

**BEFORE THE PLANNING COMMISSION
FOR THE CITY OF OREGON CITY**

In the Matter of an Application by Icon Construction and Development, LLC regarding property located at 19510 Leland Road, Oregon City, OR 97045 is zoned Single-Family Dwelling (“R-8”) and Institutional (“I”) at Clackamas County Map 3-2E-07D, Tax Lots 600, 601, 700, 701, 501, and 401 (the “Property”). The Application proposes to subdivide the Property into 11 lots for single-family residential development.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. PROCEDURAL STATUS

The Applicant seeks approval of an 11-lot subdivision in the R-8 zone. The subdivision is inside of the Portland Metropolitan Urban Growth Boundary (the “UGB”) and is a limited land use decision as that term is defined in ORS 197.015(12). The City deemed the application complete and the City Commission thereafter “called up” the application. The City Commission discussed the matter in a public work session at which no argument or evidence was accepted from the public. The City Commission scheduled the initial evidentiary hearing on the subdivision on October 9, 2017. The City Commission provided mailed notice of the public hearing to those persons entitled to notice no later than September 19, 2017. The City made the staff report available to the public on October 2, 2017.

The City Commission with all five members present opened the public hearing on October 18, 2017. No person objected to the jurisdiction of the City Commission to hear the matter, nor did any person object to the City Commission’s “call up” of the application.

No City Commissioner disclosed any bias, actual or potential conflict of interest or *ex parte* contacts. Although several City Commissioners noted that they had visited or were familiar with the site, no party questioned those City Commissioners about what they had learned by visiting the site even though they offered the opportunity to do so pursuant to ORS 227.180(3).

The City Commission announced the procedure for the public hearing. Following the staff report, the Applicant made its presentation. Following the Applicant’s presentation, those in favor and those opposed to the application testified. Finally, the Applicant provided oral rebuttal to those in opposition to the application. No party asked that the public hearing be continued to a date certain or that the written record be left open. Following the Applicant’s oral rebuttal, the City Commission closed the public hearing, deliberated on the matter and voted 4-1 to tentatively approve the application. The City Commission directed that City staff return with findings for adoption by the City Commission at its public meeting on November 15, 2017.

II. SUMMARY OF COMMISSION DECISION

The City Commission's decision is to approve the Application. As part of its decision, the Commission finds that the City Charter does not require voter approval of the roadway with 12 feet of pavement area (a half-street), a drainage swale to collect storm water runoff only from the roadway, and a 10-foot concrete path (collectively, the "Roadway" unless described separately), which the Applicant proposes to construct in Wesley Lynn Park.

III. BACKGROUND FACTS

A. Site Location and Zoning Map Designation

The property that is the subject of the Application is located at 19510 Leland Road, Oregon City, OR 97045; is zoned Single-Family Dwelling ("R-8") and Institutional ("I"); and is designated on the Clackamas County Assessor's Map 3-2E-07D, Tax Lots 600, 601, 700, 701, 501, and 401 (the "Property"). The Application proposes to subdivide the Property into 11 lots for single-family residential development. The development will retain an existing home and create an extension of Reddaway Avenue, which will bend to the southwest at the rear of the Property to provide for a potential future connection to Kalal Court. The Staff Report Recommendation, which these findings fully incorporate, describes the Property in more detail.

B. Wesley Lynn Park Easement

The subject easement was created in 1962 and allows the owner of the adjacent property, currently the applicant, and its invitees, to use a 50 foot strip of land within the Park for "roadway purposes." At the time that the easement was created, the property, as well as the three tax lots that currently comprise Wesley Lynn Park, were located outside of the city limits. In 1998, the City purchased 13.71 acres of land, abutting the subject 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. 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 voter approval efforts on this property that have failed. The 2015 / 2016 development proposals included roadway improvements that would occupy the full width of the easement area and included water and sewer lines and required use of additional park property to accommodate an underground stormwater drainage facility. The 2015 / 2016 proposals also proposed dedication of the easement to the public, which would extinguish the easement.

IV. FINDINGS IN SUPPORT OF THE BOARD'S DECISION

The Commission accepts, adopts, and incorporates within these findings, by reference, in their entirety, the October 10, 2017 Staff Report Recommendation of Oregon City Community Development – Planning, file number TP 17-02: Parker Knoll, including all exhibits attached thereto and the recommended conditions of approval set forth therein (the "Staff Report"), as

findings demonstrating that the approval criteria for the Application are met. In the event of a conflict between the incorporated documents and these findings, these findings shall control.

A. Applicable Review Criteria

Oregon City Municipal Code (“OCMC”) 12.04, 12.08, 13.12, 15.48, 16.08, 16.12, 17.10, 17.39, 17.41, 17.47, 17.50, 17.54.100, and the City Charter set forth the approval criteria that apply to the Application. The Commission finds that the Application satisfies all applicable approval criteria, as more fully set forth in the incorporated Staff Report.

B. Oregon City Charter

To facilitate access to the proposed subdivision, the Application also proposes to construct a Roadway in Wesley Lynn Park. The City’s road standards, specifically OCMC 12.04.190, encourage the alignment of road extensions with existing streets, and aligning the Roadway with the existing intersection of Reddaway Avenue and Leland Road requires the Applicant to locate the Roadway within the pre-existing 50-foot roadway easement area within Wesley Lynn Park.

Chapter X, Section 41 of the City Charter requires voter approval if an action of the Commission changes the legal status of or if the Commission constructs permanent buildings or structures (other than for recreational purposes and park maintenance) in any designated city park. Chapter X, Section 41 of the City Charter provides as follows:

“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:

- (a) Sell, lease or otherwise transfer park property.**
- (b) Vacate or otherwise change the legal status of any park.**
- (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.**
- (d) Change the status of a natural park; construct buildings, or clear vegetation in a natural park, except for the construction of trails and essential roads and elimination of hazards constituting a clear and present danger to the public.”**

Furthermore, the purpose statement for Chapter X of the City Charter provides as follows:

“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.”

Because of the above provisions of the City Charter, the Commission considered, as part of its review of the Application, whether the Applicant’s plans to construct the Roadway in Wesley Lynn Park require approval of Oregon City voters under Chapter X, Section 41 (b) or (c). For the following reasons, the Commission finds that the Applicant’s plans to construct the Roadway do not require approval of Oregon City voters under Chapter X, Section 41.

FINDINGS:

(1) Construction of the roadway will not alter the “legal status” or result in a “major change” in the use of Wesley Lynn Park.

The Commission finds that the Roadway construction will not change the legal status of Wesley Lynn Park. The Commission interprets “Legal status” to mean the circumstances describing a condition as recognized in the law. The legal status of the 50-foot strip of Wesley Lynn Park within which the Applicant proposes to construct the Roadway is that it is owned by the City, but subject to a non-exclusive roadway easement in favor of the Applicant.

The City purchased the land that is now subject to the easement in 2002. When the City acquired the park property it was already subject to an easement recorded in 1962. That easement allows the owner of the Property adjacent to the park to use the aforementioned 50-foot strip of the park property for “roadway purposes.” From the inception of the City’s ownership of the park property, this easement, and the right of the adjacent property owner to improve the easement as necessary to accommodate use of this area for “roadway purposes,” have been part of the park property’s “legal status.” The Application proposes to construct the Roadway within the easement. This is what the easement expressly allows and has allowed since the City acquired legal title to the park land. Therefore, the Applicant’s proposal to construct the Roadway does not change the park property’s legal status; it uses the park land in precisely the manner contemplated by its existing legal status. Therefore, construction of the Roadway is not a “major change” in the use of the park and will not change the park’s “legal status.”

Moreover, the current proposal provides that the Roadway improvement will remain in a private easement. This circumstance distinguishes this proposal from the two previous proposals that went to voters because the proposed improvements, which were much more extensive and extended beyond the boundaries of the easement, would have extinguished the private easement in favor of public dedication and changed the legal status of this area from public ownership subject to a private easement to public ownership. That said, the easement that burdens the park land is a nonexclusive easement. This means that, although the Applicant has the right to put the Roadway within the private easement, the Roadway will be usable by the public in the same way

as the rest of Wesley Lynn Park for so long as the City decides to use it as such. The Applicant has no right to exclude any member of the public from using the Roadway. Therefore, the Roadway will not change the legal status of the park.

(2) The City Commission is not proposing to build a permanent structure in Wesley Lynn Park.

As quoted above, the purpose of requiring voter approval before limiting activities within certain city parks is to ensure that the City Commission does not make a “major change” that could impact the recreational amenities that benefit the public. Activities that qualify as a “major change” are identified within the list of activities that follow.

In this case, when the City acquired the Wesley Lynn Park land it was already encumbered by a private easement granting the applicant the right to improve this area for the roadway. Therefore, the City Commission finds that improving this area to build a roadway - something that the Applicant had a right to improve at the time that the City acquired the property - does not result in any action by the City Commission, in the first instance. In other words, the City Commission is not allowing any reduction in the amount of land available for recreational use. Wesley Lynn Park was already impaired when the City acquired the land. Although the Commission heard testimony that the easement area has been used for recreational activities, particularly providing foot pedestrian access to the ball fields and for exercising dogs, such use did not extinguish or otherwise alter the Applicant’s pre-existing right to improve the area for “roadway purposes.”

Given that the roadway easement served as a pre-existing limit impairing the use of Wesley Lynn Park, the City Commission finds that it is the Applicant, not the Commission, who is exercising its right to install a Roadway. Charter Chapter X, Section 41 forbids the Commission from “do[ing] any of the following acts with regard to any designated city park” ... including “construct[ing] permanent buildings or structures thereon ...” Therefore, because the Commission is not the entity acting to establish a right to install the Roadway, the Roadway does not require voter approval.

Although not necessary to the Commission’s analysis, the Commission further finds that the Roadway is not a “permanent building or structure,” as the City Charter uses those terms, so as to require voter approval of the Application. The City Charter does not define “building” or “structure.” Thus, the Commission must determine whether the City voters, when they enacted Chapter X – Section 41 of the City Charter, would have considered the Roadway to be a “building” or “structure.”

The Commission finds that the voters who enacted the City Charter would not have considered the Roadway to be a “building.” The Oregon City Municipal Code does not define the term “building.” Therefore, the City Commission finds reliance on Merriam-Webster Dictionary as providing a helpful definition. The dictionary defines “building” as “a usually roofed and walled structure[.]” The colloquial understanding of a “building” is also a roofed and walled structure. The Roadway is not roofed or walled. Although dictionary definitions do not bind the Commission, the fact that the aforementioned dictionary definition of “building” aligns with the

colloquial understanding of the term is persuasive to the Commission that the dictionary definition of “building” is the meaning likely understood by the voters who enacted the Charter.

It is less clear whether the voters who enacted the City Charter would have considered the Roadway to be a “structure.” Here, although the Commission is not bound by the definitions contained in the zoning sections of the Code, it finds them instructive. OCMC 17.04.1215 defines “structure” as “anything constructed or erected that requires location on the ground or is attached to something having location on the ground.” The OCMC defines “street or road” in OCMC 17.04.1215 to mean:

“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.”

The fact that the OCMC defines the terms “structure” and “street or road” independently suggests that the City voters and their elected representatives viewed roads and structures to be distinct things.

Public comments argument that the Roadway is a “building or structure” requiring voter approval under Chapter X, Section 41 and instead argued that the City must adopt definitions of “structure” in use in Oregon law, specifically the definitions set forth in ORS 310.140, the Oregon Residential Specialty Code, and the Oregon Structural Code. They argued the definitions of structure set forth in state law “carry the most weight from a legal perspective,” that the Commission should apply those definitions in interpreting Chapter X, Section 41, and that the Roadway is a “structure” in accordance with those definitions. From a technical perspective, while the “average man would probably say that a road is not a structure,” a road is actually a “very complex” structure, the public comments asserted. They also argue that “the root of the word construction is structure.” Finally, they argue that, if the Commission accepted the Applicant’s argument that a road is not a “structure,” it would result in the absurd outcome that “underground parking structures would not be structures,” nor would underground homes, sewer systems, etc.

The Commission disagrees with the public comment’s arguments, primarily because they are irrelevant to the City’s primary finding that the City Commission is not taking any action to build a Roadway that alters the City or the public’s rights to enjoy the park.

Further, the Commission is not bound to accept any of the state law definitions of “structure”. The Commission’s interpretation of the City Charter is a local matter not governed by state law, except insofar as state law requires the Commission, when interpreting the City Charter, to try and understand what the voters who enacted it intended for it to mean. *See Brown v. City of Eugene*, 250 Or App 132, 136 (2012). Therefore, to the extent state law governs the Commission’s interpretation of Charter Chapter X, Section 41, state law actually *requires* the Commission to look beyond the various definitions of “structure” because none of those definitions, by default, represent any indication of the intent of the City voters who enacted the Charter. Nor is the Commission required to give added weight to state law definitions of

“structure” in interpreting the same term in the City Charter. The question is how City voters understood the term. There is no indication that City voters understood “structure” the same way as, for example, the Oregon Structural Specialty Code.

Second, some of the testimony supports the Commission’s conclusion where it states that the “average man would probably say that a road is not a structure[.]” Although the comment goes on to argue that, from a technical perspective, a road is a complex structure, the Commission’s purpose in interpreting the City Charter is not to adopt technical definitions of the Charter’s terms but rather those definitions most probably intended or understood by the ordinary City voters who enacted the Charter. Therefore, the notion that the “average man” would not understand a road to be a “structure” supports the Commission’s conclusion that the Roadway is not a “structure.”

Third, the comment that “the root of the word construction is structure” does not support his conclusion that the Commission must determine the Roadway to be a “structure” under Charter Chapter X, Section 41. The Commission’s goal in interpreting the Charter is to decide what the ordinary City voter understood its terms to mean.

Finally, the Commission disagrees with the argument that, if the Commission determines that a road is not a structure, that determination necessitates the conclusion that an underground parking garage is not a structure. The argument conflates verticality with “above ground.” Underground parking garages possess verticality—although they are below ground—to qualify as “structures” in the minds of ordinary people.

In conclusion, the Commission is cognizant of its obligations to require voter approval for activities that compromise the quality and character of park land. Acknowledging that the park was impaired by a private property right at the time of acquisition is a fairly unique circumstance and, as a result, makes this interpretation one that is based strictly on the facts submitted. For these reasons, the Commission finds that the proposed Roadway does not result in construction of a permanent structure by the City Commission and therefore, this Charter limitation does not apply.

(3) Reducing the size of the roadway and the provision of a multi-modal path will serve “recreational purposes.”

The Commission further finds that the proposed Roadway is less intensive and will have markedly fewer impacts on recreational uses than the 2015 / 2016 proposals. 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. All of the sewer, water, additional storm sewer and other private utilities necessary to support the subdivision will be constructed within the applicant-owned property. The remainder of the easement area will remain available for recreational purposes including the provision of a concrete-surfaced, multi-modal path connecting Leland Road with the existing path within the park.

Although the Commission does not find that installation of the half-street improvement and drainage swale will serve a “recreational purpose,” it did agree with the testimony of the Parks Director finding that reducing the size of the road improvement and the provision of a concrete path will further a “recreational purpose.”

V. CONCLUSION.

For the above reasons, the Commission finds that the Application satisfies all applicable approval criteria, and that Chapter X - Section 41 of the City Charter does not require voter approval of the Application. Therefore, the Commission approves the Application subject to the conditions of approval set forth herein.