



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: July 24, 2019

Department: Public Works Agenda Planning Date: July 18, 2019 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature: Brian Nicholas

TITLE: Receive notice of hearings officer's decision dismissing Partition/Variance (P/V) Case19-002/Short.

Issue, Description & Background: The hearings officer held a public hearing on April 3, 2019, and on July 5, 2019, issued a decision dismissing P/V19-002. As part of the land use process, the board of commissioners must receive official notice of the decision.

Financial Impacts: None.

Impacts to Department & External Agencies: None.

Options for Consideration: 1. Receive notice of the decision. 2. Receive notice of the decision and call the matter up.

Recommendation: Staff recommends the board receive the notice of decision.

List of attachments: Hearings officer's decision

Presenter: Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to: Joe Fennimore - gfennimore@co.marion.or.us

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. P/V 19-002
Application of:) Clerk's File No.
JAY AND JUDITH SHORT) **PARTITION/VARIANCE**

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on appeal of the Planning Director's approval of the application of Jay and Judith Short to divide 4.12 acres into 2.12-acre and 2.0-acre parcels, with a variance to allow more than four dwellings to be served by a private road in an AR (Acreage Residential) and a UT-5 (Urban Transition-five-acre density) zone at 4586 Viewcrest Road S, Salem, Marion County, Oregon (T8S, R3W, S08C, tax lots 400, 500, 700 and 800).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.110, 17.122, 17.128, 17.172 and 17.181. The Salem Area Comprehensive Plan (SACP) and MCC title 16 apply to tax lot 400.

III. Public Hearing

A public hearing was held on this matter on April 3, 2019. The Planning Division file was inventoried and made part of the record. The record in cases PLA 04-01 and MP 78-41 were also made a part of the record. The following persons appeared and provided testimony on the applications:

- | | | |
|----|-----------------|--|
| 1. | Brandon Reich | Planning Division |
| 2. | John Rasmussen | Marion County Public Works Engineering |
| 3. | Jason Short | For applicant |
| 4. | Norm Bickell | Applicant's consultant |
| 5. | Mark Hoyt | Appellant's attorney |
| 6. | Stacy Splonski | Appellant/Opponent |
| 7. | Debbie Rotich | Appellant/Opponent |
| 8. | Travis Hunsaker | Opponent |

The following documents were entered into the record as exhibits:

- | | |
|-------|--|
| Ex. 1 | Annotated topographic map, with possible access points |
| Ex. 2 | Annotated topographic map, with drainage flow |
| Ex. 3 | Property data printout, property ID R31742 |

No objections were raised to notice, jurisdiction, conflicts of interest, evidence or testimony. The record was left open until 5:00 p.m. April 12, 2019 for applicant and 5:00 p.m. April 26 for appellant to submit additional information, and until 5:00 p.m. May 3, 2019 for applicants' final submission. On April 10, 2019, the Marion County Hearings Officer received an April 10, 2019 letter from Norman Bickell transmitting an April 9, 2019 open record extension request from Jay and Judy Short and a letter from Byron Farley. The Planning Director also transmitted a copy of the extension request to the hearings office. Mr. and Ms. Short ask to extend the initial open record period in this case to May 8, 2019. The 21-day extension was granted. The open record date for applicants' initial open record period was extended to 5:00 p.m. May 8, 2019, and for appellants and other attendees to 5:00 p.m. May 17, 2019, and then to 5:00 p.m. May 24, 2019 for applicants' final open record period. Because the extension was at applicants' request, the hearings officer adds the requested 21 days to the 150-day time limit. During the open record period, the following documents were entered into the record as exhibits:

- Ex. 4 April 17, 2019 comments from Chris Wilhelm
- Ex. 5 April 10, 2019 letter from Norman Bickell transmitting an April 9, 2019 open record extension request from Jay and Judy Short and letter from Byron Farley
- Ex. 6 May 3, 2019 letter from Norman Bickell, said to include exhibits A-D. No document is labeled exhibit C and it is unclear whether the exhibit is missing or unlabeled. A property description from land north of Keizer appears placed in the record inadvertently.
- Ex. 7 May 17, 2019 supplemental statement from Mark Hoyt
- Ex. 8 May 17, 2019 additional argument from Mark Hoyt
- Ex. 9 May 24, 2019 final response from Norman Bickell

IV. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. Most of the subject property is designated Rural Residential under the MCCP and zoned AR under MCC title 17. A small portion of the property is within the City of Salem urban growth boundary (UGB), designated Developing Residential under the SACP, and zoned UT-5 under MCC title 16. The property is in the Sensitive Groundwater Overlay (SGO) Zone.
2. The subject property is on the north side of an east-west private roadway. Homes off the private drive are addressed Viewcrest Road S. The private drive intersects with public roadway Viewcrest Road S to the east, which then intersects with Kuebler Road S, about 2,230' to the south. The subject property is composed of tax lots 083W08C 400, 500, 700, and 800¹, and contains an existing dwelling, accessory structures, well and septic system, all on the eastern half of the property. Most of the property is part of parcel 2 of Major Partition MP 78-41, a three-parcel partition approved by the county in 1978, and recorded in Marion County records at reel 138; page 614. Property boundaries are discussed further in section V below.

¹ Tax lots do not necessarily reflect legal parcel or lot status; they are created for taxing and not land use purposes. Tax lots are used here to conveniently reference units of land involved in this application.

3. Properties to the north, west and south are zoned AR and in acreage residential use. Properties to the east are within the Salem UGB, zoned UT-5, with some in residential use.
4. Applicants propose dividing 4.17 acres into 2.17-acre and 2.0-acre parcels.
5. The Marion County Planning Division requested comments on the application from various governmental agencies.

Marion County Public Works Land Development and Engineering Permits (PW LDEP) commented:

ENGINEERING CONDITIONS

Condition A – Prior to plat approval, under an Access Permit, widen the private easement paved approach to meet MCPW Engineering standards for a shared driveway.

Access work is typically an Engineering Requirement, but is being elevated to Condition status to address timing for completion.

Condition B – Prior to plat approval; widen the private easement all-weather driving surface from the intersection with Viewcrest Road S public right-of-way, to the subject property to a minimum width of 16 feet or to the satisfaction of the local fire department, whichever is the less stringent.

Nexus is to address the Variance of allowing an increase in traffic to the easement, including facilitating fire department access. The private road appears as narrow as 9 feet in some spots.

ENGINEER REQUIREMENTS

- C. In accordance with Marion County Code (MCC) 15.10 an Erosion Prevention and Sediment Control Permit is required for construction activity on the site. The subject property is within the High Risk Area of Marion County's DEQ-designated Stormwater Management Area.
- D. Provide a notarized Road Maintenance Agreement to be recorded concurrently with the plat.
- E. In accordance with MCC 11.10, a driveway "Access Permit" for access to the public right-of-way will be required upon application for a building permit for a new dwelling. Driveways must meet sight distance, design, spacing, and safety standards.
- F. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits, per Marion County Ordinances #00-10R and #98-40R, respectively.

ENGINEERING ADVISORIES

- G. Construction of improvements on the property should not block historical or naturally occurring runoff from adjacent properties. Furthermore, site grading should not impact surrounding properties, roads, or drainage ways in a negative manner.
- H. Applicant is advised to contact the local fire department to get a determination of their access requirements.

MCPW Development Review Coordinator commented that tax lot 600 is owned by Marion County. [Tax lot 600 was initially identified as part of the subject property.]

Marion County Surveyor commented that parcels ten acres and less must be surveyed; per ORS 92.050 a plat must be submitted for review; checking, second mylar and recording fees are required; a current or updated title report must be submitted at the time of review; and title reports shall be no less than 15 days old at the time of approval of the plat by the Surveyor's Office, which may require additional updated reports.

Marion County Building Inspection commented that a building permit is required for a change in use or occupancy.

Marion County On-Site Sewage commented that an existing septic system review is required for proposed parcel 1, and septic site evaluation is required for proposed parcel 2.

Marion County Tax Assessor provided tax information printouts for the subject properties and stated that real property taxes are not paid for 2018-19, that a potential tax liability may exist that might need to be paid prior to partition, and that under ORS 92.095, all delinquent taxes and interest, and taxes that have become a lien during the tax year must be paid before a partition shall be recorded.

Marion County Code Enforcement commented that there are no code enforcement issues on the subject property.

Salem Fire Department commented that more than four dwellings would be served from a private easement, the road would need to comply with fire department access, and an approved water supply will be required for any new structures.

All other contacted agencies failed to respond or stated no objection to the proposal.

V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

"Preponderance of the evidence" means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any

question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If evidence for any criterion is equal or less, applicant's burden is not met and the application shall be denied. If evidence for every criterion is in applicant's favor, the burden is met and the application shall be approved.

PARTITION

2. BACKGROUND. The subject property is composed of tax lots 083W08C 400, 500, 700, and 800. Several deeds and surveys are in the record, which includes files MP 78-41 and PLA 04-01. The record includes:
 - York to J and J Short, Reel 48 Page 729 (1976), conveys what is now TL 500.
 - York to J and J Short, Reel 51 Page 476 (1976), conveys what are now Tls 700 and 800 and the easterly 33' of what is now TL 900. (The westerly property line of the transferred property is represented as a dashed historical boundary line on TL 900 on assessor's map 083W08C.)
 - York to J and J Short, Reel 88 Page 1000 (1977), conveys what is now TL 900 minus the easterly 33' of current TL 900. (See dashed historical boundary line on assessor's map 083W08C, TL 900.)
 - Hills to J Short, Reel 96 Page 1378 (1977), conveys what are now Tls 300 and 400.
 - J Short to Jepson, deed signed September 23, 1977, and recorded at R 110 P 173, January 18, 1978, conveys current Tls 300 and 400, save and except TL 400. (Jay Short later conveyed an undivided 1/2 interest in TL 400 to Judith Short in 2001, Reel 1745 Page 291, which reflects the current ownership of TL 400.)
 - MP 78-41, J and J Short and Jenson, Marion County Board of Commissioners (BOC) July 27, 1978 order approving partition of approximately 9 acres into three parcels of approximately 3 acres, 3.99 acres and 2 acres, recorded September 8, 1978.
 - J and J Short to Randall, Reel 221 Page 1038 (1980), conveys what is now TL 900, minus 33'. (See dashed historical boundary line on assessor's map 083W08C, TL 900.)
 - J and J Short to Randall, Reel 1712 Page 592 (2000), deeded the westerly 33 feet of TL 800.

The Shorts accumulated all properties involved in MP 78-41 in 1976 and 1977 by deed, and conveyed a portion to Jepson. The MP 78-41 application was signed by the Shorts and the Jepsons on April 12, 1978. The statement accompanying the application reads:

EXHIBIT "B"

All existing parcels in this 9 plus acre area are termed illegal because the prior owners did not receive approval from the planning commission. It is our intent to receive a legal status with regard to parcels 1, 2, and 3, and to receive a building permit on parcels 1 and 3. This is our reason for partitioning.

PLEASE NOTE: The area in the middle (3.99 acres) is now deeded with two separate tax numbers. We wish to combine these and create one parcel. The parcel has a home constructed.

* * *

PARCEL 2:

Since the partitioning as it exists presently is illegal regarding lots amounting to 3.99 acres (homesite at 1.64 acres and the 2.35 acre lot) we would like to present for approval the combining of these to one parcel. It is not our intention to build or develop this parcel at this time.

* * *

The partition order was perfected when, within 90 days of the date of the BOC order, applicant submitted a major partition map, which was signed by then Marion County Planning Director, R. Curtis, and recorded with the Marion County Clerk on September 4, 1978. Property boundaries were set as depicted and described in the partitioning map. Neither parcel 1 nor 2 reflect current deeded ownership because, in April 2000, the Shorts deeded the westerly 33' of TL 800 to the Randalls. (A correction deed was recorded in August 2000.)

Since at least the 1980s to the present, land use approval has been required to alter property boundaries set by Marion County land division processes (see e.g. Marion County Ordinance No. 540, October 27, 1982, and current MCC 17.172.120). No land use approval was obtained to alter the boundary between MP 78-41 parcels 1 and 2. To be considered legal parcels for land use purposes and to allow partitioning consideration, the unauthorized land transfer must be cured. Because the partition cannot yet be considered, the partition application is dismissed. With no partitioning application, there is no basis for considering the variance application. The variance application is also dismissed.

VI. Order

It is hereby found the subject property is not a legally established parcel for land use purposes, and neither the partition application nor the variance application can be considered. The partition and variance applications are **DISMISSED**.

VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 31st day of July 2019. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 16th day of July 2019.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Norman Bickell
2232 42nd Avenue S.E. #771
Salem, OR 97317

Jay and Judy Short
P.O. Box 3790
Salem, OR 97302

Willie and Debbie Rotich
4656 Viewcrest Road S.
Salem, OR 97302

Dustin and Stacy Splonski
4596 Viewcrest Road S.
Salem, OR 97302

Mark Hoyt
693 Chemeketa Street N.E.
Salem, OR 97301

Jason and Rachel Short
3975 Orchard Hts. Place N.W.
Salem, OR 97304

Carol Currie
4546 Viewcrest Road S.
Salem, OR 97302

Chris and Jeannie Wilhelm
2487 Ian Avenue N.W.
Salem, OR 97304

Jared Short
5113 Cherry Hollow Road S.
Salem, OR 97302

Agencies Notified
Planning Division

Code Enforcement
Building Inspection
Survey
Assessor
PW Engineering

Salem Fire Department

Travis and Laurie Hunsaker
4602 Viewcrest Road S.
Salem, OR 97302

Aileen Kaye (AAC Member No. 1)
10095 Parrish Gap Road S.E.
Turner, OR 97392

Laurel Hines (AAC Member No. 1)
10371 Lake Drive S.E.
Salem, OR 97306

Roger Kaye
Friends of Marion County
P.O. Box 3274
Salem, OR 97302

Mary Kyle McCurdy
1000 Friends of Oregon
133 SW 2nd Avenue, Suite 201
Portland, OR 97204

(via email: gfennimore@co.marion.or.us)

(via email: breich@co.marion.or.us)

(via email: lmilliman@co.marion.or.us)

(via email: mhpburn@co.marion.or.us)

(via email: lpekarek@co.marion.or.us)

(via email: deubanks@co.marion.or.us)

(via email: kinman@co.marion.or.us)

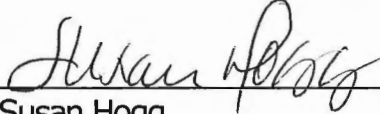
(via email: assessor@co.marion.or.us)

(via email: jrassmussen@co.marion.or.us)

(via email: mpuntney@co.marion.or.us)

(via email: ghadley@cityofsalem.net)

by mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 16th day of July, 2019, and that the postage thereon was prepaid.


Susan Hogg
Secretary to Hearings Officer