



City of Portland
Bureau of Development Services
Land Use Services Division

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**NOTICE OF FINAL
FINDINGS, CONCLUSIONS AND DECISION
OF THE CITY OF PORTLAND REVIEW BODY
ON AN
APPEALED ADMINISTRATIVE DECISION
(Type II Process)**

**CASE FILE: LU 15-106542 AD
LOCATION: 1151 SE 72nd Avenue**

The administrative decision for this case, published on May 22, 2015, was appealed to the Adjustment Committee by the applicant.

A public hearing was held on July 7, 2015. The Adjustment Committee modified the decision, deleting two conditions and modifying one of the remaining conditions of the administrative decision of approval, thereby partially granting the appeal. This document is only a summary of the decision. The original analysis, findings and conclusion have been revised by the Adjustment Committee and follow. This decision is available on line:

<http://www.portlandonline.com/bds/index.cfm?c=46429&>

Applicant/Appellant: Carrie A Richter
1151 SE 72nd Ave
Portland, OR 97215

Site Address: 1151 SE 72nd Avenue

Legal Description: BLOCK 6 S 45' OF LOT 5 LOT 6, WELCHBOROUGH
Tax Account No.: R890301160
State ID No.: 1S2E05BD 00500
Quarter Section: 3137

Neighborhood: Mt. Tabor, Stephanie Stewart at 503-230-9364.
Business District: 82nd Avenue of Roses Business Assn, Frank Harris at 503-774-2832.
District Coalition: Southeast Uplift, Bob Kellett at 503-232-0010.

Zoning: R5 (Residential 5,000, High Density Single-Dwelling)

Case Type: Adjustment Review
Procedure: Type II, administrative decision with appeal to Adjustment Committee.

Proposal: The applicant has an existing play structure that was built as a family monument and tribute. The structure is 8 feet, 5 inches long and 4 feet, 6 inches wide and has a frame for possible addition of a shed-style roof, that measures 8 feet, 9 inches tall on the east edge and 11 feet, 6 inches tall on the west side. The difference in the height of the structure is partially due to the slope of the grade level at the base, rather than entirely from the slope of the roof. A stair on the east side of the structure provides access to a platform that is approximately half-way between grade level and the roof.

The structure is located approximately 7 feet from the west property line, abutting the frontage on SE 71st Avenue, and 2 feet from the south property line, which abuts the adjacent neighbor's property at 1203 SE 72nd Avenue. The structure is situated on four posts that are placed on a dirt surface. It is constructed from pressure treated lumber and is located behind a 3 foot, 6 inch wide, 9 foot-tall camellia hedge that is estimated to be about 50 years old.

The Portland Zoning Code, Title 33 requires accessory structures that are over 6 feet in height to be located outside of the minimum building setbacks, which in the R5 zone are 10 feet from the front property line and 5 feet from the side and rear property lines. Sites that have frontage on two parallel streets are considered to be "through lots," and have front lot lines with 10-foot building setbacks from both the street lot lines. Exceptions to the minimum building setback requirements are approved through Adjustment Reviews, when and if the approval criteria are met or if the criteria can be met through reasonable conditions of approval. Therefore, the applicant has requested approval of adjustments to the minimum building setbacks to reduce the setback for the structure from 10 feet to 7 feet from the west front property line and from 5 feet to 2 feet from the south side property line.

Relevant Approval Criteria: To be approved, this proposal must comply with the approval criteria of 33.805.040 A.-F., Adjustments, cited below.

Appeal: The proposal was approved with several conditions of approval. The applicant filed an appeal of the decision, stating that:

- The decision does not indicate that the approval criteria were considered.
- Aesthetics, desirability and reduced property values are not criteria to justify mitigation.
- Requiring lowering the structure, planting buffer and removal of the roof structure are measures that exceed what is necessary to satisfy the standards.

Testimony: At the hearing, the BDS staff planner, Kathleen Stokes, presented the proposal and the administrative decision, showing pictures of the site and surrounding area that supported the decision and the conditions that were placed on the approval (Exhibit H-7). The applicant/appellant then also gave a presentation that included pictures of her property and the surrounding area to support her arguments for removal of the Conditions of Approval. The applicant stressed the point that the structure was built as a memento from her late husband for their young child and so maintaining it in its original form and location was very important to her (Exhibits H-6 and H-9).

The neighboring property owner to the south of the site, Anthony Merrithew, also testified. This neighbor is adjacent to the play structure and the reduced south side setback that has been requested. Mr. Merrithew testified that, while he felt sympathy for the situation of his neighbor, he was very negatively impacted by the visual intrusion and the loss of privacy that were created by the chosen location of the structure and provided pictures to demonstrate the situation (Exhibit H-10).

Deliberation: The Adjustment Committee found that the play structure created some significant impacts and agreed with the staff decision on several points. They found that the structure, as it currently exists was basically, "a viewing platform," and as such, it reduces the potential for privacy for the abutting neighbor to the south. They also found that the reduction in the setback from the west property line was not problematic and that, in fact, if this setback was met, it would cause the structure to intrude even more significantly on the south neighbor. The committee found that the play structure is not a significant or necessarily permanent edifice and that the only conditions that should be required to mitigate for the reduced setback from the south property line are those that would be effective to restore the sense of privacy. The Committee

found that Condition C, which required planting an 8-foot-tall evergreen shrub along the south property line was impractical, due to the lack of space and ability of the vegetation to thrive in this location. Therefore, the Committee determined that this condition is to be stricken. The Committee also determined that Condition B, should be modified to ensure that the overall structure is to be lowered 2.5 feet, and not just the platform within the structure. The Committee reasoned that this would lessen the visual effect of the upper members of the structure and so these roof supports would not need to be removed and that Condition D is also to be stricken.

ANALYSIS

Site and Vicinity: The site is an 11,061 square-foot lot that extends through the block, from SE 71st to SE 72nd Avenue, immediately to the west of the intersection SE of 72nd Avenue with SE Salmon Street. The site is developed with a two-story Mediterranean Revival-styled residence that was constructed in 1925. The terraced property slopes uphill from east to west. A large camellia hedge, reputed to be at least 50 years old and approximately 9 feet in height, is located in the southwest corner of the property. The play structure that is the subject of this review is located within a break in the hedge, which wraps around it on the north and east sides.

The area around the site is developed with other single-dwelling residences. The steep slope from SE 72nd to SE 71st Avenue results in houses that present the bulk of their structures to the east and have private back yard areas that are generally closed off from the street side on the west. Similarly, on the west side of this street, the homes are also largely cloistered, resulting in a somewhat alley-like character along this street. Immediately to the west of the homes that front onto the west side of SE 71st Avenue, and also coming all the way to the street edge, at the north and south ends of the block face, is the boundary of Mt. Tabor Park, a regional public open space.

Zoning: The site is zoned Residential 5,000 (R5, High Density Single-Dwelling). This zone is intended to provide opportunities for single-dwelling development. The development standards for the zone require buildings and other structures that are taller than 6 feet above grade level to be set back a minimum of 10 feet from front property lines and 5 feet from the side and rear property lines.

Land Use History: City records indicate there are no prior land use reviews for this site.

Agency Review: A “Notice of Proposal in Your Neighborhood” was mailed **February 19, 2015**. The following Bureaus have responded with no issues or concerns:

- Water Bureau noted no objections and provided information on the water service that serves the site (Exhibit E-1).
- Site Development Section of BDS stated that they take no exception to the adjustments and provided a description of the physical characteristics of the site (Exhibit E-2).
- The other service agencies merely noted, “no concerns,” including Environmental Service, Transportation Engineering, Fire Bureau, Life Safety Plan Review Section of BDS and Parks-Forestry Division (Exhibit E-3).

Neighborhood Review: Prior to the original decision, staff received two written responses from notified property owners in response to the proposal. One was opposed to approval of the requested Adjustments, stating that due to its height, the play structure severely impacted the privacy of that abutting neighbor’s property (Exhibit F-1). This neighbor also provided pictures of the structure, as viewed from his yard (Exhibit F-2). The other response simply stated support for approval of the requested Adjustments (Exhibit F-3).

ZONING CODE APPROVAL CRITERIA AND ADJUSTMENT COMMITTEE FINDINGS:

33.805.010 Purpose of Adjustments The regulations of the zoning code are designed to implement the goals and policies of the Comprehensive Plan. These regulations apply city-wide, but because of the city's diversity, some sites are difficult to develop in compliance with the regulations. The adjustment review process provides a mechanism by which the regulations in the zoning code may be modified if the proposed development continues to meet the intended purpose of those regulations. Adjustments may also be used when strict application of the zoning code's regulations would preclude all use of a site. Adjustment reviews provide flexibility for unusual situations and allow for alternative ways to meet the purposes of the code, while allowing the zoning code to continue to provide certainty and rapid processing for land use applications.

33.805.040 Adjustment Approval Criteria

Adjustment requests will be approved if the review body finds that the applicant has shown that approval criteria A. through F. stated below, have been met.

- A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and

Findings: An Adjustment is requested to Code Section 33.110.220, to reduce the setback for the play structure from 10 feet to 7 feet from the west front property line and from 5 feet to 2 feet from the south side property line.

The purpose of building setback requirements are to maintain light, air, separation for fire protection, and access for fire fighting. Setback standards also reflect the general building scale and placement of development in the City's neighborhoods and promote a reasonable physical relationship between residences. They promote options for privacy for neighboring properties and provide adequate flexibility to site a building so that it may be compatible with the neighborhood, fit the topography of the site, allow for required outdoor areas, and allow for architectural diversity. Larger front setbacks are required, in order to maintain open and visually pleasing front yards.

The structure is small in scale and is partially open in appearance and is built of treated timbers that are not particularly flammable. Due to these factors, the structure does not create any impacts on light, air, separation for fire protection or access for fire fighting.

The location of the structure does cause issues for the abutting neighbor to the south, because a person standing on the deck of the structure, even a child, has a direct view into the private rear yard area on this adjacent property. In addition to this impact on privacy, activity can cause general disturbance when it gives the impression of looming over what has been created as a quiet leisure space. The Adjustment Committee found that the structure is, basically a viewing platform," and does not have the same impacts as an enclosed structure would have in this location.

The impact from the SE 71st Avenue street frontage is not as dramatic, as the structure blends in with foliage and other larger structures from that vantage point and there do not appear to be any impacts on privacy from the aspect of this west side of the structure. This area is technically a front setback, because this is a through lot, with two parallel street frontages. However, the west frontage serves more as a backyard area for the properties that also front onto SE 72nd Avenue and this site has a large front yard area on that east side of the property that is not impacted by the location of the play structure. Because of this, the request to reduce the setback from the west property line, abutting SE 71st Avenue, can easily be found to meet this criterion.

The request to reduce the setback from the south property line is much more problematic, but there are possible solutions. The Adjustment Committee found that planting vegetation to screen the structure was not advised, due to the difficulty in planting something viable within the available area to the south of the structure. The Adjustment Committee also found that the upper members of the structure that were intended as framing for a roof would not have a significant visual impact, especially with the lowering of the structure, so the two conditions of the original administrative decision (C and D), that required planting a hedge on the south side of the structure and removing the upper timbers were stricken by the Adjustment Committee.

The applicant proposed lowering the height of the platform on the structure by 2.5 feet. This would make it much more difficult for someone using the structure to see into to the private yard of the adjacent property. This idea for mitigation was accepted by the Adjustment Committee and is enforced through a condition of approval which also requires that the entire structure be lowered and not just the platform. The applicant could also choose to move the structure 3 feet to the north but retain the location within the western front setback area. Either of these changes would reduce the impacts on privacy to the reasonable expectations that are guaranteed by the setback requirement. With this amended condition, the Adjustment Committee finds that the purpose of the regulation can be equally met for this exception to the south side setback and this criterion can also be met for that Adjustment.

- B.** If in a residential zone, the proposal will not significantly detract from the livability or appearance of the residential area, or if in an OS, C, E, or I zone, the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area; and

Findings: Approval of the request to reduce the required setbacks from the west and the south property line for the existing structure could detract from the both the appearance and the livability of the residential area. The Adjustment Committee found that impacts to the appearance were not significant and would be temporary, due to the nature of the structure. In response to the privacy issues for the abutting property owner to the south, the Adjustment Committee found that, in addition to the applicant's offer to lower the height of the platform of the play structure by 2.5 feet, the overall height of structure must also be reduced by at least 2.5 feet or else the structure must be moved over at least 3 feet to the north. The Adjustment Committee finds that, with a condition of approval that requires these mitigation measures, this criterion can be met.

- C.** If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone; and

Findings: Two adjustments are being requested. However, the structure will be required to be modified so that it will not be readily seen or noticed. This will bring it closer into compliance with the nature of structures that are accessory to the residences in the single-dwelling zones and so it will then still be consistent with the overall purpose of the R5 zone where this site is located. Therefore, with the condition of approval that was previously described in this decision, this criterion can be met.

- D.** City-designated scenic resources and historic resources are preserved; and

Findings: City-designated scenic resources are shown on the City's zoning maps by an "s" or Scenic Overlay Zone. City-designated historic resources are shown on the City's zoning maps, either as an adopted landmark, or as a site that is located within the boundaries of a Historic Conservation or Historic Design District. There are no City-designated scenic or historic resources on the site. Therefore, this criterion does not apply.

E. Any impacts resulting from the adjustment are mitigated to the extent practical.

Findings: Potential impacts from approval of the requested Adjustments will be mitigated by conditions of approval. A condition that will require the play entire structure, including the platform, to be lowered by 2.5 feet will mitigate the impacts on privacy for the abutting property. With this condition, this criterion can be met.

F. If in an environmental zone, the proposal has as few significant detrimental environmental impacts on the resource and resource values as is practicable.

Findings: Environmental zones are designated with either a lower case “c,” for the Environmental Conservation Overlay, or “p,” for the Environmental Protection Overlay. The site is not located in an environmental zone. Therefore, this criterion does not apply.

DEVELOPMENT STANDARDS:

Unless specifically required in the approval criteria listed above, this proposal does not have to meet the development standards in order to be approved during this review process. The plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.

CONCLUSIONS:

The appellant prevailed, and the decision was revised to include modified Conditions of Approval for the requested Adjustments. The Adjustment Committee found that all of the relevant approval criteria can be met for the requested Adjustments with conditions that require a zoning permit for modifications that would either lower the structure or move it to the north. The request to reduce the minimum building setback from 10 feet to 7 feet from the west, or second front property line, meets all the relevant approval criteria because the structure does not visually intrude on the area or cause any negative impacts in this location. The request to reduce the minimum building setback from 5 feet to 2 feet from the south side property line can be approved with conditions that will create mitigation to remove the impacts on privacy and on the appearance of the area. A condition that requires lowering the height of the platform of the structure, as well as the overall height of the structure will restore privacy for the abutting neighbor to the south. The applicant may also choose to move the structure 3 feet to the north, without reducing its height.

ADJUSTMENT COMMITTEE DECISION:

The Adjustment Committee grants the appeal and modifies the original conditions of approval:

Approval is granted for Adjustments to Code Section 33.110.220 B, to reduce the minimum building setback from the west property line, from 10 feet to 7 feet, and from the south side property line, from 5 feet to 2 feet for the play structure, in general compliance with the final approved site plan and elevation drawings, Exhibits C-3 and C-4, (which revise and replace the original approval exhibits, C-1 and C-2), and subject to the following conditions:


A. A Zoning Permit is required. As part of the permit application submittal, the following development-related condition (B) must be noted on each of the 4 required site plans or included as a sheet in the numbered set of plans. The sheet on which this information appears must be labeled "ZONING COMPLIANCE PAGE - Case File LU 15-106542 AD." All requirements must be graphically represented on the site plan, landscape, or other required plan and must be labeled "REQUIRED."

- B. The platform of the play structure and, also, the overall height of the structure must be lowered by at least 2.5 feet from its existing height. As an alternative, the structure may be moved over 3 feet to the north, while still remaining within the same location in relation to the west front property line. If the structure is moved to the north, so that it is outside of the required setback area, it does not need to be lowered in height.

Staff Planner: Kathleen Stokes

**Date of Adjustment Committee Decision:
(Hearing Date) July 7, 2015**

These findings and conclusions were adopted by the Adjustment Committee:

By: 
Adjustment Committee
Chair person name: Roger Alfred

Date Final Decision Effective/Mailed: July 20, 2015
120th day date: August 11, 2015

About this Decision. This land use decision is **not a permit** for development. Permits may be required prior to any work. Contact the Development Services Center at 503-823-7310 for information about permits.

Procedural Information. The application for this land use review was submitted on January 16, 2015, and was determined to be complete on **February 13, 2015**.

Zoning Code Section 33.700.080 states that Land Use Review applications are reviewed under the regulations in effect at the time the application was submitted, provided that the application is complete at the time of submittal, or complete within 180 days. Therefore this application was reviewed against the Zoning Code in effect on January 16, 2015.

ORS 227.178 states the City must issue a final decision on Land Use Review applications within 120-days of the application being deemed complete. The 120-day review period may be waived or extended at the request of the applicant. In this case, the applicant extended the 120-day review period, as noted in Exhibit A-4. Unless further extended by the applicant, **the 120 days will expire on: August 11, 2015**.

Some of the information contained in this report was provided by the applicant.

As required by Section 33.800.060 of the Portland Zoning Code, the burden of proof is on the applicant to show that the approval criteria are met. The Bureau of Development Services has independently reviewed the information submitted by the applicant and has included this information only where the Bureau of Development Services has determined the information satisfactorily demonstrates compliance with the applicable approval criteria. This report is the decision of the Bureau of Development Services with input from other City and public agencies.

Conditions of Approval. If approved, this project may be subject to a number of specific conditions, listed above. Compliance with the applicable conditions of approval must be documented in all related permit applications. Plans and drawings submitted during the permitting process must illustrate how applicable conditions of approval are met. Any project elements that are specifically required by conditions of approval must be shown on the plans, and labeled as such.

These conditions of approval run with the land, unless modified by future land use reviews. As used in the conditions, the term "applicant" includes the applicant for this land use review, any person undertaking development pursuant to this land use review, the proprietor of the use or development approved by this land use review, and the current owner and future owners of the property subject to this land use review.

Appeal of this Decision. This decision is final and becomes effective the day the notice of decision is mailed (noted above). This decision may not be appealed to City Council; however, it may be challenged by filing a "Notice of Intent to Appeal" with the State Land Use Board of Appeals (LUBA) within 21 days of the date the decision is mailed, pursuant to ORS 197.0 and 197.830. A fee is required, and the issue being appealed must have been raised by the close of the record and with sufficient specificity to afford the review body an opportunity to respond to the issue. For further information, contact LUBA at 775 Summer St NE, Suite 330, Salem, OR 97301-1283. [Telephone: (503)373-1265]

Recording the Final Decision.

If this Land Use Review is approved, the final decision must be recorded with the Multnomah County Recorder. A building or zoning permit will be issued only after the final decision is recorded. The final decision may be recorded on or after **July 20, 2015**.

The applicant, builder, or a representative may record the final decision as follows:

- By Mail: Send the two recording sheets (sent in a separate mailing) and the final Land Use Review Decision with a check made payable to the Multnomah County Recorder to: Multnomah County Recorder, PO Box 5007, Portland OR 97208. The recording fee is identified on the recording sheet. Please include a self-addressed, stamped envelope.
- In person: Bring the two recording sheets (sent in separate mailing) and the final Land Use Review Decision with a check made payable to the Multnomah Recorder to the County Recorder's office located at 501 SE Hawthorne Boulevard, #158, Portland OR 97214. The recording fee is identified on the recording sheet.

For further information on recording, please call the County Recorder at 503-988-3034.

For further information on your recording documents, please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

Expiration of this approval. This decision expires three years from the date the Final Decision is rendered unless:

- A building permit has been issued, or
- The approved activity has begun, or
- In situations involving only the creation of lots, and the land decision has been recorded.

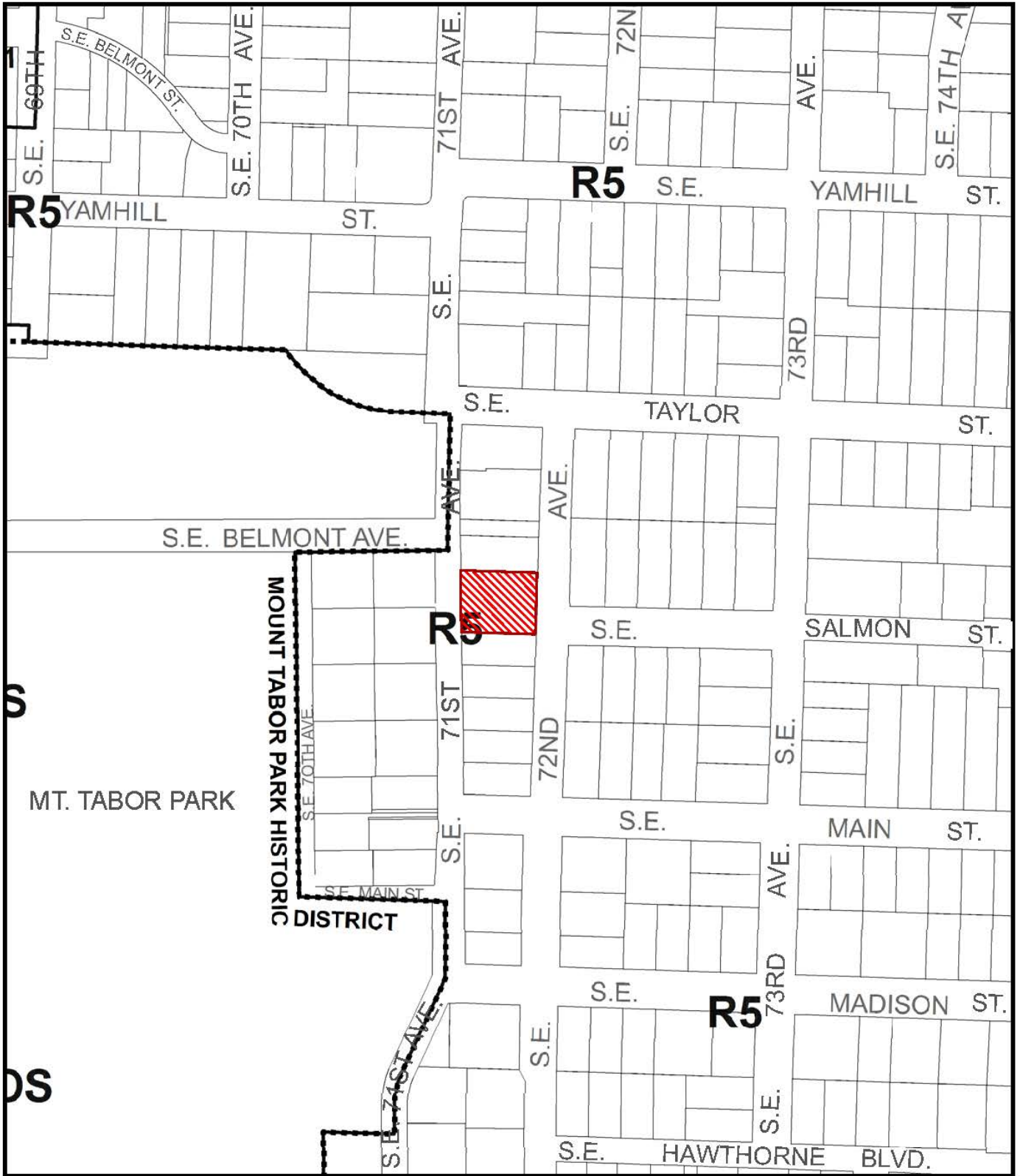
Applying for permits. A building permit, occupancy permit, or development permit must be obtained before carrying out this project. At the time they apply for a permit, permittees must demonstrate compliance with:

- All conditions imposed here.
- All applicable development standards, unless specifically exempted as part of this land use review.
- All requirements of the building code.
- All provisions of the Municipal Code of the City of Portland, and all other applicable ordinances, provisions and regulations of the city.

EXHIBITS (NOT ATTACHED UNLESS INDICATED):

- A. Applicant's Statement
 - 1. Application and original narrative and plan
 - 2. Supplemental information, revised narrative, plans and drawings, February 12, 2015
 - 3. Memo from applicant, March 12, 2015
 - 4. Email exchanges with applicant, with various requests to provide time extensions and consider various options.
- B. Zoning Map (attached)
- C. Plans/Drawings:
 - 1. Site Plan
 - 2. Elevation drawings
 - 3. Revised Site Plan (attached)
 - 4. Revised Elevation drawings (attached)
- D. Notification information:
 - 1. Mailing list
 - 2. Mailed notice
- E. Agency Responses:
 - 1. Water Bureau
 - 2. Site Development Review Section of BDS
 - 3. Bureau of City Service Agency responses, including Bureau of Environmental Services, Bureau of Transportation Engineering and Development Review, Fire Bureau, Life Safety Plan Review Section of BDS, Bureau of Parks, Forestry Division
- F. Correspondence:
 - 1. Tony Merrithew
 - 2. Pictures of structure sent by Tony Merrithew
 - 3. Mary Hennrich
- G. Other:
 - 1. Letter from Kathleen Stokes to Carrie Richter, February 2, 2015
- H. Appeal
 - 1. Appeal Submittal
 - 2. Appealed Decision
 - 3. Notice of Appeal
 - 4. Notice of Appeal Mailing list
 - 5. Adjustment Committee Packet Memo
(Received During Hearing)
 - 6. Applicant/Appellant Power Point presentation
 - 7. Bureau of Development Services staff Power Point presentation
 - 8. Mary Hennrich email, July 7, 2015
 - 9. Carrie Richter letter, July 7, 2015
 - 10. Tony Merrithew pictures, July 7, 2015

K.Stokes, July 15, 2015



ZONING



Site



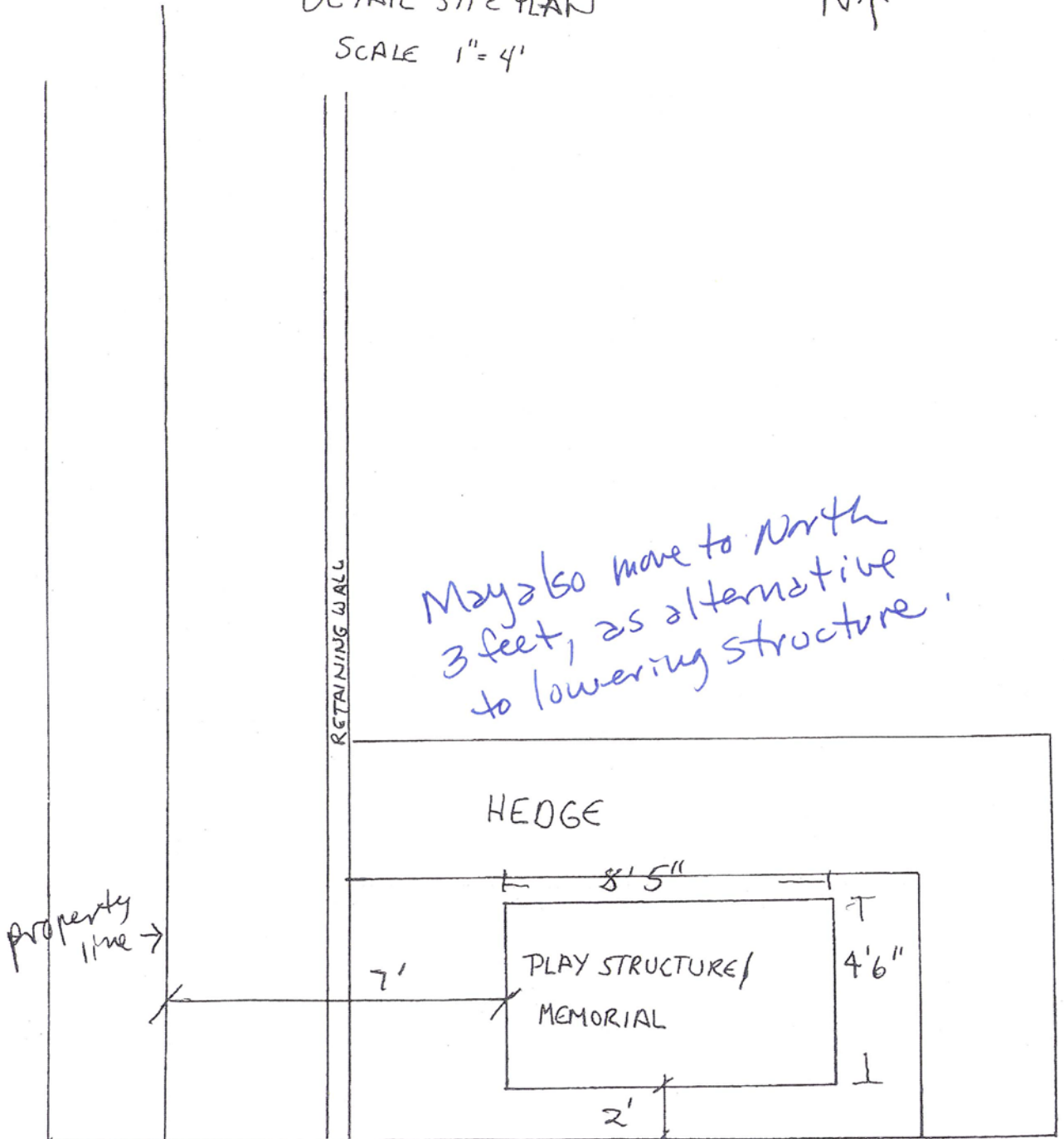
NORTH

File No. LU 15-106542 AD
 1/4 Section 3137,3138
 Scale 1 inch = 200 feet
 State_Id 1S2E05BD 500
 Exhibit B (Jan 21,2015)

1151 SE 72ND AVE
DETAIL SITE PLAN
SCALE 1" = 4'



SE
71ST



May also move to North
3 feet, as alternative
to lowering structure.

Reduced setbacks
approved with conditions
to gain zoning permit
and lower structure
coverall and also deck/platform
by 2.5 feet

ADJACENT
STORAGE / GARAGE
STRUCTURE

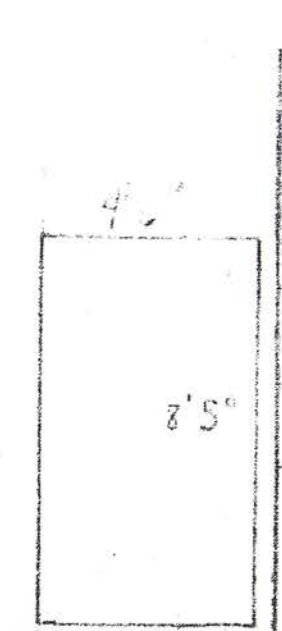
Not to Scale

Exhibit
C-3
(replaces
C-1)

LU 15-106542 AD

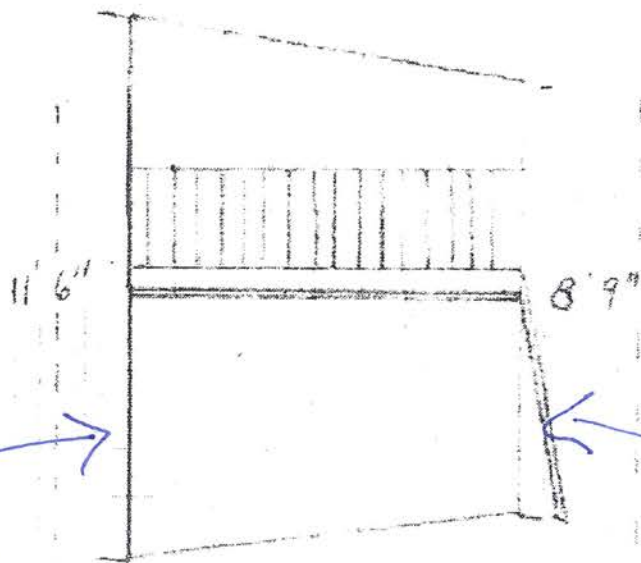
May also move 3 feet to North
as an alternative
to lowering
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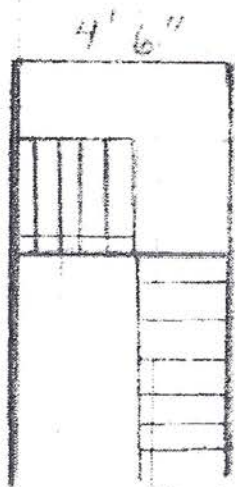
HEDGE

3' 6"



SOUTH ELEVATION

Reduce
height
of overall
structure
and of
platform
by 2.5 feet



EAST
ELEVATION

8' 9"

lower
overall
structure
by 2.5 feet
also, lower platform
by 2.5 feet

Exhibit C-4 (replaces
C-2)

LU 15-106542 AD