



Hearings Office

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DECISION OF THE HEARINGS OFFICER ON APPEAL OF ADMINISTRATIVE DECISION

I. GENERAL INFORMATION

File Number: LU 17-245578 LDP AD, Type IIx (Hearings Office 4200015)

Applicant(s): Eric Rystadt Main Street Development 5331 SW Macadam Avenue
Suite 258 PMB 208 Portland, Oregon 97239

Owner(s): Burlingame View Condominium 1015 SW Bertha Boulevard
Portland, Oregon 97219

Owner's Representative(s): Sara Vatay , Unit Owners of the Burlingame View Condominiums
PO Box 28174 Portland, Oregon 97228

Other: Mark Dane, Mark Dane Planning 14631 SW Millikan Way
#6 Beaverton, Oregon 97003

Hearings Officer: Kathryn Beaumont

Bureau of Development Services (BDS) Staff Representative: Sean Williams

Site Address: 1015 SW Bertha Blvd, SW 13th Dr

Legal Description: BLOCK 4 LOT 11-14 TL 3400, BARBUR HTS; GENERAL COMMON
ELEMENTS, BURLINGAME VIEW CONDOMINIUM

Tax Account No.: R054500990, R119480010

State ID No.: 1S1E21AC 03400, 1S1E21AC 90000

Quarter Section: 3728

Neighborhood: Hillsdale, contact at contact@hna-pdx.com

Business District: None

District Coalition: Southwest Neighborhoods Inc., contact Sylvia Bogert at 503-823-4592.

Other Designations: Potential Landslide Hazard

Zoning: Residential 2,000 (R2)

Land Use Review: Type IIX, Land Division Partition (LDP), Adjustment Review (AD)

BDS Administrative Decision: Approval

Appellants: Hillsdale Neighborhood Association, Janet and Mark Zimmerdahl, Tatiana Lifshitz, Jonas and Nancy Nordwall, Gail and Dan Stiffler, and other individual neighbors

Public Hearing: The appeal hearing was opened at 9:00 a.m. on September 9, 2020, via in the third floor hearing room, 1900 SW 4th Avenue, Portland, Oregon, and was closed at 11:54 a.m. Before the conclusion of the hearing, one of the Appellants, Tatiana Lifshitz, requested to hold the record open for an additional seven days. The record was held open for the submission of additional information until 4:00 p.m. on September 16, 2020, for rebuttal to this new information until 4:00 p.m. on September 23, 2020, and until 4:00 p.m. on September 30, 2020 for the Applicant's final written argument. The record was closed at 4:00 p.m. on September 30, 2020.

All documents submitted during the open-record period were timely and are accepted as part of the record.

Testified at the Hearing:

Sean Williams
Kevin Wells
Emma Kohlsmith
Mark Dane
Glenn Bridger
Tatiana Lifshitz
Gail Stiffler
Mark Zimmerdahl
Janet Zimmerdahl

II. ANALYSIS

A. General Information

The Applicant proposes to partition the site into two parcels and seeks approval of three adjustments to develop Parcel 2 with nine condominium units consisting of three buildings each containing three units. Parcel 1 is currently developed with 42 condominium units contained in four structures and no change to that development is proposed.

The Bureau of Development Service's Decision (BDS Decision) further describes the Applicant's proposal, relevant approval criteria, site and vicinity, relevant infrastructure, zoning, land use history, agency review, and neighborhood review as follows:

Proposal: "The applicant has proposed to partition the site into two parcels of approximately 91,040 (Parcel 1) and 18,295 (Parcel 2) square feet in size. Parcel 1 will retain an existing condominium development and Parcel 2 is proposed to be developed with 9 dwelling units. The following three concurrent Adjustment reviews are requested:

- Reduction in minimum lot depth for Parcel 2 from 70 to approximately 40-feet (33.612.200 & Table 612-1);
- Reduction in front building setback for proposed development on Parcel 2 from 10 to 5-feet (33.120.220 & Table 120-3);
- Reduction in garage entrance setback for proposed development on Parcel 2 from 18 to 5-feet (33.120.220 & Table 120-3).

For purposes of State Law, this land division is considered a partition. To partition land is to divide an area or tract of land into two or three parcels within a calendar year (See ORS 92.010). ORS 92.010 defines "parcel" as a single unit of land created by a partition of land. The applicant's proposal is to create 2 units of land (2 parcels). Therefore, this land division is considered a partition.

This partition proposal is reviewed through a Type IIx procedure because: (1) the site is in a residential zone; (2) two or three lots are proposed; (3) the site is located within a Potential Landslide Hazard Area and (4) concurrent Adjustment reviews are proposed/required (see 33.660.110)."

Approval Criteria: "In order to be approved, this proposal must comply with the approval criteria of *Title 33*. The relevant criteria are:

- Section 33.660.120, Approval Criteria for Land Divisions in Open Space, and Residential Zones
- Section 33.805.040.A-F, Approval criteria for Adjustments"

Site and Vicinity: "The site is approximately 150-foot northwest of the intersection of SW Bertha Boulevard and SW Barbur Boulevard. Existing development consists of the Burlingame

View Condominiums, which is comprised of 42-units within 4 separate buildings and accessory parking. The site steeply slopes downward from north to south with grade differences as much as 90-feet between the site's SW 13th Drive and SW Bertha Boulevard frontages. The surrounding neighborhood is primarily developed with single family homes to the north, with a mix of multi-dwelling and commercial development along SW Barbur Boulevard to the south."

Infrastructure:

- **"Streets** – The site has approximately 675-feet of frontage on SW 13th Drive, 240-feet of frontage on SW 10th Avenue, and 575-feet of frontage on SW Bertha Boulevard. There is one driveway entering the site from SW Bertha Boulevard that serves the existing condominium development. At this location, SW Bertha Boulevard is classified as a District Collector, Transit Access Street, City Bikeway, City Walkway, Truck Access Street, and Major Emergency Response street in the Transportation System Plan (TSP). Both SW 10th and 13th Avenues are classified as Local Service Streets for all modes in the TSP. Tri-Met provides transit service along SW Bertha Boulevard via Bus #1.

The sites SW Bertha Boulevard frontage is improved with an approximately 45-foot wide roadway surface (with bike lanes) and 6-foot curb tight sidewalk within a 100-foot wide right-of-way. The sites SW 13th Drive frontage is improved with a 30-foot roadway surface and curb within a 50-foot wide right-of-way. SW 10th Avenue is an unimproved 30-foot wide right-of-way at this location."

- **"Water Service** – There is an existing 6-inch CI water main in SW 13th Drive and an 8-inch CI water main in SW Bertha Boulevard. The existing development is served by both water mains."
- **"Sanitary Service** - According to available GIS data, the following sewer infrastructure is located in the vicinity of the project site:
 - Public 8-inch CSP sanitary-only sewer in SW 13th Drive (BES as-built # 2170).
 - Public 15-inch CSP sanitary-only sewer in SW Bertha Boulevard (BES as-built #1834).
 - Public 8-inch sanitary-only sewer of varying materials location on the Burlingame View Condominium portion of this site (BES as-built #2306)."
- **"Stormwater Disposal** – According to available GIS data, the following stormwater infrastructure is located in the vicinity of the project site:
 - Public 12-inch CSP storm-only sewer in SW 13th Drive (BES as-built # 2170).

- Public 10-inch NCP storm-only sewer in SW Bertha Boulevard (BES as-built #4418)."

Zoning: "The R2 designation is one of the City's multi-dwelling zones which is intended to create and maintain higher density residential neighborhoods. The zone implements the comprehensive plan policies and designations for multi-dwelling housing."

The site is currently zoned Residential Multi-Dwelling 1 (RM1) but is vested under the R2 zoning as that was the designation at time of application submittal."

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

Agency Review: "Several Bureaus have responded to this proposal and relevant comments are addressed under the applicable approval criteria. Exhibits "E" contain the complete responses."

Neighborhood Review: "A Notice of Proposal in Your Neighborhood was mailed on December 19, 2017 and October 16, 2019. Multiple written responses (Exhibits F.1-6) have been received from the Neighborhood Association or notified property owners regarding the proposal. The applicant has provided a response to the Neighborhood Association Letter (Exhibit A.13)." Written comments were also submitted before and at the public hearing. The Appellants and neighbors submitted additional written comments during the open-record period after the hearing (Exhibits H-5 - H-20) The Applicant also submitted additional written responses to these comments and hearing testimony following the hearing. (Exhibits H-21 - H-25)

B. Findings - Preliminary Issue

Before addressing the substantive approval criteria applicable to this proposal, it is appropriate to address an issue the Appellants raised concerning the timeliness and changes to the Applicant's proposal over the course of this land use review. The Applicant initially sought approval of a partition to divide the site into two parcels for the purpose of developing seven single-family condominium units on Parcel 2. This application was filed in late 2017. BDS responded with a letter describing numerous incomplete items in the application, including the need to include requests for adjustments for the proposed development. Over time and with some lapses, the Applicant supplied the missing information. According to BDS staff and Applicant testimony at the hearing, the Applicant spent at least some of this time working with BDS and other city bureau staff to modify its proposal into a form that BDS could approve. The Applicant ultimately revised the proposal to its current form: a two-parcel partition with three adjustments to develop nine condominium units in three buildings on Parcel 2.

The Appellants suggest BDS denied the initial application and should treat the revised proposal as a new application. Additionally, the Appellants argue this proposal should be denied because the review time exceeds the statutory 365-day limit for making a final decision. They also assert it's unfair that the Applicant worked with BDS and modified its proposal without informing the neighborhood of the ongoing discussions and changes. In the Appellants' view, other reasons for treating the revised proposal as a new application include changes in the site's ownership and proposed parcel sizes over the course of this land use review.

While the Appellants' frustrations with this lengthy land use review are evident, their arguments offer no basis for denying the Applicant's proposal. BDS staff testified at the hearing that BDS issued no prior decision denying the proposal. At most, staff informed the Applicant his proposal could not be approved unless additional information was submitted and the proposal was modified. (See Exhibit E-5) However, the only decision BDS issued is the administrative decision under review here. Based on this testimony and the absence of contrary evidence, I find there has been only one decision made on this application: appealed decision before me.

Revisions to a land use application are permissible and common, including changes of property ownership. They do not transform an initial application into a new application as long as the application stays "fundamentally intact." *Welch v. Yamhill County*, 56 Or LUBA 166 (2008); *Corbett/Terwilliger/Lair Hill Neighborhood Association v. City of Portland*, 25 Or LUBA 601 (1993). I find the application before me meets this standard. The Applicant has consistently sought approval of a two-parcel partition for the purpose of developing condominium units on Parcel 2. The sizes of the two parcels have been adjusted over the course of this review with an ultimate decrease in Parcel 1 and increase in Parcel 2. These changes are not so significant, however, as to render the partition proposal a completely new application.

The primary change over the process of this review has been the number and configuration of the proposed condominium units on Parcel 2: from seven detached single family units to nine units configured into three buildings containing three units each. In part, this change was made in response to geotechnical and storm drainage concerns. Additionally, the Applicant modified its proposal to include the adjustment requests in response to BDS's identification of missing information and necessary additional land use reviews. The Applicant also testified these revisions were intended to mollify neighborhood concerns about the proposal as originally envisioned. Based on the evidence in the record, I find this application as modified has remained a fundamentally intact application for a two-parcel partition and associated adjustments to develop multiple condominium units on Parcel 2.

The fact that the review time for this proposal exceeds the statutory 365-day time limit is not fatal to the Applicant's proposal. The Applicant has consistently extended and ultimately waived this time limit in its entirety. (See Exhibit A-16) Where an applicant waives the time

limit and continues on with a land use review past the 365-day time limit, a city decision issued after that time limit is not invalid or void. *Davis v. Polk County*, 58 Or LUBA 1 (2008). This is also true if an applicant waives its right to seek mandamus review for exceeding the statutory timeline, as appears to be the case here. *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011). Accordingly, there is no basis for denying or voiding the Applicant's proposal because the city's review time for this land use application exceeded the statutory time limit.

Finally, the Applicant's discussions with city staff over time about its proposal and responsive modifications are not impermissible. Understandably, this places a responsibility and burden on neighbors interested in this application to check-in with BDS staff and periodically review the file. However, neighbors and other interested persons were notified of the original and revised proposal and provided an opportunity to comment as required by the zoning code--both to BDS before it issued the BDS Decision and before, during, and after the appeal hearing in this matter. This is all the code requires. While more voluntary updates from the Applicant might have reduced neighbor frustrations and eased perceptions of mistrust the Appellants conveyed at the appeal hearing, their absence offers no basis to deny this application.

This proposal has posed challenges for both the Applicant and the Appellants. Parcel 1 comprises the bulk of the site and is developed with condominium units. Parcel 2 is much smaller and potential development is constrained by the shallow depth of this parcel, topography, stormwater disposal, and the existing development on Parcel 1. As the record reveals, the Applicant's efforts to garner approval of this proposal by various city bureaus resulted in a series of changes over time. Numerous revised and updated reports from the Applicant's geotechnical engineer, stormwater consultant, and arborist were submitted during the review process. Unfortunately, some of the updated reports repeat information from earlier reports--and sometimes inconsistencies--which has made it difficult for city staff, neighbors, and decision makers to detect the changes from report to report. It also means that piecing together all of the information that addresses the approval criteria requires identifying the relevant portion(s) of different documents. It would have been helpful if the Applicant had presented one final, complete, understandable narrative document that addressed all of the applicable approval criteria in one place.

For the Appellants, any development of Parcel 2, including the Applicant's proposal, necessarily represents a change to what has been a vacant piece of land for years. It will affect what neighbors see and experience on SW 13th Drive. It will add more people and cars. The likelihood that this parcel will remain undeveloped forever is slim, as the Applicant's representative indicated in his testimony. It is equally unlikely the Appellants will be able to forestall any and all future development of this site. Given the former R2 zoning and the current RM1 zoning, any future development may well consist of a different housing type than the single family homes located across the street from the site. The Applicant's proposal

addressed in this review challenges neighbors and the Appellants to acknowledge the reality that Parcel 2 is unlikely to remain a vacant site forever.

C. Findings - Partition into Two Parcels

The Applicant's proposal to partition the site into two parcels is integrally related to and dependent on the specific 9-unit condominium development proposed for Parcel 2. The Applicant relies on this Parcel 2 development configuration, accompanying easements, "exchange parcels," and lot line refinements to demonstrate compliance with the approval criteria in PCC 33.660.120. The Parcel 2 development also depends on approval of the requested lot depth and setback adjustments. This makes it virtually impossible to evaluate the partition request for compliance with the criteria in 33.660.120 independent of this development.

As discussed below in Section D, I find the Applicant and the BDS Decision fail to demonstrate the Applicant has complied fully with the approval criteria in PCC Chapter 33.805 for the requested adjustments. Since the partition request depends on the specific development proposed for Parcel 2 and these adjustments, I find Applicant's proposal to partition the site into two parcels cannot independently satisfy the applicable approval criteria in PCC 33.660.120 absent that development proposal.

For simplicity in this decision, I adopt and incorporate some discussion of the approval criteria that appears in the BDS Decision. Where I have done so, this discussion is set out in quotation marks (" "). I also include supplemental findings below that address issues the Appellants raised pertaining to several key approval criteria.

1. PCC 33.660.120 - Inapplicable Approval Criteria

"Due to the specific location of this site, and the nature of the proposal, some of the criteria are not applicable. The following table summarizes the criteria that are not applicable. Applicable criteria are addressed below the table." The table below is incorporated exactly as it appears at pages 3-4 of the BDS Decision.

| Criterion | Code Chapter/Section and Topic | Findings: Not applicable because: |
|-----------|----------------------------------------------------|--------------------------------------------------------------------------------------------|
| C | 33.631 - Flood Hazard Area | The site is not within the flood hazard area. |
| E | 33.633 - Phased Land Division or Staged Final Plat | Not applicable. These standards only apply to land divisions in the RF through R2.5 zones. |
| F | 33.634 - Recreation Area | The site is currently developed with over 40 units, only 9 units are proposed. |

| | | |
|---|--------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
| H | 33.636 - Tracts and Easements | No tracts or easements have been proposed or will be required. |
| I | 33.639 - Solar Access | The proposed development is for something other than single-dwelling detached homes. |
| J | 33.640 - Streams, Springs, Seeps and Wetlands | No streams, springs, seeps or wetlands are evident on the site. |
| L | 33.654.110.B.2 - Dead end streets | No dead end streets are proposed. |
| | 33.654.110.B.3 - Pedestrian connections in the I zones | The site is not located within an I zone. |
| | 33.654.110.B.4 - Alleys in all zones | No alleys are proposed or required |
| | 33.654.120.C.3.c - Turnarounds | No turnarounds are proposed or required |
| | 33.654.120.D - Common Greens | No common greens are proposed or required |
| | 33.654.120.E - Pedestrian Connections | There are no pedestrian connections proposed or required |
| | 33.654.120.F - Alleys | No alleys are proposed or required |
| | 33.654.120.G - Shared Courts | No shared courts are proposed or required |
| | 33.654.130.B - Existing public dead-end streets and pedestrian connections | No public dead-end streets or pedestrian connections exist that must be extended onto the site. |
| | 33.654.130.C - Future extension of dead-end streets and pedestrian connections | No dead-end street or pedestrian connections are proposed or required. |
| | 33.654.130.D - Partial rights-of-way | No partial public streets are proposed or required. |

2. PCC 33.660.120.A - Lots

Subsection A requires the Applicant to meet the standards and approval criteria PCC Chapters 33.605 through 33.612. The density and lot dimension requirements applicable to the R2 zone and the proposed two multi-dwelling parcels are contained in PCC Chapter 33.612, as the BDS Decision describes below.

"Minimum density in the R2 zone is one unit per 2,500 square feet and the maximum density is one unit per 2,000 square feet. The total site area shown on the applicant's survey is approximately 109,303 square feet. Therefore, the site has a minimum required density of 44 units and a maximum allowed density of 55 units.

When development other than single-dwelling or duplex development is proposed, minimum and maximum density must generally be met at the time of development. However, since the site has existing development, density must be verified at the time of the land division as well.

The applicant is proposing to develop Parcel 2 with 9 units and the existing 42-units will be retained within Parcel 1, for a total of 51 units, which complies with the density standards described above.

The required and proposed lot dimensions are shown in the following table:

| R2 | Minimum lot area (square feet) | Minimum lot width (feet) | Minimum lot depth (feet) | Minimum front lot line (feet) |
|-----------------------|--------------------------------|--------------------------|--------------------------|-------------------------------|
| Multi Dwelling | 4,000 | 33 | 70 | 30 |
| Parcel 1 | 91,008 | ≈ 321 | ≈ 300 | 550 |
| Parcel 2 | 18,295 | ≈ 440 | ≈ 40 | 436 |

* Width and depth is measured from the midpoints of opposite lot lines.

The applicant has requested an Adjustment to the minimum lot depth of Parcel 2 from 70 to approximately 40-feet, as addressed later in this report. As shown above, the applicable density standards are met."

The lot depth standard can be met only with approval of the requested adjustment to the minimum lot depth from 70 feet to approximately 40 feet. As discussed in Section D, the Applicant has not met the approval criteria for this adjustment. Without this adjustment, the Applicant's partition does not meet the lot dimension requirements and fails to satisfy Criterion A.

3. PCC 33.660.120.B - Trees

Criterion B requires an applicant to comply with the minimum standards and approval criteria in PCC Chapter 33.630. The BDS Decision describes these as follows:

" The regulations of Chapter 33.630 require that trees be considered early in the design process with the goal of preserving high value trees and, when necessary, mitigating for the loss of trees.

To satisfy these requirements, the applicant must provide a tree plan that demonstrates, to the greatest extent practicable, the trees to be preserved provide the greatest environmental and aesthetic benefits for the site and the surrounding area. The tree plan must also show that trees are suitable for preservation, considering the health and condition of the tree and development impacts anticipated. Tree preservation must be maximized, to the extent practicable, while allowing for reasonable development considering the intensity of development allowed in the zone and site constraints, including existing utility easements and requirements for services and streets.

Trees that are healthy, native and non-nuisance species, 20 or more inches in diameter and in tree groves are the highest priority for preservation. Additional considerations include trees that are slower growing native species, buffering natural resources, preventing erosion and slope destabilization and limiting impacts on adjacent sites.

Some trees are exempt from the requirements of this chapter, if they are unhealthy, a nuisance species, within 10 feet of a building to remain on the site, within an existing right-of-way, or within an environmental zone.

In order to identify which trees are subject to these requirements, the applicant provided an Existing Conditions survey (that shows the location and size of trees on the site). The applicant also provided an arborist report that identifies each tree, its condition and suitability for preservation or its exempt status.

The Applicant has addressed Criterion B in terms of the 9-unit condominium development proposed for Parcel 2. As required, the Applicant submitted an original and revised arborist's report that describes the total trees on the site, including trees to be removed and trees to remain to accommodate this development. Based on this information, 125 trees, which provide a total of 1,474 inches of tree diameter, are subject to the preservation requirements of this chapter. Of these trees, 31 are 20 or more inches in diameter. The applicant has proposed to retain 1,415 inches, or approximately 96 percent, of the total tree diameter on site and all of the trees that are 20 or more inches in diameter." According to BDS, "a majority of the trees on site are being preserved with removal only occurring in the area of Parcel 2 to accommodate reasonable development of the proposed multi-dwelling structures."

Since the Applicant addressed Criterion B anticipating the specific development proposed on Parcel 2, there is nothing in the record that indicates how the Applicant would comply with this criterion in the absence of this development. That is, whether the Applicant would propose to save or remove trees if the partition alone is approved is unclear. It is possible the Applicant might retain all existing trees, remove the same trees, or propose additional tree removal on either or both parcels. There is nothing in the record to indicate what the Applicant would choose to do. There is additional lack of clarity because the BDS Decision states the Applicant is complying with Option 1 standard in PCC 33.630.100 and the

Applicant's materials state compliance is based on the lower tree-preservation Option 3 standard. (Compare Exhibits H-3 and H-5)

The Appellants and neighbors also questioned the accuracy of the arborists' report and the Applicant's statements concerning tree preservation and removal. They asserted some trees counted on Parcel 1 had actually been removed in response to a water line break and had never been replaced as required. (Exhibits H-9, H-10, H-11, H-19) They asserted other trees that were counted are no longer alive or existing. While not entirely clear, the Applicant's response to these assertions appears to indicate their arborist's tree count is accurate but also relies on assumptions and states field verification is needed to be certain. This response also deflects responsibility for replacing the trees neighbors identified as removed to the contractor hired to cut them down. (Exhibits H-23 - H-25)

Simply stated, compliance with Criterion B is based on the specific 9-unit condominium development proposed for Parcel 2. The applicant has failed to meet the adjustment approval criteria for that development for the reasons discussed in Section D below. Absent that development, the Applicant has not discussed how the tree preservation standards in PCC Chapter 33.630 would be independently satisfied. Accordingly, I find the Applicant's partition approval does not satisfy Criterion B.

4. PCC 33.660.120.D - Potential Landslide Hazard Area

For any site that is partially or wholly within a Potential Landslide Hazard Area, Criterion D requires an applicant to demonstrate compliance with the approval criterion in PCC Chapter 33.632. That criterion requires an applicant to show that lots, services, and utilities will be located on "parts of the site that are suitable for development" and "in a manner that reasonably limits the risk of a landslide affecting the site, adjacent sites, and sites directly across a street or alley from the site." (PCC 33.632.100)

As the BDS Decision explains: "The entire site is located within the Potential Landslide Hazard Area. The approval criteria state that the lots, buildings, services, and utilities must be located on parts of the site that are suitable for development in a manner that reasonably limits the risk of a landslide affecting the site, adjacent sites, and sites directly across a street or alley from the site.

In order to evaluate the proposal against this criterion, the applicant has submitted a Landslide Hazard Study of the site and proposed land division, prepared by a Certified Engineering Geologist and a Geotechnical Engineer (Exhibit A.1). This report noted less than optimal slope stability and recommended various strategies to mitigate for these instabilities. To address these concerns, numerous reports have been submitted to support the proposed development."

As the record indicates and BDS geotechnical engineering staff testified, the Applicant's initial geotechnical reports identified steep slopes, potential slope instability, and difficulty with developing the site. (Exhibit E-5) Working with BDS staff and its own experts, the Applicant's revised geotechnical reports concluded Criterion D could be satisfied only if substantial recommendations were followed and strictly adhered to during development of the proposed condominium project on Parcel 2. (Exhibits A-1, A-3, A-5, A-11, A-18) As with other approval criteria in PCC 33.660.120, the Applicant and its experts analyzed compliance with Criterion D in terms of the specific 9-unit condominium development proposed. The BDS Decision makes this clear and adopts the following statements by the Applicant's geotechnical engineer's as its findings:

"The EEI Report No. 17-184-5, 12/27/19 (Exhibit A.18) indicates that the site is suitable for development and the proposal reasonably limit the risk of landslide potential on the site and other properties in the vicinity, as summarized below:

The layout of the buildings has changed from 7 separate condominium buildings to a total of 9 condominiums in three, 3-unit buildings. In terms of the lot layout, the overall lot coverage of the development remains generally the same. As stated above the layout has changed from 7 individual units to 9 total units in three 3unit buildings. The setbacks from 13th have not changed and remain about 15 feet from the curb line (at its closest). However, the change in configuration has resulted in larger gaps between the buildings with the addition of stormwater planters at the top of the slopes between the gaps. The new configuration (Figure 2) exposes more of the slope to potential slope instability between the buildings due to the larger gaps. EEI recommends that in order to mitigate this potential that the front (north) retaining wall extend not only under the buildings but across the gaps as well and that the entire slope within the development envelope (i.e. including between buildings) be benched (the same as in front of the buildings) and lightweight fill placed behind said wall. This not only improves the slope stability in the building area but improves the slope stability (over the existing slope stability) across the entire development."

BDS Site Development staff agreed and noted that the condominium structures could be occupied only after "significant structural" construction, stabilizing and mitigating structures (retaining walls), and drainage facilities are complete. (Exhibit H-3)

The Appellants and neighbors expressed concern about the geotechnical stability of the site, noting the site's steep slopes, a 1995 landslide on Parcel 1, the sinking curb and "alligator cracking" in SW 13th adjacent to the site, the nearby Oatfield Fault line, and inconsistencies in the Applicant's geotechnical reports. Although the Appellants submitted no geotechnical expert testimony or report, the Applicant's geotechnical expert noted that existing conditions on the site and Parcel 2 are unsuitable for building development based on slope stability

concerns. (Exhibit A-5) The Appellant testified that SW 13th Avenue adjacent to the site was built on improperly compacted fill, which may have contributed to the alligator cracking and sinking curb.

The evidence in the record ties compliance with Criterion D to the 9-unit condominium development on Parcel 2 the Applicant has proposed. That development is dependent on the requested lot depth and setback adjustments, which, as explained in Section D below, do not satisfy the approval criteria for adjustments in PCC Chapter 33.805. With the requested adjustments, the Applicant's proposal appears able to address slope stability concerns and satisfy Criterion D if the geotechnical recommendations and conditions of approval BDS staff proposed are followed stringently. Without the adjustments, the development on Parcel 2 cannot be approved and there is nothing in the record that addresses how the partition satisfies Criterion D independent of this development. For this reason, I find the Applicant's proposal fails to satisfy this criterion.

5. PCC 33.660.120.G - Clearing, Grading and Land Suitability

Under this criterion, a land division can be approved if it complies with the approval criteria in PCC 33.635. The BDS Decision describes the purpose of these criteria as follows:

"The regulations of Chapter 33.635 ensure that the proposed clearing and grading is reasonable given the infrastructure needs, site conditions, tree preservation requirements, and limit the impacts of erosion and sedimentation to help protect water quality and aquatic habitat.

Additionally, where geologic conditions or historic uses of the site indicate that a hazard may exist, the applicant must show that the proposed land division will result in lots that are suitable for development. The applicant may be required to make specific improvements to make the lots suitable for their intended uses and the provision of services and utilities."

The zoning code requires a Clearing and Grading Plan to be submitted as part of a land division application. (PCC 33.730.060.D.1.d(4)). The approval criteria in PCC 33.635.100 reflect the relevance of this requirement. They require an applicant to show that clearing and grading "is sufficient for construction of development shown on the Preliminary Clearing and Grading Plan," is "limited to areas of the site that are reasonably necessary for construction of development on the Preliminary Clearing and Grading Plan," and disturbance limits and tree protection measures "shown on the Preliminary Clearing and Grading Plan" are adequate to protect trees to be retained on the site. (33.635.100.B, C, F) Other criteria require an applicant to show proposed development will leave intact existing contours and drainage patterns to the extent practicable, topsoil will be preserved onsite as practicable for later use in grading, and soil stockpiles will be kept onsite in areas designated for clearing and grading as much as is practicable. (PCC 33.635.100.A, D, and E)

Clearing and Grading. Despite the steep slopes (more than 20%) on the Applicant's site, the Applicant chose not to submit a Clearing and Grading Plan. Instead, the Applicant relied on its geotechnical reports (collectively described in the BDS Decision as a Landslide Hazard Report) to demonstrate compliance with Criterion G. That is permissible as long as the information in that report contains the information necessary to comply with Criterion G, which BDS determined it did.

Like its response to the Potential Landslide Hazard Area criterion, the Applicant's documents analyzing compliance with Criterion G are all phrased in terms of the specific nine-unit condominium development proposed for Parcel 2. That is they address how clearing, grading, excavation, construction of retaining walls, placement of fill, and storm drainage disposition will occur for *that particular development*. (Exhibits A-1,A-5, A-9)

While BDS found and I agree that the two-parcel partition with the condominium development appears to satisfy Criterion G, that conclusion is also dependent on three adjustments that do not meet the approval criteria in PCC Chapter 33.805. Without the adjustments for the proposed nine-unit condominium development, there is no other development proposed for Parcel 2 that addresses the criteria in PCC 33.635.100. In short, there is nothing else in the record that allows me to conclude the proposed partition independently satisfies Criterion G and I find the Applicant has not satisfied this criterion.

Land Suitability. The land suitability criterion in PCC 33.635.200 requires that where, as here, geologic conditions indicate a hazard may exist, the Applicant must show "the proposed land division will result in lots that are suitable for development." The BDS Decision relied on the findings addressing the Potential Landslide Hazard criterion (PCC 33.660.120.D and PCC 33.632.100) to conclude the Applicant's proposal satisfies the criterion in PCC 33.635.200. Again, I agree that if the adjustments for the 9-unit condominium development on Parcel 2 were approvable, the Applicant's proposal would satisfy this criterion. As explained in Section D, the adjustments fail to satisfy the approval criteria in PCC Chapter 33.805 and there is no other development proposed for Parcel 2 that will result in "lots that are suitable for development." Accordingly, I find the Applicant's proposal fails to satisfy the land suitability criterion in PCC 33.635.200.

6. PCC 33.660.120.K - Transportation Impacts

This criterion requires an applicant to show the approval criteria in PCC Chapter 33.641 are satisfied. To comply with PCC 33.641.020.A, the Applicant must show the transportation system is "capable of supporting the proposed development in addition to the existing uses." This code section lists numerous factors to be evaluated in determining compliance with this criterion, including "safety, street capacity, level of service, on-street parking impacts, availability of transit, neighborhood impacts, and safety for all modes." BDS and the City's Bureau of Transportation (PBOT) did not require the Applicant to submit a

transportation impact study and PBOT's comments on this proposal are the only expert information addressing this approval criterion.

The BDS Decision quotes PBOT's comments on the Applicant's proposal and relies on them as the principal findings demonstrating compliance with PCC 33.641.020.A as follows:

"Street Capacity and Levels of Service

The proposal will result in an increase of 9 multi-family condo residences. These residences can be expected to generate 90 daily vehicle trips with 9 trips occurring in each of the AM and PM Peak Hours. This small increase in peak hour vehicles will not have significant impact on intersection levels of service or street capacity. No mitigation is needed. In addition, the applicant is not constructing more dwelling units than they would be allowed outright with a building permit based on the R2 zoning.

Vehicle Access/Loading

The new lots will have driveways to provide access to parking and loading.

On-Street Parking Impacts

The new lots will have at least two on-site parking spaces and one on-street parking space between the driveways. Impacts to the on-street parking supply should be minimal.

Availability of Transit

Tri Met Bus Line #12 and #94 are available to serve the site at SW Barbur/SW Bertha.

Neighborhood Impacts

The site is being developed with net increase of 9 new single-family residences in compliance with the existing R2. zoning. In addition, standard frontage improvements including sidewalks will reduce the potential for conflicts between pedestrians and vehicles.

Safety for All Modes

New sidewalks along the site frontage will provide adequate pedestrian facilities. This section of SW 13th has low enough vehicle/speed volumes for cyclist to share the roadway."

PBOT's comments focused primarily on its technical standards and requirements for evaluating the transportation system in the vicinity of the Applicant's proposed development. (Exhibit E-2) PBOT's analysis of necessary transportation elements, including approval of two Public Works Alternative Reviews for street improvements, was also based on the difficulty of meeting the city's right-of-way requirements and fitting the Applicant's proposed development on the steeply sloped Parcel 2. (Exhibit E.2)

In response, the Appellants and neighbors argued the Applicant's development proposal will create safety hazards for pedestrians, emergency vehicles, and other drivers. They testified about high schoolers using SW 12th and 13th as a shortcut to and from Wilson High School and speeding up and down these streets. Pointing to the number of new residents in the Applicant's proposed development and the Applicant's request to reduce the garage setback from 18 feet to 5 feet, the Appellants argued more cars will park on the street and across the new sidewalk the Applicant proposes to build in front of the new development. In their view, this will create a safety hazard for pedestrians, emergency vehicles trying to navigate between rows of parked cars on this narrow street, and other drivers trying to pass each other as they drive on SW 13th. While this testimony has some relevance here, it is most relevant to the Applicant's requested garage setback adjustment and will be addressed in Section D below.

Like BDS's and the Applicant's analysis of other approval criteria, PBOT's findings of compliance with PCC 33.660.120.K and PCC 33.641.020.A focus on the Applicant's proposed 9-unit condominium development on Parcel 2 and its specific features like garages, driveways, and potential on-street parking spaces. As explained above, that development is dependent on obtaining approval of the three adjustments the Applicant has requested and, as explained in Section D below, those adjustment requests fail to comply with the approval criteria in PCC 33.805.040. Without these adjustments, there is only the partition request and no other development proposal to analyze for compliance with Criterion K. As I have with the approval criteria discussed above, I find the Applicant's proposal does not comply with this criterion.

7. PCC 33.660.120.L - Services and Utilities

To comply with this Criterion L, the Applicant must demonstrate that his proposal meets "[t]he regulations and criteria of Chapters 33.651 through 33.655." As the BDS Decision explains, "Chapters 33.651 through 33.654 address water service standards, sanitary sewer disposal standards, stormwater management, utilities and rights of way." The BDS Decision includes a table addressing each of the infrastructure criteria as the findings showing the Applicant's proposal satisfies each criterion.

The BDS Decision and relevant city bureau responses indicate that water, sanitary sewer, and other utilities (telephone, cable, natural gas, and electric) are currently available to the site--with or without any partition or development proposal. There is a 6-inch water main in SW 13th Drive to serve the site and water standards are met, as required by PCC Chapter 33.651. A public 8-inch CSP sanitary-only sewer main is located in SW 13th Drive as well and sanitary sewer standards are also met consistent with PCC Chapter 33.652. No specific utility easements are indicated as necessary to serve the site and PCC 33.654.130.A is satisfied as well. I agree with BDS that Criterion L is satisfied as to these services and utilities.

That is not the case with respect to the relevant stormwater management criteria in PCC Chapter 33.653 and the rights-of-way in Chapter 33.654. The Bureau of Environmental Service's (BES) evaluation of stormwater management was based on the particulars of the Applicant's development proposal for Parcel 2. Specifically, BES relied on the Applicant's proposal to treat and detain runoff from each of the three buildings on Parcel 2 in on-site planters and to collect this treated runoff into a common storm sewer line that would discharge into the existing storm-only sewer in SW 13th Avenue. (Exhibit E.1)

Simply stated, compliance with portions of Criterion L is tied to the specific 9-unit condominium development proposed for Parcel 2. As explained in Section D below, the Applicant fails to satisfy the approval criteria in Chapter 33.805 for the adjustments necessary for this development. As a result, there is no approvable development proposal and it is not possible to evaluate compliance with the stormwater management and transportation elements of Criterion L without one. Accordingly, I find the Applicant's proposal does not fully comply with Criterion L.

D. Adjustments - Findings

1. Introduction

The Applicant has requested three adjustments to accommodate the proposed three-structure condominium development on Parcel 2. The BDS Decision describes the requested adjustments as follows:

- "Reduction in minimum lot depth for Parcel 2 from 70 to approximately 40-feet (33.612.200 & Table 612-1);
- Reduction in front building setback for proposed development on Parcel 2 from 10 to 5-feet (33.120.220 & Table 120-3);
- Reduction in garage entrance setback for proposed development on Parcel 2 from 18 to 5-feet (33.120.220 & Table 120-3)."

"PCC 33.805.040 contains the approval criteria for adjustments. They are:

- A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and
- 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
- 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
- D. City-designated scenic resources and historic resources are preserved; and

- E. Any impacts resulting from the adjustments are mitigated to the extent practical;
- F. If in an environmental zone, the proposal has as few significant detrimental environmental impacts on the resource and resource values as is practicable; or
- G. Application of the regulation in question would preclude all reasonable economic use of the site; and
- H. Granting the adjustment is the minimum necessary to allow the use of the site; and
- I. Any impacts resulting from the adjustment are mitigated to the extent practical."

This code section states that an applicant for one or more adjustments must demonstrate "that *either* approval criteria A. through F. *or* approval criteria G. through I." are satisfied. (emphasis added)

The Applicant's narrative in support of the three adjustment requests did not affirmatively choose between the two sets of approval criteria and addressed all of them in some fashion. BDS identified criteria A through F as the relevant criteria and analyzed the requested adjustments for compliance with them. The Applicant has not objected orally or in writing to BDS's determination that criteria A through F are the most relevant, nor has the Applicant asserted its adjustment requests should be analyzed for compliance with criteria G through I instead. I concur with BDS's application of criteria A through F and address the relevant criteria (A, B, C, and E) in the findings below. Criteria D and F are not applicable to this proposal because no scenic or historic resources are designated on the site and it is not in an environmental zone.

The BDS Decision quotes and relies entirely on the Applicant's narrative to conclude the three adjustment requests satisfy the relevant approval criteria. BDS offers no independent analysis of the Applicant's justification for these adjustments and does not consider the specific language of each approval criterion. After evaluating the Applicant's narrative, the considerable evidence the Appellants submitted, and the hearing testimony, I conclude the Applicant has failed to offer persuasive, credible evidence that all of the approval criteria are satisfied for each of the three requested adjustments.

2. Criterion A

Criterion A requires the Applicant to explain how the requested adjustments will "equally or better meet" the purposes of the lot depth and setback standards for the R2 zone. Below I address the purpose of each standard and the Applicant's statements explaining how each adjustment request equally or better serves the relevant purpose.

Lot depth adjustment. The code identifies multiple purposes for lot dimension standards, including lot depth. They include to ensure: that each lot has enough room for development that complies with the zoning code, each lot is an appropriate size and shape so development can be oriented toward the street as much as possible, the multi-dwelling zones can be

developed to full potential, and the housing goals for the City are met. (PCC 33.612.200) The Applicant explains that the lot depth adjustment is necessary because the proposed 9-unit condominium development is considered to be multifamily development and subject to a 70-foot lot depth standard, unlike single family detached homes or duplexes. Given the constraints of providing parking, fire access, and vegetative landscaping on the already developed Parcel 1, that leaves only 32.4 feet of lot depth on a portion of Parcel 2. Addressing the purpose statement, the Applicant states:

"The parcel was partitioned through deed and was not processed through the City. The intent was to allow this property to be developed. Parcel 2 has adequate street frontage, and accessibility to all public improvements. The property is developed well below its maximum capacity. The partition of this hereto unused, and vacant property that has remained derelict, and overgrown would remove a blight from the community, and allow the construction of sorely needed homes. The combination of the lot depth requirement and reduction in setbacks is the only reasonable way to allow an effective, and livable development to occur. Without the adjustments development of this parcel is not possible." (Exhibit A.3)

The Applicant asserts this development will meet the city's housing goals, will be oriented to SW 13th Avenue, and represents "infill at its finest."

The Appellants argue Parcel 2 is not deep enough for the proposed development, particularly considering most of the development on this parcel will be concentrated on the portion of it that is closer to 32 feet in depth. They point to the nearby Burlingame View apartments built on a parcel that is 100 feet deep. Finally, they argue the condominiums to be built on the reduced depth Parcel 2 will not add to the city's affordable housing stock. (Exhibits H-7, H-10)

Based on the evidence in the record, I find the Applicant offers a reasonable explanation of how the requested lot depth adjustment for Parcel 2 will enable that irregularly configured parcel to be developed in a way that serves the purposes of the lot dimension standard. While the Applicant's explanation is fairly general, it is minimally adequate to satisfy Criterion A.

Setback adjustments. As described in the zoning code, required building setbacks are intended to serve multiple purposes. They include: reflecting "the general building scale and placement of multi-dwelling development in the City's neighborhoods," "promote a reasonable physical relationship between residences," "provide adequate flexibility to site a building so that it may be compatible with the neighborhood, fit the topography of the site,**and allow for architectural diversity," and "provide room for a car to park in front of a garage door without overhanging the street or sidewalk, and***enhance driver visibility when backing onto the street." (PCC 33.120.220.A)

The Applicant's adjustment requests will enable the proposed condominium development on Parcel 2. The requested adjustments are to reduce the front building setback from 10 feet to

5 feet and the garage entrance setback from 18 feet to 5 feet, reductions of 50% and 72% respectively. The Applicant's relies on the statements summarized and quoted above to explain how the proposed setback adjustments equally or better meet the purposes of the building setback standards. According to the Applicant, the height of the condominium structures have been reduced below the maximum height permitted in order to minimize the massing and height of these structures from the street level.

The Appellants argue the proposed setback adjustments do not address or serve the code's articulated purpose for building setback requirements. (Exhibits H-5, H-7). I agree. The Applicant's narrative offers little to no explanation of how the front building and garage entrance setback adjustments equally or better meet the purposes of building setbacks. While the Applicant points to Parcel 2's steep topography as a reason for requesting both setbacks, what is missing is a reasonable explanation of how the resulting multi-dwelling development is similar in size and scale to similar developments in the city and, more specifically, how these structures are compatible with the R5-zoned single dwelling neighborhood to the north and west. The 8-foot curb tight sidewalk and 5-foot garage entrance setback the Applicant proposes leaves a distance of 13 feet between the street and the garage for each unit. The Appellants note that most cars are 18 - 20 feet in length, which means any resident's car parked in front of a garage would block the sidewalk and hang out into the street. (Exhibits H-9, H-10) PBOT made the same observation. (Exhibit E-2) This does not equally or better serve the setback purpose of providing "room for a car to park in front of a garage door without overhanging the street or sidewalk." For these reasons, I find the Applicant has not carried his burden to show the requested front building and garage entrance setback adjustments satisfy Criterion A.

3. Criterion B

Criterion B requires the Applicant to show that the proposed setback adjustments will not "significantly detract from the livability or appearance of the residential area." The Applicant acknowledges the detached single family homes across the street are developed at a lower density consistent with their R5 zoning. He asserts they are also somewhat higher at grade than the proposed condominiums because of the grade on which they are built. With respect to the lot depth adjustment for Parcel 2, the Applicant argues the condominium structures have been reduced in height to approximately 23 feet at the midpoint of the main roof pitch to more in scale with the homes across the street, at BDS's request. He applies this same argument to the front building setback adjustments, acknowledging that the style of the proposed condominium buildings is "a bit more modern" than the surrounding homes. (Exhibits A-3, Dane testimony) For the garage entrance adjustment, the Applicant's representative testified it will prevent residents from parking their cars in front of their garages because the shorter 5-foot driveway makes the garages more readily available and leaves no room to park in front of them. The Applicant did not otherwise address Criterion B for the garage entrance setback.

The Appellants offered numerous arguments in opposition to the requested adjustments. First, they contend the lot depth adjustment is inconsistent with a key purpose of the R2 zone, which is to ensure that housing types are compatible with adjacent homes. (Exhibit H-9) They characterize the adjacent single family development to the north and northwest of the site as 1 1/2 story, daylight basement homes with the main floor slightly above grade. They argue there are very few two-story homes and none that are three or four stories. For this reason, the Applicant's proposed 4-story condominium units are inconsistent in size and height with the homes in the surrounding residential area. (Exhibits H-7, H-9, H-10)

Second the Appellants contend the Applicant's proposal to place the buildings and garages close to the street will obliterate the openness of the streetscape and views, and submitted photos to illustrate this assertion. (Exhibits H-6, H-7, H-10) Third, they assert the style of the condominiums set close to the street will not contribute to the attractiveness of the neighborhood filled with older homes set back from the street and bordered by sidewalks with planting strips. (H-7, H-10) They fault the Applicant for failing to include any planting strip along the sidewalk in front of the proposed development to soften its appearance.

Finally, they argue placing garage entrances within 5 feet of the sidewalk and 13 feet from the street creates a safety hazard. Despite the inclusion of one-car garage units in the condominiums, they assert residents will likely park in their driveways, which will block the sidewalk. Pedestrians using the sidewalk will be forced to walk out into the street to get around the cars, which will put them in danger of being hit by vehicles using the street. (Exhibits H-7, H-9, H-10, H-14) The Appellants dispute the Applicant's assertion that bringing the garage entrance closer to the street will encourage condominium residents to park their cars inside the garages rather than in front of them. They offer a photograph of a car parked in front of a garage close to the street and blocking the sidewalk, noting "this appears to be a common occurrence in front of garages with reduced setbacks of 5 feet." (Exhibit H-9) Taken together, the Appellants contend the requested adjustments will allow a development that degrades the livability and appearance of the neighborhood and is not pedestrian friendly.

After considering the evidence in the record and both parties' arguments, I find the Appellants have presented credible, persuasive, and substantial evidence that the Applicant has failed to demonstrate the requested adjustment comply with Criterion B. Aside from lowering the height of the proposed condominiums to less than that allowed in the R2 zone, the Applicant has offered little explanation of how the proposed development with the adjustments addresses the language of Criterion B. Placing very modern structures on the narrowest portion of the site, close to the street, and with very short driveways in an established neighborhood with one- to two-story homes is not consistent with the appearance of the surrounding residential area. While creative, I find the Applicant's argument that shorter driveways will encourage residents to park in their garages rather than in front of them unpersuasive and unrealistic. If it is possible or likely that condominium residents will park in front of their garages at least some of the time, as the Appellants contend, their cars will block the sidewalk and potentially a portion of the street and create an

obstacle for pedestrians. For these reasons, I find the Applicant has failed to demonstrate the requested adjustments will not detract from the livability and appearance of the surrounding residential area as Criterion B requires.

4. Criterion C

Where, as here, multiple adjustments are requested, Criterion C requires evaluation of the cumulative effects of these adjustments. To be approved, the Applicant must demonstrate that this cumulative effect "results in a project which is still consistent with the overall purpose of the zone." The Applicant addresses this approval criterion as follows:

"The applicant is requesting a depth adjustment to the proposed lot so that it matches the existing parcel lines. This will allow the development of the vacant lot to density, and level of development that is consistent with the R2 zone. The reduction in the front-yard, And garage setback is to allow the garages to be deep enough to fit a car, and to allow sufficient living area on the main floors" (Exhibit A-3, A-5)

The BDS Decision, quoted in Sections II.A and C.2 above, describes the R2 zone as a multi-dwelling zone that is intended to create and maintain higher density neighborhoods. The R2 zone requires a minimum density of one unit per 2,500 square feet, yielding a minimum density of 44 units and a maximum allowed density of 55 units on the Applicant's site. Proposed Parcel 1 has been developed with 42 units. The Applicant proposes to develop 9 units on the 18,295 square feet comprising the proposed Parcel 2. The total density on the site is 51 units and within the maximum allowed by the R2 zoning for this site.

The Appellants identify a principal intent of the R2 zone as "housing types are to be compatible with adjacent houses" and assert the cumulative effect of the adjustments yields a project that is inconsistent with this purpose. (Exhibit H-9) With respect to Criterion C, the Appellants argue:

"The Applicant states that building the development is in itself mitigation of the adjustments. In reality, the Applicant does not support mitigation of the cumulative effects in any manner. Applicant's cumulative effects of [the] adjustments are 53% for the depth, 72% on garages and 50% on the front setback.***These enormous adjustments are gravely inconsistent with the intent and purpose of the R2 zone in every way, and they are inconsistent with the properties located in the landslide hazard zones. Granting such cumulative adjustments in the R2 zone and in the landslide hazard are sets an extremely dangerous precedent for the West Hills and Hillsdale neighborhood in particular and the community in general." (Exhibit H-10)

They also contend the cumulative adjustments will create a narrow lot that is not comparable to any other lots in the neighborhood and a development that "does not reflect the general

building scale and placement of units in an R2 zone." In particular, they point to the adjacent 12-unit Burlingame Terrace Apartments, stating that it has an average lot depth of 100 feet, 24-foot building setbacks, and 20-foot parking setbacks. They characterize this comparative development as "a typical R2 development." (Exhibit H-10) According to the Appellants, the cumulative effect of the requested adjustments is a development that isn't compatible with the adjacent homes or neighborhood, creates a safety issue for pedestrians and motorists with the short driveways, and "creates a canyon type effect for the neighbors." (Exhibits H-9, H-10)

The Applicant addresses "consistency with the overall purpose of the [R2] zone" primarily in terms of density and argues the adjustments will enable development of a project to the allowed density on Parcel 2. That is true as far as it goes. However, the Applicant does not identify or address any of the other purposes of the R2 zone or offer any significant response to the Appellants' analysis of the cumulative effects of the requested adjustments. Once again, I find persuasive and credible the testimony and evidence the Appellants offer concerning the cumulative negative effects of the proposed development on non-density related purposes of the R2 zone. Accordingly, I find the Applicant has not carried his burden to demonstrate the proposed adjustments comply with Criterion C.

5. Criterion E

Criterion E requires the Applicant to demonstrate the impacts resulting from each adjustment "are mitigated to the extent practical." The Applicant identified height as the primary impact from the lot depth, front building, and garage entrance setbacks and addressed Criterion E by explaining:

"The impact from the adjustments have been mitigated in following ways:

- 1) The height of the units fronting 13th Drive has been limited to 23-feet, reducing the height, and mass of the buildings fronting the public street.
- 2) While not required the applicant has included multiple design elements in the units that if used for a density bonus would permit up to a 50% increase in density. For example: All of the units are three bedroomed; the kitchens have 67.5SF of pantry space and 36" SF of draws in the island; All bedrooms have a minimum of 16SF of closet space; The linen closet has 13.75 SF of storage; There is also 54 SF of sperate storage for large items. All party wall assembly will have an STC rating of 55 or better; the entry door and all windows will have an STC rating of 35 or better. The applicant is also providing two 48 SF decks for each unit. In addition over 80% of the total tree count, and overall circumference is being protected, and preserved." (Exhibit A-3, A-5)

Additionally, some portions of the site that are shallow will not be developed (Exhibit A-5). This presumably refers to an area of the site that is encumbered by an easement in favor of Parcel 1. At the hearing, the Applicant's representative also offered that trees would be planted in the sidewalk in front of the condominium development. (Dane testimony)

The Appellants reiterate the arguments summarized above concerning Criterion C, citing the height, architectural incompatibility, traffic and pedestrian safety, and creation of a canyon-like effect as primary impacts of the Applicant's proposed development. (Exhibits H-9, H-10). They also argue the development's proposed height will "create a wall of towers along this section of SW 13th Drive." Further, they note "there are no plans for a planting strip between the sidewalk and the curb to soften the look of the front of the buildings. The planting strip is a hallmark of the entire Barbur Heights/Wilson Park neighborhood." (Exhibit H-9) They also challenge the Applicant's mitigation in the form of a height reduction in the condominium roofs. Comparing the Applicant's original and revised proposals, the Appellants contend the Applicant has reduced the roof height by only 2 feet. (Exhibit H-9)

The Applicant is dealing with a difficult site (proposed Parcel 2) that was created by deed without the benefit of a land division review. Reducing the roof height a step toward mitigating the impact of a condominium development that is proposed to be close to the street with only a sidewalk and small 5-foot building setbacks in front of the units. Planting trees in the sidewalk is another small way to mitigate this impact. That said, the Applicant has not explained why these are the only practical ways to address or mitigate the many impacts the Appellants have identified. The Applicant's description of the internal design elements of the condominium units is nonresponsive to this approval criterion; it focuses on the interior of the units and not the exterior impacts the Appellants identified. For these reasons, I find the Applicant has not carried his burden to explain how the requested adjustments satisfy Criterion E.

6. Reasonable Economic Use of the Property

One last issue bears addressing: the Applicant's assertion that denial of the adjustments will preclude all reasonable economic use of the site. Without the adjustments, the Applicant argues the partition needed to legalize the previous division of the site by deed can't be approved and the proposed Parcel 2 can't be developed. It is true that without the specific lot depth and setback adjustments the Applicant seeks in this application, the proposed partition does not meet the approval standards in PCC Chapter 33.660 for the reasons explained in Section C above. This does not mean, however, that there is no future partition and development proposal that could satisfy these approval standards and be developed under the current zoning for the site.

The history of this application and the Applicant's testimony at the hearing illustrates this point. During the review process for this application, the potential development configurations proposed for Parcel 2 evolved from 7 detached condominium units to 12

condominium units in an unspecified number of buildings to 9 condominium units in three structures (Exhibits A-1, A-5). The Appellants suggested other configurations more acceptable to the neighborhood that generally consisted of fewer units and structures. (Exhibits ____A-9, A-10) Although some or all of these options might not yield the most profitable development for the Applicant, they suggest there are other potentially approvable and reasonable development configurations for Parcel 2.

Additionally, the Applicant's representative testified at the hearing that if this application was denied, the Applicant would seek to develop triplexes on the property under the current RM1 zoning in the future. (Dane testimony) Whether this statement was intended as a warning to the neighbors (because he asserted triplexes could be built taller and to a higher density) or notice of the Applicant's next step, it nevertheless reveals that denial of this application will not deprive the Applicant of all reasonable economic use of the site and Parcel 2. There are other possible --and apparently economically reasonable--development alternatives for the proposed Parcel 2, as the Applicant indicated.

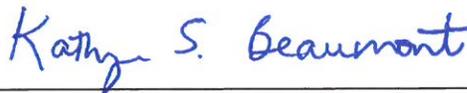
III. CONCLUSIONS

The Appellants have carried their burden of persuasion and successfully challenged the BDS Decision approving the Applicant's proposed 2-parcel partition and lot depth, front building and garage entrance setback adjustments. As explained in the findings contained in Section II, the Applicant has not carried his burden of proof to demonstrate this proposal satisfies the relevant approval criteria in PCC 33.660.120 and PCC 33.805.040. For this reason, the Applicant's application to partition the site into two parcels with three adjustments to develop a 9-unit condominium project on the proposed Parcel 2 must be denied.

IV. DECISION

The Appellants prevailed in this appeal.

The Applicant's application to partition the site into two parcels and for adjustments to the lot depth, front building, and garage entrance setback standards to enable a 9-unit condominium development on Parcel 2 is denied.



Kathryn Beaumont, Hearings Officer

October 14, 2020

Date

Application Determined Complete: November 22, 2017
Staff Decision to Hearings Officer: August 28, 2020
Decision Mailed: October 14, 2020
Last Date to Appeal: November 4, 2020

Appealing this decision. The Hearings Officer's decision is final and takes effect on the day the notice of decision is mailed. The decision may not be appealed to City Council, but may be appealed to the Oregon Land Use Board of Appeals (LUBA), as specified in the Oregon Revised Statute (ORS) 197.830. Among other things, ORS 197.830 requires that:

- an appellant before LUBA must have presented testimony (orally or in writing) as part of the local hearing before the Hearing's Officer; and
- a notice of intent to appeal be filed with LUBA within 21 days after the Hearings Officer's decision becomes final.

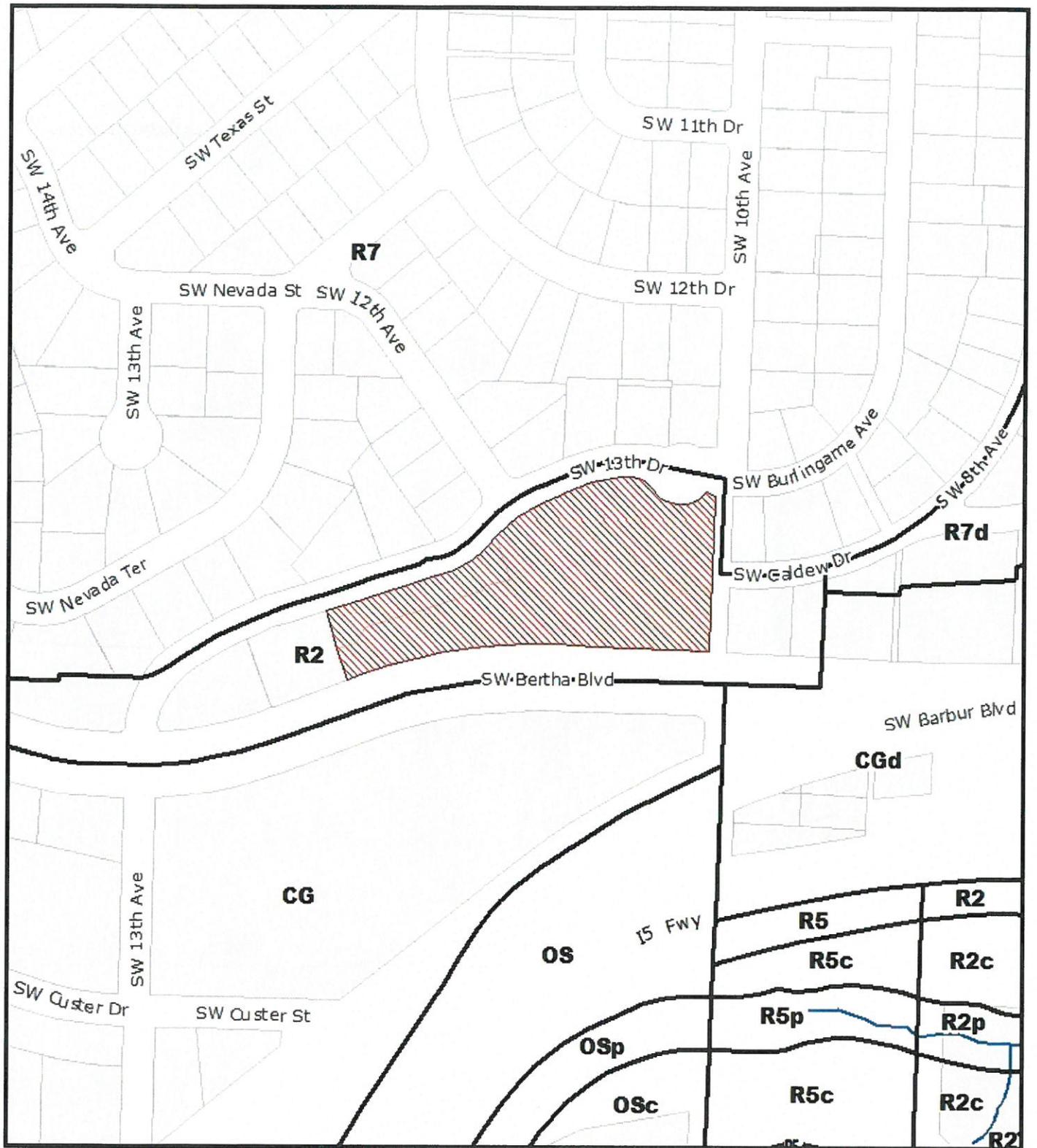
Please contact LUBA at 1-503-373-1265 for further information on filing an appeal.

EXHIBITS
NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement
 - 1. Geotechnical Report & Landslide Hazard Study w/ Addendums
 - 2. Stormwater Management Report w/ revisions
 - 3. Adjustment Narrative
 - 4. Geotech Response Summary
 - 5. Approval Criteria Narrative
 - 6. Earth Engineers Memo 1/9/18
 - 7. Applicant revised narrative 12/20/18
 - 8. Geologist Report to Springs, Seeps, Streams, Wetlands
 - 9. Revised Narrative: Clearing, Grading, and Land Suitability
 - 10. Revised Stormwater Report (October 2018)
 - 11. Applicant Submittal 10/4/18
 - 12. Foundation Drain(s) Info from Applicant
 - 13. Applicant Response to Neighborhood Comments
 - 14. Expedited Land Division Form
 - 15. Neighborhood Contact
 - 16. Land Use Timeline Extensions
 - 17. Arborist Report
 - 18. EEI Report No. 17-184-5, 12/27/19
- B. Zoning Map (**attached**)
- C. Plans/Drawings:
 - 1. Existing Conditions Map
 - 2. Site Utility Plan
 - 3. Boundary Survey
 - 4. Elevations
 - 5. Preliminary Partition Plat (**attached**)
 - 6. Rendering
 - 7. Preliminary Site Plan (**attached**)
 - 8. Floor Plans
- D. Notification information:
 - 1. Mailing list
 - 2. Mailed notice
 - 3. Revised Notice of Proposal
 - 4. Mailing List for Revised Proposal
- E. Agency Responses:
 - 1. Bureau of Environmental Services w/ Addendums
 - 2. Bureau of Transportation Engineering and Development Review w/ Addendums
 - 3. Water Bureau w/ Addendum
 - 4. Fire Bureau w/ Addendum
 - 5. Site Development Review Section of BDS w/ Addendums

6. Bureau of Parks, Forestry Division w/ Addendum
7. Life Safety Plans Examiner w/ Addendum
- F. Correspondence:
 1. Hillsdale Neighborhood Association 11/15/19
 2. Mark and Janet Zimmerdahl - 7301 SW 13th Drive
 3. Dylan Parkins and Alex Morris 1/16/18 & 11/15/19
 4. Tatiana Lifshitz & Jackson Roholt
 5. Jonas G Nordwall – 7221 SW 13th Drive 1/12/18 & 11/8/19
 6. Neighbors of SW 13th Drive Letter:
 - a. Linda & Robert Diffely - 7202 SW Nevada Terrace
 - b. Sharon Mahony Roholt (Burlingame Terrace Apartments owner) - 7322-7333 SW 13th Drive
 - c. Clarissa Stoney & Max Wohlhuter - 7315 SW 13th Drive
 - d. Dan & Gail Stiffler - 7205 SW 12th Avenue
 - e. Megan and Brent Fare - 7241 SW 13th Drive
 - f. Matt Doces - 7117 SW 12th Avenue
 - g. Eric Oslund - 7217 SW 12th Avenue
 - h. Sarah Pagliasotti Newman - 7261 SW 13th Drive
 - i. Brooke Zueck - 7117 SW 12th Avenue
 - j. Sarah & Michael Hohn - 7120 SW 12th Ave.
 - k. Naomi Enos & Sean Burles - 7332 SW 13th Drive
- G. Other:
 1. Original LU Application
 2. Incomplete Letter w/ RFC responses
 3. Original Submittal
- H. Received in Hearings Office:
 1. Hearing Notice Williams, Sean
 2. Decision Appeal Form Williams, Sean
 3. Notice of Type IIX Decision Williams, Sean
 4. Planner PowerPoint Presentation Williams, Sean
 5. Written testimony Stiffler, Gail and Dan
 6. 2 Appellant exhibits Lifshitz, Tatiana
 7. Written testimony Bridger, Glenn
 8. Written testimony Roholt, Jackson
 9. Written testimony Zimmerdahl, Mark and Janet
 10. Neighbors testimony Lifshitz, Tatiana
 11. New Evidence Email from Gail Stiffler Stiffler, Gail and Dan
 12. New Evidence - Comments on Next Door site Stiffler, Gail and Dan
 13. New Evidence Stiffler, Gail and Dan
 14. New Evidence Bridger, Glenn
 15. New Evidence Zimmerdahl, Mark and Janet
 16. New Evidence Stiffler, Gail and Dan
 17. New Evidence Nordwall, Jonas

18. New Evidence Lifshitz, Tatiana
19. New Evidence Lifshitz, Tatiana
20. Response to New Evidence Lifshitz, Tatiana
21. Response to new evidence Dane, Mark
22. Response to new evidence - detail sheet Dane, Mark
23. Response to new evidence - response to appellant Dane, Mark
24. Response to new evidence - estimated tree removal location Dane, Mark
25. Response to new evidence - arborist report Dane, Mark



ZONING

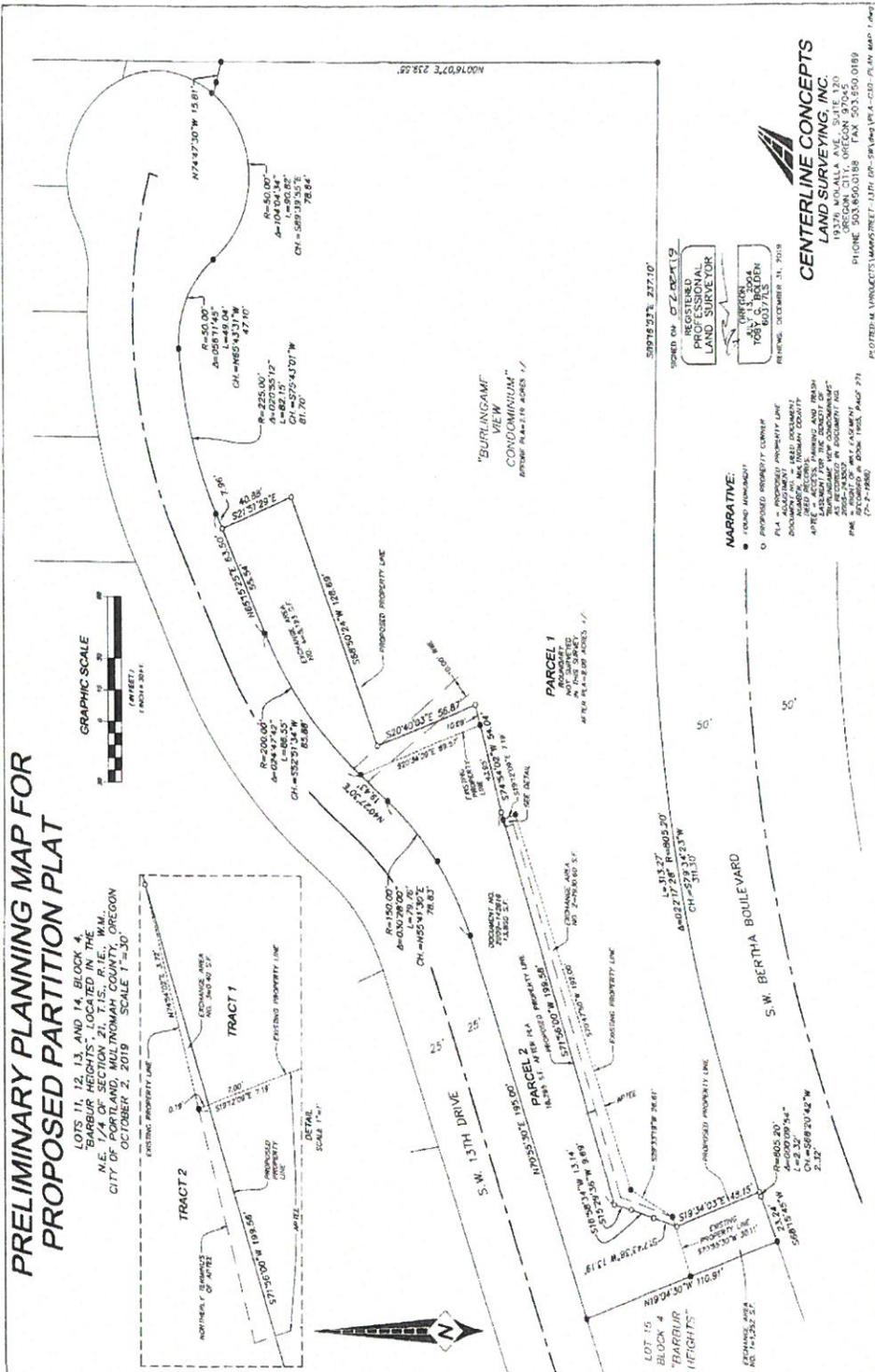


- Site
- Stream

| | |
|-------------|----------------------|
| File No. | LU 17-245578 LDP, AD |
| 1/4 Section | 3728 |
| Scale | 1 inch = 200 feet |
| State ID | 1S1E21AC 3400 |
| Exhibit | B Dec 13, 2017 |

PRELIMINARY PLANNING MAP FOR PROPOSED PARTITION PLAT

LOTS 11, 12, 13, AND 14, BLOCK 4, "BARRIOR HEIGHTS" LOCATED IN THE CITY OF PORTLAND, MULTNOMAH COUNTY, OREGON
 OCTOBER 2, 2019 SCALE 1"=30'



NARRATIVE:
 • EXISTING PROPERTY CORNER
 ○ PROPOSED PROPERTY CORNER
 PL-1 = PROPOSED PROPERTY LINE
 PL-2 = PROPOSED PROPERTY LINE
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SIGNED ON: OCTOBER 2, 2019
 REGISTERED PROFESSIONAL LAND SURVEYOR
 CENTERLINE CONCEPTS LAND SURVEYING, INC.
 19379 MONALLA AVE., SUITE 120
 PORTLAND, OREGON 97228
 PHONE 503.850.0188 FAX 503.850.0189
 PLOTTED IN UNITS: METERS
 DATE PLOTTED: 10/02/2019

