gamba asked for a legal definition of "feasible."

- **Mr. Monahan** responded that many cases dealt with "feasible," but it depended upon the local interpretation. "Feasible" typically meant that something could be done other than the proposal that still allows the Applicants to have economic use and enjoyment of their property. He also defined the phrase "substantially the same as others in the surrounding area." The Commission needed to look to the size of the footprint, size of total property, or total house compared to other properties in the immediate area. If surrounding properties were able to enjoy their property and build a structure that was similar to the Applicants' then it could meet the definition of feasible development.

- He reviewed granting or denying a variance. To grant a variance, the Commission had to find that there was no other feasible location, design, or size of the property that would allow the Applicants enjoyment of their property. If the Commission could find that there was no other feasible alternative for the setback, then the variance could be granted. However, if they could not make the determination that no other feasible alternative existed, the variance could be denied.

Commissioner Gamba:
- Noted the conflicting regulations regarding setbacks between the Code's averaging rule and the WG overlay.
- Stated that another rule said that the setback was a calculation based on the height of the house. He had questioned and the Applicant made a good point about where the measurement was to be taken.
- Asked if the WG trumped City regulations.
  - **Ms. Mangle** responded yes, but the City also had a policy in which the Code stated that in the case of a conflict, the most restrictive one applied.

Chair Klein summarized that the Commission liked and supported the project, but the variance request for the front yard setback was the issue. He asked if the Commissioner believed that the alternative criteria had been met.

Commissioner Bresaw acknowledged that it could be feasible to change the plan, although a lot of work.

Commissioner Wilson stated that it appeared the requirements had been met.

Commissioner Gamba stated that the rule was badly written with vague language that was open to interpretation. A lemonade stand would satisfy the economical use of the property. He clarified that he was asking about "feasible," which spoke to…

Mr. Monahan clarified that issue of "feasible" regarded what else was in the neighborhood. If there were lemonade stands in the neighborhood and someone was only allowed something less than a lemonade stand, then that would be an issue. But the issue was that the City was allowing a dwelling size that appeared comparable to other properties in the surrounding area, which might need to be made clearer in the record, so it qualified as feasible. Are there feasible alternatives, such as something else utilizing the site, moving the building plan on the site, or making an alteration to the building plan and still achieving the objective of allowing something to be built that was allowed as a permitted use in the underlying zone?

Commissioner Gamba said that as far as he could tell there was no regulation or rule that would keep the Applicants from moving the house back on the lot because they were a long way from the river. The house could be moved and stay the same size. Making the house smaller was the only logical, feasible alternative, but the City could not make them build a smaller house.

Ms. Mangle said that under WG and the CU, the Commission could ask the Applicants to build a smaller house if it impacted the view.

Commissioner Gamba said the rule had vague wording that could cause the Commission to force the Applicants to kill the trees. The house was 35 ft from the pavement. The spirit of the

concept of setback was there naturally. No one would build a sidewalk on that slope; no view would be blocked sideways, so the spirit of the law said that 7 ft was fine.

Commissioner Bresaw stated that setting the building back farther lowered the roofline.

Commissioner Gamba agreed that it improved the view corridors, but he did not believe the framers of the WG intended for the rules to cause prime bird habitat to be killed.

Chair Klein clarified the question was about the variance, not the WG.

Commissioner Gamba agreed, but noted that the problem was that the variance was vague.

Chair Klein agreed, but asked if the Applicants met the criteria for a variance on the setback.

Commissioner Gamba said that by some interpretations, the criteria were absolutely met. He could interpret that the application did meet the criteria.

Ms. Mangle offered that if the Commission could find that no feasible alternatives existed, then they needed to do that.

Mr. Monahan added that the Commission could consider that they were balancing a series of different rules and regulations, including the HCA, WG, and view corridors. If the Commission could balance those, then they could make a determination that in their judgment the criteria were met because there was no feasible way of moving the house or changing the size.

Chair Klein asked Vice Chair Harris if the application met the variance criteria for the setback.

Vice Chair Harris replied that he did not think so. He wished he could say it absolutely did, but there were feasible alternatives.

Chair Klein agreed with Commissioner Gamba that it did not make sense as is, but unfortunately the criteria were what they had to work with. He believed there were other alternatives that could be met. He asked for a motion with a condition of approval to be sure the geothermal heat pump was removed.

Commissioner Gamba liked the heat pump concept. The short-term disturbance for the long-range environmental benefit was brilliant. It was too bad that more rules and regulations prevented the Applicants from installing it.

Chair Klein agreed and wanted to see a heat pump on the property, but there were constraints with what the property allowed.

Commissioner Gamba commented that environmental rules were causing the Commission to do non-environmental things.

Vice Chair Harris moved to approve WG-10-01, WQR-10-01, VR-10-02, R-10-01 with conditions of approval as stated in the staff report and adding a condition of approval to remove the heat pump. Commissioner Bresaw seconded the motion, which passed 3 to 2, with Commissioners Wilson and Gamba opposing.

Ms. Mangle noted for the record that the motion called for the changes to the conditions of approval as follows:

- Attachment 2, Condition 3B, add one sentence at the end of the paragraph stating, "*Plans shall not include a geo-thermal heat pump."*

Chair Klein read the rules of appeal into the record.

6.0 Worksession Items—None

7.0 Planning Department Other Business/Updates

7.1 PC Notebook Update Pages

Ms. Mangle stated that the PC Notebook update pages were available and would be provided to the Commissioners.

7.2 Commission Training

Ms. Mangle noted there has been discussion about how to make the Commission more effective, and Chair Klein had suggested that staff make the packet available earlier. While the staff report could not be sent earlier than a week before the meeting, she proposed sending the applicants' material to the Commission earlier. The applicants' material was already being sent with a cover page 20 days before the hearing to NDAs, fire district, and people who comment on it. The 20-day mark was the go/no go decision point as to whether an application was ready for a hearing and notice was put in the newspaper. So, now staff will do 2 different mailings, first the Applicants' material and then the staff report, but it would give Commissioners 2 weekends to review the application material. She requested feedback from the Commission.

Commissioner Bresaw believed it was a good idea.

Chair Klein agreed, and requested that any correspondence received by staff also be sent for their review as early as possible. This would ensure the Commissioners had enough time to review those comments as well.

Ms. Mangle commented that sending the correspondence was a change in procedure that staff was making gradually. The official deadline for people to send comments for the Commission to consider was one week prior to the hearing, but in reality the goal was to provide all of the information to the Commission. Staff could forward public emails and provide printed material. However, staff sometimes received 50 emails regarding an application, so staff would probably batch them together and forward the comments up to once a day before the hearing.

Chair Klein said he would also check to be sure the Commissioners were able to read the material because it was important to do so before getting too deep into discussion. Submitted comments would help with discussions with the applicants and staff.

- He declared that the Commission would stick with the criteria. He would be asking where it was met in the criteria to prevent wandering into areas that did not pertain to the application.

8.0 Planning Commission Discussion Items—None

9.0 Forecast for Future Meetings:

July 13, 2010
1. Public Hearing: WQR-10-02, CSU-10-06 Pond House Deck & Landscaping
2. Worksession: Review Procedures Code Project briefing part 2

July 27, 2010 1. Public Hearing: CPA-10-01 North Clackamas Park North Side Master Plan

Ms. Mangle reviewed the forecasted meetings, noting that on July 13th, discussion on the Code Project would involve changes to the variance criteria that the Commission had struggled with tonight.

Chair Klein announced that he would not be present for the July 13th meeting.

Ms. Mangle said that she and Ms. Stoutenburg had set up a better system for tracking the Commissioners' vacations and asked that the Commissioners let staff know as soon as possible when they might be absent from a meeting. The earlier staff knew the better.

Chair Klein added staff could then inform an applicant when a full Commission would be present, allowing them the opportunity to push their application to another week.

Meeting adjourned at 10:05 p.m.

Respectfully submitted,

Paula Pinyerd, ABC Transcription Services, Inc. for
Alicia Stoutenburg, Administrative Specialist II

Jeff Klein, Chair

Nick Harris, Vice Chair,
for Jeff Klein.