

**BEFORE THE LAND USE HEARINGS OFFICER  
OF CLACKAMAS COUNTY, OREGON**

Regarding an Application for a Zone Change	)	<b>Case File No.</b>
From R-10 to R-7 or R-8.5	)	<b>Z0388-15-Z</b>
	)	<b>(Abbott)</b>

**A. SUMMARY**

1. The applicant and owner is Susan Abbott. The application is for a zone change from R-10 Urban Low Density Residential zoning district to an R-7 or R-8.5 Urban Low Density Residential zoning district.

2. The subject property is located at 3816 Southeast Hill Road, Milwaukie, OR 97267. The legal description is T2S, R1E, Section 01 DD, Tax Lots 4500 & 4600, WM. The subject property is approximately 1.79 acres and is zoned R-10 Urban Low Density Residential.

3. On November 5, 2015, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application.

**B. HEARING AND RECORD HIGHLIGHTS**

1. The Hearings Officer received testimony at the public hearing about this application on November 5, 2015. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

2. At the hearing, county planner Rick McIntire discussed the staff report and recommended approval of a zone change to R-8.5 Urban Low Density Residential.

3. The applicant, Susan Abbott, testified in support of the application.

4. Opponents Aaron Breunig, Sandy Breunig and Rick Rudisel testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer closed the record.

## C. DISCUSSION

### 1. Facts

The subject property is located at 3816 Southeast Hill Road, Milwaukie, Or 97267. The property is approximately 1.79 acres and is developed with an existing residence and two accessory buildings. The property is located in an area of mostly Urban Low Density Residential zoning, primarily R-10 (10,000 square-foot minimum lot sizes) to the north, R-8.5 (8500 square-foot minimum lot sizes) to the south and east, and R-7 (7000 square-foot minimum lot sizes) to the west. The slope is generally flat with a few trees. The property has access to Southeast Hill Road. Under the current zoning, the applicant would be allowed to develop a 6-lot subdivision. Under R-8.5 zoning the applicant would be allowed to develop an 8-lot subdivision. Under R-7 zoning the applicant would be allowed to develop a 9-lot subdivision. No specific development plans have been submitted.

### 2. Zone Change Application

Clackamas County Zoning and Development Ordinance (ZDO) 1202.03 provides the approval criteria for a zone change:

“A zone change requires review as a Type III or IV application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria:

“A. The proposed zone change is consistent with the applicable goals and policies Comprehensive Plan.

“B. If development under the new zoning district designation has a need for any of the following public services, the need can be accommodated with the implementation of the applicable service provider’s existing capital improvement plan: sanitary sewer, surface water management, and water. The cumulative impact of the proposed zone change and development of other properties under existing zoning designations shall be considered.

“C. The transportation system is adequate, as defined in Subsection 1007.09(D), and will remain adequate with approval of the proposed zone change. Transportation facilities that are under the jurisdiction of the State of Oregon are exempt from Subsection 1202.03(C). For the purpose of this criterion:

- “1. The evaluation of transportation system adequacy shall include both the impact of the proposed zone change and growth in background traffic for a 20-year period beginning with the year that a complete land use application is submitted pursuant to Section 1307.
  - “2. It shall be assumed that all improvements identified in Comprehensive Plan Table 5-3a, 20-Year Capital Projects; the Statewide Transportation Improvement Plan; and the capital improvement plans of other local jurisdictions are constructed.
  - “3. It shall be assumed that the subject property is developed with the primary use, allowed in the proposed zoning district, with the highest motor vehicle trip generation rate.
  - “4. Transportation facility capacity shall be calculated pursuant to Subsection 1007.09(E).
  - “5. A determination regarding whether submittal of a transportation impact study is required shall be made based on the Clackamas County Roadway Standards, which also establish the minimum standards to which a transportation impact study shall adhere.
- “D. The proposed zone change, as it relates to transportation facilities under the jurisdiction of the State of Oregon, complies with the Oregon Highway Plan.
- “E. Safety of the transportation system is adequate to serve the level of development anticipated by the proposed zone change.”

The October 29, 2015 staff report does a thorough job of explaining that the approval criteria for a zone change are satisfied. Most of the findings in the staff report are not challenged. I agree with the staff report regarding the unchallenged findings and adopt and incorporate those findings in this decision, except as discussed.

ZDO 1202.03(A) requires that the approval of the zone change is consistent with the Comprehensive Plan. The subject property is zoned R-10 and is designated Urban Low Density Residential in the comprehensive plan. The proposed zone change is from R-10 to R-8.5 or R-7, which are all allowed zoning districts under the Urban Low Density Residential Comprehensive Plan designation. Therefore the proposed zone change is consistent the comprehensive plan designation for the property.

Chapter 4, Land Use of the Comprehensive Plan, and the Residential section 4.R.2 provide for Immediate Urban Low Density Residential Areas to include zoning districts of 2500 to 30,000 square feet in size. Sub-Policies 4.R.2.1 through 4.R.2.7 describe the factors used to guide the determination of the most appropriate zoning classification for a specific site. The seven sub-policies are not individual approval criteria, but rather seven issues to consider in a balancing test to determine what Urban Low Density Residential zoning district to apply. Sub-Policy 4.R.2.1(a) provides that lands with “soils subject to slippage, compaction or high shrink-swell characteristics shall be zoned for larger lots.” The subject property does not contain such types of soils. Sub-Policy 4.R.2.1(b) provides that land with slopes “less than 20 percent shall be considered for the R-2.5 through R-8.5 zoning districts” while lands with slopes of “20 percent and over shall be considered for the R-10 through R-30 zoning districts.” The slopes on the subject property are in the six percent range. Sub-Policy 4.R.2.1(c) provides that land with “hydrological conditions such as flooding, high water table or poor drainage shall be zoned for larger lots.” None of those conditions are present on the property. Sub-policy 4.R.2.1 clearly supports a zone change to R-7 or R 8.5 zoning.

Sub-Policy 4.R.2.2 provides, “[C]apacity of facilities such as streets, sewers, water, and storm drainage systems.” Opponents argue that the increase in traffic will affect an already busy area. Opponents’ traffic arguments are addressed in greater detail later. Under the sub-policy, balancing factors are used in determining what the appropriate zoning classification should be. As the County Engineering staff explains, even with a zone change to R-7 there would only be two additional a.m. peak hour vehicle trips and three additional p.m. peak hour vehicle trips and that there is more than sufficient capacity in the area. Sub-policy 4.R.2 supports a zone change to R-7 or R8.5 zoning.<sup>1</sup>

Sub-Policy 4.R.2.3 provides, “[A]vailability of transit: Land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots implemented by the R-2.5, R-5, R-7, and R-8.5 zoning districts.” There are Tri-Met transit stops located just over a quarter-mile from the edge of the property (30 feet more than a quarter-mile). While the edge of the property is approximately one-quarter mile

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<sup>1</sup> There are no challenges to the findings regarding capacity of other facilities.

from transit stops, most of the property is a little farther away. The property is within walking distance as it is approximately a quarter-mile from transit stops. Sub-Policy 4.R.2.3 slightly supports a zone change to R-7 zoning or R 8.5 zoning.

Sub-policy 4.R.2.4 provides, “[P]roximity to jobs, shopping, and cultural activities: Areas in proximity to trip generators shall be considered for smaller lots implemented by the R-2.5, R-5, R-7, and R-8.5 zoning districts.” The property is located to the east of the McLoughlin Boulevard commercial area that provides jobs, shopping, and cultural activities. The property is approximately 1560 feet from the Oak Grove Fred Meyer shopping complex, and there are many other retail and commercial services nearby. Although the commercial and retail areas are in relatively close proximity they are not necessarily within walking distance. Under this sub-policy, however, they need not be within walking distance – just in proximity. Sub-Policy 4.R.2.4 supports a zone change to R-7 or R-8.5 zoning.

Sub-Policy 4.R.2.5 refers to the locational factors for 2500 and 5000 square-foot lots in Corridor design type areas. The property is not located in a Corridor design area permitting R-2.5 or R-5 zoning. Sub-Policy 4.R.2.5 is not applicable to the application.

Sub-Policy 4.R.2.6 provides:

“Need for neighborhood preservation and variety: Areas that have historically developed on large lots where little vacant land exists should remain zoned consistent with the existing development pattern. Otherwise, unless physical or service problems indicate to the contrary, areas of vacant land shall be zoned for lots of 8,500 square feet or smaller.”

The property is within an area with a wide range of lot sizes and zoning designations of R-7, R-8.5, and R-10. Properties to the east and south are primarily R-8.5, and properties to the north are R-10. There is an R-7 eight-lot subdivision immediately west of the property that was rezoned in 2006. Except for the R-7 subdivision, Southeast Hill Road serves as a boundary between R-10 and R-8.5 zoning. Rezoning the property would tend to conform to the neighborhood by having smaller lots south of Southeast Hill Road. Rezoning the property would also advance the interest of vacant land being zoned for lots of 8500 square feet or less. Sub-policy 4.R.2.6 supports a zone change to R-7 zoning or R 8.5 zoning.

Sub-Policy 4.R.2.7 involves density averages in Future Urban areas. The subject property is not in a Future Urban area, so Sub-Policy 4.R.2.7 is not applicable.

As discussed earlier, under Sub-Policies 4.R.2.1–7 there is a balancing test to determine the most appropriate zoning. All of the applicable sub-policies weigh in favor of a zone change to R-7 or R-8.5 zoning. Therefore, the proposed zone change is consistent with the comprehensive plan. ZDO 1201.01(A) is satisfied.

ZDO 1202.03(B) provides that any need for sanitary sewer, surface water management, or water can be provided. The staff report explains that these services can be provided, and opponents do not challenge the application under this provision. Accordingly, I adopt and incorporate those findings from the staff report in this decision. Therefore, ZDO 1202.03(B) is satisfied.

ZDO 1202.03(C) provides that the transportation system is adequate for the proposed zone change. As discussed earlier, the maximum potential traffic impact would result in two additional a.m. peak hour vehicle trips and three additional p.m. peak hour vehicle trips. As the County Engineering department stated, there are no intersections near the project site that are expected to exceed County mobility standards by 2035. The County Engineering department also stated with the minimal increase in traffic volume associated with the proposed development that no intersections will exceed County mobility standards. Opponents testified that Southeast Hill Road is a very busy road and that the intersection with Southeast Oatfield Road is very busy and often backs up. Anecdotal evidence from opponents, however, is not as persuasive as expert testimony from the County Engineering department. I agree with the County Engineering department and the staff report that the transportation system is adequate to accommodate the proposed zone change. Therefore, ZDO 1202.03(C) is satisfied.

ZDO 1202.03(D) provides that the proposed zone change must comply with the Oregon Highway Plan. As there are no state highway facilities within 500 feet of the property, this provision is not applicable. Therefore, ZDO 1202.03(D) is satisfied.

ZDO 1202.03(E) provides that the safety of the transportation system is adequate to serve the level of development anticipated by the zone change. As already discussed, the transportation system is adequate to support a zone change to R-7 or R-8.5. Therefore, ZDO 1202.03(E) is satisfied.

Opponents also argue that allowing the zone change would adversely affect property values. According to opponents, including the Breunigs who are developing an R-10 subdivision to the northeast of the property, allowing smaller lot sizes with presumably less expensive houses would reduce the values of surrounding R-10 lots. Even if this were true, as opponents acknowledged, this argument does not implicate any of the approval criteria. Therefore, this argument does not provide a basis for denying the proposed zone change.

The application therefore satisfies all the approval criteria for a zone change to R-7 or R-8.5. The question is whether the property should be rezoned to R-7 or R-8.5. The applicant argues the zoning should be changed to R-7 while the staff report recommends changing the zoning to R-8.5. The staff report relies primarily on sub-policy 4.R.2.3 regarding the availability of transit stops within walking distance (approximately one-quarter mile):

“The staff finds that the subject property is slightly more than one-quarter mile from the nearest transit stops on SE Oatfield Road. Therefore, based upon the discussion above, the staff finds that the proposed R-8.5 zoning designation is most consistent with this factor.”  
Staff Report 5.

As the applicant points out, the property immediately to the west was rezoned from R-10 to R-7 instead of R-8.5 in 2006. The property to the west was 1.5 acres and the zone change from R-10 to R-7 allowed three additional lots (although the applicant only proposed two additional lots). A zone change to R-8.5 would have allowed one additional lot. In that case (Z0120-06-SS & Z0121-10-Z), another hearings officer’s analysis was very similar to the analysis in this case. The only real difference between the two properties is that the property to the west is slightly closer to the transit stops and shopping areas to the west. The hearings officer concluded:

“The hearings officer finds that both the proposed R-7 and R-8.5 zones are consistent with the applicable policies. However, on balance, the hearings officer finds that the R-7 zoning is most appropriate in this case, given the site’s proximity to transit and jobs, shopping and other trip generators and the variety of existing lot sizes in the surrounding area. Therefore the hearings officer approves the requested zone change to R-7.” Final Order 8.

I do not see that there is much difference between the property at issue in the 2006 case and the present case. Both properties were between one and two acres. Both properties sought a zone change to R-7. On both properties, allowing a zone change to R-7 would only result in one or two additional lots. Both properties are obviously in the same neighborhood and area. Development of the subject property would almost certainly entail an extension of Southeast Garland Road through the property basically connecting the 2006 property and the current property. The only difference is that the subject property is slightly farther away from the transit stops and shopping areas. In fact, the northern lots in the subject property would likely be closer to transit stops and shopping than the southern lots in the 2006 subdivision. I do not see that this slight increase in difference dictates a different conclusion. I do not think that the 2006 decision established the eastern boundary of R-7 zoning. The difference between the eight lots that would be allowed under R-8.5 zoning and the nine lots that would be allowed under R-7 zoning would be negligible. Perhaps I would feel differently if this were a larger parcel that would have a larger difference between the two potential zones. Given that the difference between R-7 and R-8.5 is so small and that the adjacent property was found to be appropriate for R-7 zoning, I agree with the applicant that R-7 is the most appropriate zoning classification for the property.

**D. DECISION**

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **APPROVES** application Z0388-15-Z, with the following condition of approval.

**E. CONDITION OF APPROVAL**

1. The official zoning map shall be amended to reflect this zoning map change from R-10 to R-7.

DATED this 12<sup>th</sup> day of November, 2015.

  
Fred Wilson  
Clackamas County Hearings Officer

## **ENDANGERED SPECIES ACT NOTICE**

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

## **APPEAL RIGHTS**

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).