

MEMORANDUM

TO: Honorable Mayor and City Commissioners
FROM: Carrie A. Richter, Deputy City Attorney
DATE: September 5, 2017
RE: Request for Interpretation of the Oregon City Charter Chapter X to Accommodate the Parker Knoll Subdivision within Wesley Lynn Park

Introduction

The City has received an application from Icon Construction and Development LLC (“Icon”) to subdivide property adjacent to Wesley Lynn Park into an 11-lots residential subdivision. The proposal includes constructing a roadway to access to the subdivision on a portion of land within Wesley Lynn Park. Ex A. In order to align the roadway with an existing intersection of Reddaway Avenue and Leland Road, the road extension must be located within a pre-existing 50-foot roadway easement area.¹ The land within the easement is currently unimproved, although it does contain a well-worn foot path that connects to a hard-surfaced pedestrian trail within the park. Ex B. The improvements proposed within the easement area include a portion of a local roadway, 12 feet of pavement area, a drainage swale necessary to collect runoff from the roadway only, plus a 10 foot concrete path for use by residents as well as park attendees.

The question for the City Commission to decide is whether construction and/or use of these improvements requires prior approval by the voters, under Chapter X of the Oregon City Charter.

It is important to note at the outset that it is the City Commission who is charged with interpreting its own City Charter. Chapter II, Section 5 of the charter provides that “[t]he charter shall be liberally construed to the end that the city may have all powers necessary or convenient for the conduct of its municipal affairs.” Where there is more than possible interpretation of a charter provision, the choice of which interpretation is the proper one is for the City Commission to make not the courts. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978) (cited approvingly in *Gage v. City of Portland*, 319 Or 308, 315, 877 P2d 1187 (1994)). As discussed in greater detail below, whether the proposed activities trigger the voter approval threshold is subject to more than one interpretation and for that reason, the City Commission’s interpretive guidance is essential.

¹ The City’s road standards encourage the alignment of road extensions with existing streets. OCMC 12.04.190 provides:

The centerline of streets shall be:

- A. Aligned with existing streets by continuation of the centerlines; or
- B. Offset from the centerline by no more than five (5) feet, provided appropriate mitigation, in the judgment of the city engineer, is provided to ensure that the offset intersection will not pose a safety hazard.

Given that this express authority for interpretation rests with the City Commission and that the courts should affirm a Commission interpretation that is consistent with the text of the Charter, this memorandum does not conclude with any recommendation. Staff is standing by to respond to questions and to assist the Commission with its analysis, as requested.

Background Facts

The subject easement was created in 1962 and allows the owner of the adjacent property, currently Icon, and its invitees, to use a 50 foot strip of land within the Park for “roadway purposes.” Ex C. At the time that the easement was created, the Icon property, as well as the three tax lots that currently comprise Wesley Lynn Park, were located outside of the city limits. Ex D. In 1998, the City purchased 13.71 acres of land, abutting the Icon property to the southeast, known as Tax Lot 501, for use as a park. This property was annexed to the City in 2001. The City acquired the subject property, already encumbered by the easement in 2002. In 2003, the land was annexed to the City, becoming part of the recently renamed Wesley Lynn Park.² The City has not completed any formal master planning for this park and does not expect to have funds available for further development of this park for some time.

Development of a subdivision requiring use of this easement area has been subject to two previous voter approval efforts on this property that have failed. Ex. E. In both of those cases, the activities proposed were different in the following respects:

- The 2015 /2016 development proposed roadway improvements to occupy the full width of the easement area and included water and sewer lines. An additional easement to accommodate an underground stormwater drainage facility was also necessary. The improvements currently proposed are limited solely to a portion of a street, 12 feet, with a storm drainage swale necessary to move runoff from the roadway only, plus a multi-use concrete trail for access by park users. All of the sewer, water, additional storm sewer and other private utilities necessary to support the subdivision will be constructed within the Icon-owned property.
- In order for the underground utilities to be maintained by the City within the roadway, as proposed with the 2015 / 2016 development, Icon and the City would have been required to dedicate the parkland subject to the easement to the public for use as a public street.³ This would have the effect of extinguishing the easement and, in turn, changing the legal status from public park property subject to an easement to a dedicated public street. The current proposal does not include the creation of a dedicated public street on park property. Rather, the underlying fee ownership will remain in City ownership, for use as a park, subject to the road access obligations guaranteed to Icon pursuant to the existing easement.

In April 2017, Icon filed the subject subdivision application. Subdivision applications are processed by providing a period for the submittal of written comments, rather than a public hearing. During the comment period, the city received a significant number of concerns related to the Oregon City Charter and the previous election determinations made by Oregon City voters. Rather review the subdivision for

² When the City acquired this land, it consisted of a single tax lot, Tax Lot 400 that was subsequently partitioned.

³ Another solution would be the conveyance of a private or public utility easement but such actions would similarly change the “legal status” of this area within the park.

compliance with the Oregon City Municipal Code separately from reviewing the proposal for compliance with the Oregon City Charter, the City Commission decided to review the application as a whole in a process that resulted in increased opportunities for public participation. The application was noticed a second time to the public identifying an additional opportunity to submit written comment as well as testify at a City Commission hearing to be held on October 18.

The Applicable Standards

The standards applicable to the City Commission's consideration of these issues set forth in Chapter X, Section 41 of the City Charter provide, in relevant part:

The commission may not do any of the following listed acts with regard to any designated city park or part thereof without first obtaining approval of the legal voters of the city. Said acts are as follows:

(b) Vacate or otherwise change the legal status of any park.⁴

(c) Construct permanent buildings or structures thereon other than for recreational purposes and park maintenance. In any case where at the date of adoption of this section there are existing structures which do not comply with this provision, such structures and any additions and alterations thereto are excepted from the provisions of this section.

The Charter does not absolutely prohibit the activities such as a change in legal status or the construction of permanent non-recreation structures. Instead, the Charter provision requires that the City Commission receive voter approval for taking such actions. Further, although the City is not the party constructing the road, the applicant has requested an interpretation of these Charter provisions as part of its subdivision request to determine if these construction activities may proceed without voter approval.

Chapter X, Section 40 of the City Charter contains a purpose statement that might provide some helpful context to the City Commission in considering these matters as well:

The purpose of this 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 the legal voters of this city; to designate certain park areas and their use; to preserve the natural beauty of public parks and to protect the rights of citizens in the preservation of their heritage of nature. Its purpose also is to establish authority and procedures for abatement of nuisances and fire hazards for the protection of the public, as well as protection of the rights of individual citizens.

⁴ Section 41 also limits the ability of the City to transfer any aspect of ownership of park property, including creating an additional easement, but that limitation is not implicated by Icon's current proposal.

Analysis

Construction of a Roadway and Its Use as “Changing the Legal Status” of a Park

Voter approval is required whenever an action by the City Commission will “change the legal status” of a park. The Commission must decide what the term “change the legal status” means and then decide if this threshold is triggered given the facts. “Legal status” generally means the circumstances describing a condition as defined in the law. In this case, the legal status of this 50 foot strip of Wesley Lynn Park is that it is owned by the City for park purposes and is subject to a roadway easement in favor of Icon. There are a number of considerations that may affect whether this proposal alters the “legal status” of the park.

First, the City acquired this property, designating it a Charter park, after the easement was already in place. Installation of the roadway improvements will not change the existing easement encumbering this property. In other words, the extent to which the public could use the easement area for park purposes has always been limited by the easement rights held by Icon and its predecessors-in-interest, even though the road has not yet been installed. Although constructing the roadway in this area will change the look of the land, that right to make improvements, constructing a roadway, pre-existed the land becoming a park. No further change in that status is proposed.

Second, as the City Commission is likely aware, where a subdivision requires the extension of utilities and roadways, these utility extensions are typically located within the road area that is dedicated for public use. A public road dedication, as noted on a subdivision plat, in effect, creates a public easement. This is the permission that allows the City to freely install and maintain utilities within public roads and keeps them open for unrestricted public use. In 2015 / 2016, when previously proposed, this easement area was to be used to accommodate utilities, which would have the effect of expanding the easement to include all utilities, and not just a roadway. Locating utilities in the easement area would have expanded the existing private easement for roadway purposes to include utility purposes as well. The current proposal does not include utilities within the easement area.

Lastly, allowing the City and the public unfettered access to this easement area to maintain the utilities, would have the effect of converting the existing private easement into a public one – changing its “legal status.” This was one of the reasons that the City Commission cited for its conclusion that voter approval was required in 2015 and 2016.

Icon has altered its proposal so that no public dedication of the roadway within the easement is proposed. Icon finds support for its position in the fact that nothing in the OCMC or public works standards prohibit private streets. For example, all of the roadways within the County’s Red Soils campus are private roads subject to maintenance and access easement authorizations running to the City. Since the portion of the road will not be subject to a public dedication, the City, as the underlying owner of the property may still exercise all of the existing ownership rights, subject to the easement limitation. In other words, the City could lease the park for a private event and, as part of that lease, could limit those who access the park via the easement solely to event guests as well as the Icon authorized users, as required by the easement. The general public could be prohibited from entry. This ability to exclude others is a right that the City currently enjoys as the owner of park property that would not exist if the property is dedicated to public use. This ability to exclude others is confusing because as a practical matter the City leaves this park land open for use by the public and is likely to continue to do so in the

future. In other words, the City has no desire to restrict access so long as this area remains a park, open to the public and thus this proposal should have no impact on the public ability to access or use this easement area.

With that background, Icon has asked for a finding that the proposal does not change the legal status of the park. Icon's argument is that the City took title to the property subject to the easement and, therefore, the easement has been part of the legal status of the park since the inception of the City's ownership. The stated purpose is that voter approval is required when there is a "major change in use." Icon argues that construction of this roadway represents nothing more than the realization of a right that was already guaranteed to Icon at the time that the City acquired the land.

An alternative interpretation would be to conclude that, from a public policy and sound planning perspectives, land divisions that require the extension of utilities or roadways to be maintained by the City, must be accomplished by extinguishing the private easement in favor of public dedication. The justification for this is two-fold. The result of such a public dedication would be unrestricted public access within the park which, as pointed out above, is likely the result in any event because this area is a fully accessible to the public by virtue of being a Charter park.

Secondly, providing for public dedication through voter approval would result in a more traditional road cross-section, with utilities running through the street. Under Icon's proposal, the road ownership will be split – one half owned by Icon subject to a dedication for public use and the other half owned by the City subject to a private easement in favor of Icon. Rather than the utilities running down the middle of the road, as is typically the case, the utilities are constrained, pushed to one side and located on the Icon owned property. However, it is also likely the case that proposing a less complex road / utility proposal that would require a vote, would also result in a redesign of the roadway locating it within the entire 50 foot easement area leaving less room available for greenspace and traditional park uses.

Roadway and Sidewalk as Permanent Structures for Purposes other than Recreation

In addition to the "change in legal status," the Charter limits the construction of "structures" or "buildings" in parks under certain circumstances. This standard requires consideration of whether the roadway paving, stormwater swale and multi-use trail that Icon plans to provide in the easement area qualify as "structures," and if these improvements are structures, whether they could be excluded from consideration by the voters because they are for "recreation purposes."

The term "structure" is not defined, nor does this term appear anywhere else within the body of the City Charter. As a result, the Commission could conclude that this term was intended to carry its plain and ordinary dictionary meaning: "something (such as a building) that is constructed" or, alternatively, as "something arranged in a definite pattern of organization." *Merriam-Webster Dictionary*. Another alternative would be to look to the definition of "structure" as it is defined in the City's land use and zoning regulations. OCMC 17.04.1215 defines "structure" as "anything constructed or erected that requires location on the ground or attached to something having location on the ground."

Icon argues that both the dictionary and zone regulations definition of "structure" suggests a "vertically organized construction" that would not include a roadway or a swale. Icon places significance on the term "erect" as indicating some vertical construction is necessary to create a "structure." Icon distinguishes the term "structure" from the term "street or road," which is defined in the zoning regulations 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.” Icon argues that as a specifically defined term that is not similarly referenced within the definition of “structure,” a “street” cannot also be a “structure.”

On the other hand, a roadway, although it is of limited verticality, is something that is built. Just like a vertical building, a roadway has a complex, logical and definite organization, like a bridge, a dam or a runway, that must be attached or located upon the ground in order to serve its purpose. In that way, a road could be a “structure.” It is true that, with regard to zoning and land use, the OCMC Chapter 17 generally regulates “structures” differently from “streets,” however, there is also a general definition of “streets” in the code that controls the definitions appearing in all ordinances unless the context dictates otherwise. OCMC 1.04.010. “Streets” are defined under this section to include “all streets, highways, avenues, lanes, alleys, courts, places, squares, curbs, or other public ways in this city which have been or may hereafter be dedicated and open to public use, or such other public property so designated in any law of this state.” This definition does not include private streets. Therefore, if the term “structure” as used in the Charter excludes “streets,” the City Commission needs to clarify whether this exception applies to all streets or just public streets.⁵

The Commission may place some significance on the introductory language of Section 41, which opens with the stipulation that “the commission may not do any of the following listed acts with regard to any designated city park...” In this case, neither the City, nor the City Commission will be constructing any improvements within the park. Rather, it will be Icon or its representatives that will be doing all of the work. This limitation is directed at situations where the City is the actor – giving up some right of ownership or making some physical change for non-recreation purposes. Certainly, the conveyance of a roadway easement in the first instance would be an action by the City that would trigger the Charter but in this case, the easement was in place at the time that the City acquired the property. No City action is needed and construction of the roadway is already allowed.

The City Commission’s analysis may also include some consideration of the “recreation purposes” qualification. Should the term “structure” be considered in isolation? Or is it possible that what qualifies as “structure” could vary depending on the recreational benefit realized? The provision of a multi-use trail will further a recreational purpose. It may also be that reducing the road width to leave a majority of the easement area vacant and available for recreational use, and providing vehicular access to the center of the park could serve a recreational purpose. However, the City has no adopted parks plan for Wesley Lynn Park and has no plans to provide further vehicular or pedestrian access at this time. As a result, it may be premature to determine whether the road extension, when viewed in isolation or considered in tandem with the other benefits, would serve a recreational purpose.

Precedent for Interpreting Chapter X, Section 41

The City has some precedent for requiring voter approval where the activity proposed within park land included a roadway. In 2010, the City Commission required voter approval to allow for the extension of Josephine Street and a storm detention facility to be located within Oak Tree Park. A memorandum summarizing the legal issues in the Oak Tree Park proposal is attached as Ex. F. The Oak Tree Park proposal presented a clearer case for requiring voter approval because the land to be occupied by the

⁵ This distinction was not relevant to the City’s previous considerations of this request because it included utility lines, both within and beyond the easement boundaries that were not “streets.”

roadway was not subject to a pre-existing roadway easement, restricting the public right to use this area at the time that the park was acquired. There was no indication that the road or storm detention proposal would further any recreational purpose.

As pointed out above, in 2015 / 2016, the City interpreted Chapter X, Section 41 to require voter approval with regard to the subject property on two prior occasions. The explanatory statement for the 2016 measure stated that the “improvement require voter approval because Chapter X of the Oregon City Charter prohibits improvements on park property, other than for recreational purposes, without a vote of the people,” Ex E. The Commission could distinguish this proposal from its previous decisions because the previous requests required reforming the existing private easement into a public easement, increasing the number of uses within the easement area to include water and sewer utilities and expanded the overall area encumbered by easement to include a stormwater detention area. The 2015 / 2016 physical improvements occupied the full width of the easement area and did not include any non-vehicular amenities.

Conclusion and Next Steps

The City Commission will need to interpret the City Charter to determine if voter approval is required for Icon’s current proposal. Given the deferential standard of review to the City’s interpretive authority, it is likely that a court would defer to any interpretation that is plausible. Any of the interpretations set forth above would be consistent with the text of the Charter, if challenged. Therefore, staff has not provided any recommendation about the most appropriate outcome.

At the work session on September 12, staff will present a report summarizing the issues presented in this memorandum. Although the Commission is encouraged to ask questions, and staff will make every effort to respond to these questions, the City Commission will also be holding a public hearing where it will take testimony from the public, including the applicant at its hearing on October 18th. It is at that point, after hearing public testimony, that the Commission will be given an opportunity to deliberate and make a decision.

We look forward to discussing these issues further with you on September 12.

Exhibits:

Exhibit A: Proposed subdivision site plan

Exhibit B: Aerial photo of existing conditions

Exhibit C: Deed creating easement

Exhibit D: Existing tax lots

Exhibit E: Resolution No 16-03 and ballot measure

Exhibit F: 2010 Memorandum considering Oak Tree Park and Josephine Street Extension