

August 22, 2017

TO: Carrie Richter, Assistant City Attorney, Oregon City

FROM: Chris C. Criglow
Michael C. Robinson

RE: **Analysis of Chapter X of Oregon City City Charter (the "Charter")
Relating to Exercise of Roadway Easement Benefitting Adjacent Real
Property in Oregon City, Oregon Owned by Icon Construction and
Development LLC**

Background

This office represents Icon Construction and Development LLC ("Icon") in its proposed development (the "Development") of a subdivision consisting of up to twelve (12) single family home lots on certain property (collectively, the "Property") in Oregon, City, Oregon (the "City"). The Development is commonly known as Parker Knoll.

The Icon Property is benefitted by an easement for road purposes 50 feet in width (the "Easement") created by a deed (the "Deed") dated November 29, 1962 and recorded on December 14, 1962 in Book 615, Page 119 in the real property records of Clackamas County. We have attached a copy of the Easement for your reference. The Easement runs across certain property acquired by the City, which has been dedicated for park purposes (the "Park Property" or "Wesley Lynn Park"). The Easement existed on the Park Property prior to the City's acquisition and dedication of it for park use. As such, the Park Property has been subject to the Easement from the moment the City took title to the Park Property and dedicated it to park use. Icon has submitted a proposed plan for the Development which utilizes a portion of the Easement for road purposes to provide access to the Development. We have attached a drawing of that proposed plan to this memorandum for your reference (the "2017 Plan").

As you know, Icon previously submitted a proposed plan for the Development in 2016 (the "2016 Plan"). As we explained in our letter to you dated June 8, 2017, however, that plan was materially different from Icon's current proposed plan in several respects, including the following:

1. The 2016 Plan used the entire Easement area for roadway and other purposes, with the exception of the jog at the access point onto Leland Road needed to align with Reddaway Street. Only 4 feet of the neighboring Icon property would have been used for street purposes along most of the Reddaway Street frontage.

2. Under the 2016 Plan, all of the paved surface of Reddaway Street would have been in the Easement area. The 2017 Plan places only a 12-foot width of pavement for the street in the 50-foot easement on the Park Property, plus the “knuckle” and emergency vehicle turn-around. In the 2017 Plan, twenty-seven feet of Reddaway Street is on the Icon property, which has reduced the Development by one lot from the 2016 Plan.
3. All of the area shown for street use within the Easement area would have been dedicated to Oregon City as city street right-of-way in the 2016 Plan, which would have changed the legal status of the Park Property within the Easement area from park to dedicated public street. No dedication of right-of-way in Wesley Lynn Park is proposed in the 2017 Plan.
4. Under the 2016 Plan, Reddaway Street would have been paved all the way to the site’s southeasterly property line. The 2017 Plan terminates this street at the “knuckle” where it bends into the Icon property.
5. Under the 2016 Plan, sewer, water, storm sewer, and other private utilities would have been constructed within the Easement area on the Park Property. The 2017 Plan places all of the utility lines within the 27-foot right-of-way to be granted by Icon on the Icon property. Under the 2017 Plan, the only “utility” to be included within the Easement area on the Park Property will be a storm drainage swale for roadway surface drainage.

We are aware that Chapter X, Section 41 of the City’s charter (the “Charter”) includes certain limitations on the City Commission’s (the “Commission”) ability to change the legal status of a Charter park or to make or permit construction of certain buildings or structures on a Charter park without first obtaining the approval of the voters. In our prior memorandum to you dated March 13, 2017, we explained why Icon’s location of a portion of the roadway and the related swale within the Easement area was wholly within the legal scope of use of the Easement because the Easement was expressly granted or reserved for “road purposes.” The purpose of this memorandum is to supplement our prior memorandum to explain in more detail why Icon’s exercise of the Easement according to its purpose and within its scope, and the Commission’s approval of Icon’s proposed 2017 Plan for the Development, do not require the Commission to obtain voter approval under Chapter X, Section 41 of the City’s Charter.

Discussion

Limitations of the City’s Charter

The stated purpose of Chapter X of the Charter is “to prevent the transfer, sale, vacation, or major change in use of city parks without first obtaining an approving vote of legal voters of the city.”¹ It is a restriction on the discretionary authority of the Commission to dispose of or

¹ Section 40, Chapter X, Oregon City Charter.

effect major changes in the use of the City's parks. Specifically, Chapter X, Section 41 of the Charter requires, in pertinent part, that the Commission obtain approval of the legal voters of the City to (i) "change the legal status of any park" or (ii) "construct buildings or structures thereon other than for recreational purposes and park maintenance."² If Icon did not have a valid easement for road purposes over the Park Property, and were proposing to have any portion of the Easement formally dedicated as a public street and to construct various utilities and related facilities within it (as was proposed in the 2016 Plan), then in that case we would agree that its proposal may trigger application of the above-referenced provisions of the City Charter requiring voter approval. But in this case, none of those things are being proposed. Icon has a valid easement for road purposes that pre-dates the park. Icon is not proposing that any portion of the Easement area on the Park Property be formally dedicated as a public street. And, Icon is not proposing that any structural improvements be constructed within the Easement area on the Park Property. Accordingly, we assert that Icon's proposal under its 2017 Plan does not require voter approval under Chapter X, Section 41 of the Charter because none of the conditions listed in Chapter X, Section 41 of the Charter requiring voter approval are occurring.

Exercise of the Easement Does not Change the Park's Legal Status

Because the City took title to the Park Property subject to the Easement, the Easement has been part of the Park Property's legal status from the inception of the City's ownership. As such, that legal status included the Easement holder's right to exercise the Easement for roadway purposes. Accordingly, Icon's exercise of the Easement to pave the roadway and provide a standard graded swale for storm water runoff from the roadway cannot constitute a change in the legal status of the property. The legal status of the Park Property has always included that use and dedication of the property to park use did not change that.

Exercise of the Easement is not a Major Change in Use of the Park

While the legal status of the Park Property has always included the Easement, it is also important to note that Icon's proposed exercise of the Easement according to the 2017 will also not constitute a major change in the use of the Park Property. As described above, and as shown on the 2017 Plan, Icon's proposal will use only a relatively small portion of the Easement area on the Park Property for roadway. The balance of the Easement area will remain open for park use. Moreover, Icon does not have the exclusive right to use the Easement area because the Easement is a nonexclusive easement.

The general rule in Oregon easement law is that unless there is evidence of contrary intent, the grantee of an easement acquires a nonexclusive right, and the grantor (i.e. the owner of the underlying fee title to the property) retains the right to use the easement area or permit others to use it in any manner that is not inconsistent with the easement holder's rights.³ In this case, there is no express intent in the original grant of the Easement to make the Easement

² Oregon City Charter, Chapter X, Section 41.

³ See William B. Stoebuck & Dale A. Whitman, *The Law of Property* §§ 8.9, 8.11, at 458–63, 464–65 (3d ed 2000); see also Restatement of Property § 481 comment a (1944).

exclusive. As such, it is nonexclusive, which means that the City, as the successor in interest to the original grantor of the Easement, and the current owner of the property, retains the right to use the Easement area, including the proposed roadway, or permit others to use it, in any manner not inconsistent with Icon's rights, which would include use of the roadway and the balance of the Easement area in connection with the "recreational purposes" and/or "maintenance" of the Park Property consistent with Section 41, Chapter X of the Oregon City Charter.

Icon is not Constructing Buildings or Structures within the Easement Area

The roadway paving and related storm water swale that Icon proposes to provide in the Easement area according to the 2017 Plan do not constitute the construction of any "buildings or structures" within the meaning and intent of the Charter. The Charter does not specifically define "buildings or structures", so to interpret the meaning of those terms, we must consider them in context and reasonably determine the likely intent of the voters when the Charter was adopted.⁴ Dictionary definitions are helpful in these cases, albeit not determinative, where they can support an interpretation of a disputed term in the absence of a specific Charter or legislative definition.⁵ *Merriam-Webster* defines "buildings" as "a usually roofed and walled structure built for permanent use (as for a dwelling)." *Merriam-Webster* defines "structure" as "something (such as a building) that is constructed" or, alternatively, as "something arranged in a definite pattern of organization." Both of those definitions suggest a vertically organized construction or assemblage of component parts of which a "building" would be a specific type, which is characteristically distinct, at least to common understanding, from a roadway or a swale ditch.

Another available reference to aid in defining "buildings or structures" as used in the Charter is the Oregon City Municipal Code ("OCMC"). The OCMC defines a "structure" as "anything constructed or erected that requires location on the ground or is attached to something having location on the ground."⁶ While a roadway is on the ground, it is not commonly understood to be "erected" or "constructed", both of which terms connote vertical construction as opposed to earth grading and paving. By contrast, "Street or road" is defined in the OCMC as "a public or private way that is created to provide the principal means of ingress or egress for persons to one or more lots, parcels, areas or tracts of land, excluding a private way that is created to provide ingress and egress to such land in conjunction with the use of such land for forestry, mining or agricultural purposes."⁷ The OCMC defines and regulates "buildings and structures" entirely differently from "streets". You noted the same distinction between these definitions in the OCMC in your June 29, 2010, memorandum to the City Manager with reference to the Oak Tree Park and Josephine Street Extension. In that memorandum, you concluded that although roads were typically separately described and distinguished from structures, it appeared that a road for non-recreational purposes *could* be viewed as a structure. Whether it *could* be viewed that way, however, is not the standard of interpretation, but rather

⁴ *Brown v. City of Eugene*, 250 Or App 132, 136 (2012).

⁵ *Brown* at 137.

⁶ OCMC 17.04.1215.

⁷ OCMC 17.04.1210.

whether that interpretation is the most reasonably likely intended meaning of that term considering the context and other indicia of its intended meaning.

We contend that the difference in definition and regulation of “structures” versus streets and roadways, together with the standard dictionary definitions noted above, are indicative of a common understanding that “structures” would typically not be understood to include streets and roadways. Accordingly, they indicate that the more likely intended meaning of the voters at the time of adoption of the Charter was that “structures” did not include streets. We also note that it is not necessary for the Charter definitions of “structures” to include streets or roadways because any change or transfer of park use by the Commission to use as a street would necessarily involve dedication of the street to public use, which would be a transfer or change of legal status covered by the other subsection of the Charter provision.⁸ Therefore, we do not believe that Icon’s proposed roadway improvements constitute either “buildings or structures” as those terms were intended to be interpreted in the Charter, and therefore do not require voter approval. For the sake of argument, however, we do note that even if Icon’s proposed roadway improvements could be viewed as “structures”, the Commission’s approval of Icon’s proposal should still not require voter approval because the roadway is not being formally dedicated as a street (which would change its legal status) and Icon’s use of the roadway will be nonexclusive, allowing the City and park users to utilize it along with the balance of the Easement area for access to the park for recreational and maintenance purposes.

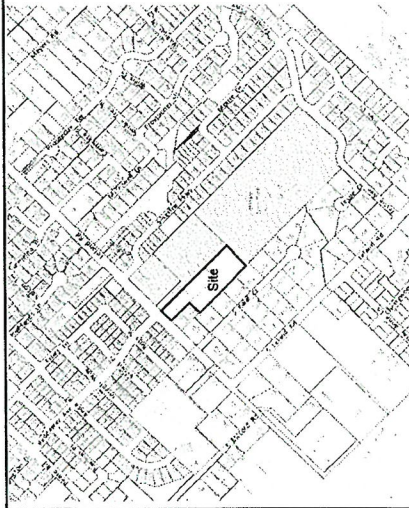
Conclusion

For these reasons, Icon’s exercise of the Easement according to its purposes and within its scope does not require the Commission to obtain voter approval under the Chapter X, Section 41 of the City Charter.

CCC/MCR

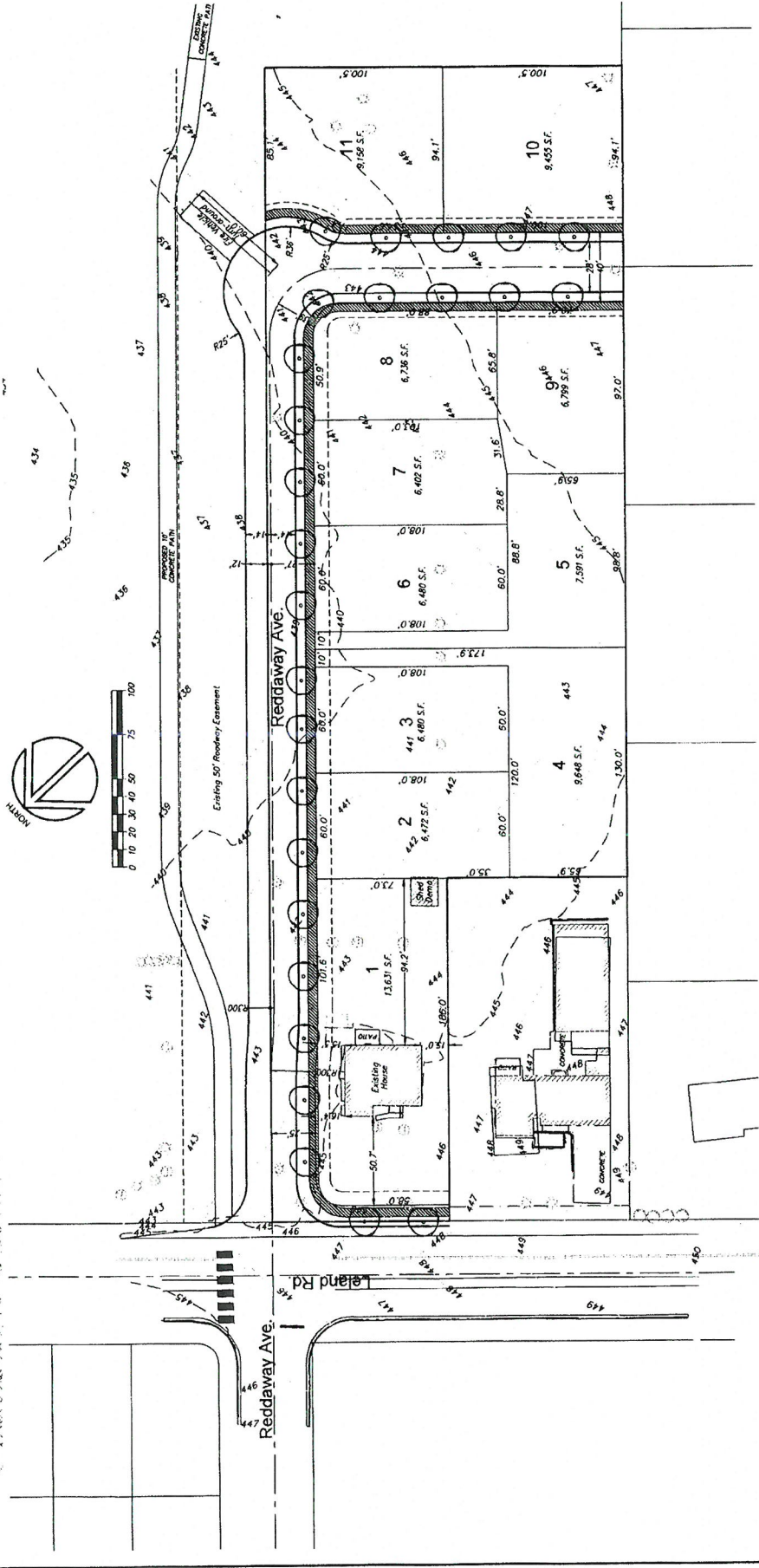
Attachments - 2017 Plan and Easement

⁸ Chapter X, Section 41 of the City Charter provides that the “*commission* may not *do* any of the following listed acts...[emphasis added]”, indicating that it is concerned only with actions taken by the Commission to do certain things, as opposed to private parties.



Contours: Field Survey by Centerline Concepts, Inc.
Site Area: 2.57 Acres
Engineer:
Thiela Engineering, Inc.
4260 Country Woods Ct.
Lake Oswego, OR 97035
PH: (503) 481-8822
Zoning: R-8
Impervious Areas: Street - 22,209 sq. ft.

Owner/Applicant:
Icon Construction & Development, LLC
1980 Willamette Falls Drive, Suite 200
West Linn, OR 97068
PH: (503) 657-0406
Legal: 3-2-E-7D TL 600, 601 & 701
Water: City of Oregon City
Sewer: City of Oregon City



KNOW ALL MEN BY THESE PRESENTS, That
TUALATIN VENTURES, INC.

a corporation duly organized and existing under the laws of the State of OREGON
in consideration of \$100.00 and no/100-- Dollars,
to it paid by DONALD L. FOWLER AND VERN FOWLER

Does hereby grant, bargain, sell and convey to said DONALD L. FOWLER AND VERN FOWLER

heirs and assigns forever, the following real property, with the tenements, hereditaments and appur-
tenances thereto belonging, or in anywise appertaining; and also all its estate, right, title and interest,
at law and equity, therein and thereto, situated in the County of CLACKAMAS and State of Oregon, bounded and described as follows, to-wit:

Part of the John S. Howland D.L.C. No. 45 in T.3.S.R.2.E, of the
W.M., in the County of Clackamas and State of Oregon, more
particularly described as follows:

Beginning at a stake at the most Westerly corner of that tract
conveyed to Tualatin Ventures, Inc., by deed recorded in Book 599
page 352, records of Clackamas County, Oregon, which said point is
South 43 deg. West 31.72 chains from the most Northerly corner of
said Howland D.L.C.; thence running South 45 deg. 45' East 68 1/2 feet;
thence North 43 deg. East 200 feet; thence North 45 deg. 45' West
68 1/2 feet to the Northerly line of said Howland D. L.C.; thence
South 43 deg. West 200 feet to the place of beginning.

ALSO an easement 50 feet in width adjoining the above tract along
the Northeasterly line thereof, for road purposes



TO HAVE AND TO HOLD the same to the said DONALD L. FOWLER and
VERN FOWLER
heirs and assigns forever. And the said TUALATIN VENTURES, INC.
and VERN FOWLER and their legal representatives forever, that it is lawfully
seized in fee simple of the above described and granted premises, and has a valid right to convey same;
that the said real property is free from all encumbrances, except rights of the public
in and to the County Road along the Northwestern line.

and that it will, and its successors shall WARRANT AND DEFEND the same to the said grantee,
their heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, TUALATIN VENTURES, INC.

pursuant to a resolution of its Board of Directors, duly and legally adopted,
has caused these presents to be signed by its President and
Secretary and its corporate seal to be affixed this 29th
day of November, 1962.



Executed in the presence of

TUALATIN VENTURES, INC.
By *[Signature]* President
By *[Signature]* Secretary

BOOK 615 PAGE 119

STATE OF OREGON.

County of Washington } ss. On this 29th day of November, 1962
before me appeared M. V. Walker and
David P. McCready both to me personally known, who being
duly sworn, did say that he, the said M. V. Walker
is the President, and he, the said David P. McCready
is the Secretary of TUALATIN VENTURES, INC.
the within named Corporation, and that the seal affixed to said instrument is the corporate seal of said Corporation,
and that the said instrument was signed and sealed in behalf of said Corporation by authority of its Board
of Directors, and M. V. Walker and David P. McCready
acknowledged said instrument to be the free act and deed of said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
my official seal the day and year last above written.

Notary Public for Oregon.
My Commission expires April 16, 1964

Corporation
WARRANTY DEED
FORM No. 10

TUALATIN VENTURES, INC.

STATE OF OREGON,
County of Clatsop,

I, Robert Schumacher, County Clerk, Esq.,
this 29th day of November, 1962, at the County of Clatsop, Oregon,
in the presence of the undersigned, a Notary Public for Oregon,
the within instrument of writing was received for
record and recorded in the records of

DEED

1962 DEC 14 PM 3 26

BOOK 615 PAGE 119

Witness my hand and seal of said Court
affixed.

ROBERT SCHUMACHER,
County Clerk,
Oregon

Deputy

Recording Clerk

RECORDED FOR THE CLERK OF THE COURT

Oregon Title Co.
Euclid Building
Oregon City

BOOK 615 PAGE 120