

Council Business Meeting

January 3, 2023

Agenda Item	Land Use Appeal for Mixed Use Development at 165 Water Street, 160 Helman Street and 95 Van Ness Avenue	
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SUMMARY

Consideration of an appeal of the Planning Commission’s May 10, 2022 denial of a request for a six-lot commercial subdivision to accommodate a phased mixed-use development for the three properties at 165 Water Street, 160 Helman Street and 95 Van Ness Avenue, and Site Design Review for five mixed-use buildings.

POLICIES, PLANS & GOALS SUPPORTED

Comprehensive Plan, Policy 1.31.2. The Historic Commission shall offer recommendations to the City Council and Planning Commission concerning the alteration or disposition of structures, sites, or neighborhoods within the historic interest areas in Ashland.

Comprehensive Plan, Policy 1.31.7. The City shall develop and implement through law design guidelines for new development as well as for alteration of existing structures within the historic interest areas for structures and areas that are historically significant.

PREVIOUS COUNCIL ACTION

N/A.

BACKGROUND AND ADDITIONAL INFORMATION

Original Request

The original application was a request for a six-lot commercial subdivision to accommodate a phased mixed-use development for the three properties at 165 Water Street, 160 Helman Street and 95 Van Ness Street. The requested first phase Site Design Review approval included five mixed-use buildings and associated surface parking, utility infrastructure and street improvements. The three remaining lots would have initial site work completed with Phase I, but building construction would occur only after Site Design Review approvals in a future Phase II. The application also included a request for a Physical & Environmental Constraints Review Permit because the proposal includes development on severe constraints lands with slopes greater than 35 percent and on floodplain corridor lands; a request for an Exception to the Development Standards for Hillside Lands; and a request for a Tree Removal Permit to remove 20 trees on the three properties and within the adjacent rights-of-way.

Planning Commission Decision

The Planning Commission concluded that the application as presented had not sufficiently addressed the Historic District Development Standards, and as such could not be found to have fully satisfied the approval criteria for Site Design Review. The Planning Commission denied the application without prejudice.

Appeal Request

Subsequent to the mailing of the Planning Commission’s adopted findings, an appeal was timely filed by applicant Gil Livni and his agent Eric Bonetti, both of whom had participated in the Planning Commission hearing. This appeal will be processed on the record according to AMC 18.5.1.060.I. The grounds for the appeal as identified in the notice of appeal are:

- 1) That the staff report was not received seven days prior to the hearing.
- 2) That staff presented new information during the public hearing.
- 3) That a member of the Historic Commission had *ex parte* contact with a member of the public outside of the public hearing.
- 4) That the standard in AMC 18.4.2.050.B.1 addressing Transitional Areas (“*For projects located at the boundary between zones or overlays, appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment may be considered to address compatibility with the transitional area while not losing sight of the underlying standards or requirements applicable to the subject property.*”) was misapplied by the Planning Commission

This appeal on the record is limited to these four grounds for appeal which were clearly and distinctly identified in the appeal request. As provided in AMC 18.5.1.060.I.5.b., in their review “*the Council shall not re-examine issues of fact and shall limit its review to determining whether there is substantial evidence to support the findings of the Planning Commission, or to determining if errors in law were committed by the Commission. Review shall in any event be limited to those issues clearly and distinctly set forth in the notice of appeal.*”

This appeal hearing was originally scheduled for June 21, 2022 however the applicant/appellant requested that the hearing be postponed and provided the maximum allowed 245-day extension under the state’s “120-Day Rule.” Under that rule, the Council must make a decision on the appeal no later than February 10, 2023.

Considering the Grounds for Appeal

- 1) **That the staff report was not received seven days prior to the hearing.**

The appellants note that, “*The staff report recommending denial of the application was not received seven days before the Historic Commission Hearing nor the Planning Commission Hearing. This is an error because the applicable criteria or procedure in the Ashland Municipal Code 18.5.1.060.C.3.g or other law in ORS 197.763 (3)(i) requires that a copy of the City’s staff report and recommendations to the hearings body will be available for review at no cost at least seven days before the hearing.*”

In considering this ground for appeal, staff would note that both AMC 18.5.1.060.C.3.g and ORS 197.763(3)(i) require that public notices include a clear statement that the staff report will be available seven days prior to the Planning Commission hearing, and AMC 18.5.1.060.C.3.g indicates that a copy will be provided on request. Specifically, ORS 197.763(3)(i) requires that the notice provided by the jurisdiction, “*State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost.*” Similarly, AMC 18.5.1.060.C.3.g requires that the Notice of Public Hearing contain, “*A statement that a copy of the City’s staff report and recommendation to the hearings body will be available for review at no cost at least seven days before the hearing, **and that a copy will be***

provided on request at a reasonable cost.” The public notice for the application (See https://www.ashland.or.us/SIB/files/00_Water_165_PA-T2-2022-00037_NOC.pdf) indicated that, “*A copy of the application, including all documents, evidence and applicable criteria relied upon by the applicant, and a copy of the staff report will be available on-line at www.ashland.or.us/PCpackets seven days prior to the hearing. Copies of application materials will be provided at reasonable cost, if requested.*” There is no indication in the applicants’ appeal notice or within the record that the applicant requested the staff report. The staff report was provided to the applicant six days prior to the Planning Commission hearing via e-mail and was posted on-line at that time. Given that the staff report was provided six days prior to the hearing without being requested, staff does not believe there was a procedural error which adversely impact the applicant/appellant. Any error with the one-day delay in posting the staff report on-line would be remedied by the applicant’s ability to appeal, which they have taken advantage of here. As such, staff recommends that the Council reject this first appeal issue and uphold the Planning Commission’s decision.

2) **That staff presented new information during the public hearing.**

Here, the appellants note that, “*New information was presented by staff during the hearing that had never been discussed previously with the applicant, the project team or during the previous hearing. The project team believes this new information regarding the Transit Triangle standards created confusion and obscures the relevant criteria Site Design and Use Standards and Historic District Design Standards through the introduction of irrelevant municipal code sections.*”

In considering this ground for appeal, staff would note that the new information consisted of pointing out how building massing is addressed in terms of compatibility with adjacent residential elsewhere in the code (in the Transit Triangle at AMC 18.3.14.060 and in the Croman Mill District at AMC 18.3.2.060.B.7.c). This was presented by staff while both the public hearing and the public hearing record were open to the submittal of any new information. See page 5 of 8 of the April 12, 2022 Minutes at https://www.ashland.or.us/SIB/files/2022-04-12_Planning_MIN.pdf. Staff explained clearly during the hearing that this information was not applicable to the subject property specifically and was instead being provided for reference to show how adjustments for compatibility between commercial and residential development were dealt with elsewhere in the land use ordinance as the Planning Commission was considering what might constitute “*appropriate*” adjustments.” See page 7 of 8 of the April 12, 2022 Minutes at https://www.ashland.or.us/SIB/files/2022-04-12_Planning_MIN.pdf.

New information may be presented during an open public hearing. In this instance, the new information was directly from the adopted land use ordinance and it was explained that it was not directly applicable to the current application and was instead being presented for reference. On that basis, staff recommends that the Council reject this second appeal issue and uphold the original decision of the Planning Commission.

3) **That a member of the Historic Commission had *ex parte* contact with a member of the public outside of the public hearing.**

The appellants’ Notice of Appeal explains, “*The public is entitled to an impartial hearing body as free from potential conflicts of interest and pre-hearing *ex parte* (outside the hearing) contacts as reasonably possible. One of the co-chairs of the Historic Commission had*

communications with a member of the public outside the hearing process. Though unclear to the applicant team during the Historic Commission meeting at 4.6.2022 what the substance of the ex parte comments were, the process is flawed when it is clear that conversation(s) occurred outside the hearing. This interaction taints the integrity of the hearing process. This is an error because the applicable criteria or procedure in the Ashland Municipal Code 18.5.1.060.D.2 requires that the hearing body be impartial and free from potential conflicts of interests and pre-hearing and outside of the hearing contacts. It is unclear what exactly occurred between the co-chair of the Historic Commission and a member of the public but there was a declaration of ex parte”.

On this issue, staff note that the Historic Commission is not a decision making body, and serves in an advisory role to the Planning Commission. In this instance, the *ex parte* contact in question occurred after the Historic Commission had conducted its March meeting and made its initial advisory recommendation to the Planning Commission. When the application came back to the Historic Commission for further consideration in April of 2022, the *ex parte* contact in question was declared by Historic Commission Chair Beverly Hovenkamp. The minutes for the April 6, 2022 meeting note, “*Hovenkamp disclosed that she had ex-parte contact with Mr. Brouillard, a neighbor who submitted his comments to the Commission via email. Hovenkamp expressed that this would have no impact on her decision moving forward.*”

In a February 24, 2022 e-mail, Mark Brouillard - who is a neighbor of the project site and who had attended a Historic Commission meeting in 2018 to comment on a previous development proposal for the site - expressed concerns that during the 2018 meeting, a presenter from Rogue Planning had commented that “*now that there aren’t any pesky home owners here we might get something accomplished.*” Mr. Brouillard’s email indicated that he was present as a home owner at that 2018 meeting and made objection to the comment at the time. He further suggested that the Historic Commissioners at the time had laughed and seemed entertained, and he took their response as an expression of bias. Mr. Brouillard’s e-mail is on pages 1-2 of 18 at https://www.ashland.or.us/SIB/files/Water_165_PA-T2-2022-00037_Public_Comment_Record.pdf).

As reflected between 44:45 and 47:15 of the Historic Commission’s April meeting recording, Chair Hovenkamp stated that the concerns over bias expressed by neighbor Mark Brouillard had not been addressed at the March hearing, so she had called him subsequent to the March meeting as a courtesy, after the Commission had made its initial recommendation. She indicated that she told him it was unfortunate that a disrespectful comment had been made at the 2018 meeting and that the Historic Commission was working hard to be impartial. She noted that this was why he had raised the importance of *ex parte* contact conversations and being careful about recusals. She indicated that she was unsure if this call made him feel any better, but felt it was important as a courtesy to respond on behalf of the Commission to the concerns he had raised.

During that April Historic Commission meeting, planning staff directly asked Chair Hovenkamp if any aspect discussed relating to the project during that call would bias her; she said that when Mr. Brouillard raised issues he had raised previously during the hearing, she pointed out to him that it seemed the Commission had heard his concerns at the meeting and they were reflected in the Commission’s initial recommendations. She confirmed that nothing said during the conversation would have the effect of biasing her moving forward. Neither the other Commissioners present, the applicant or his agent challenged Ms. Hovenkamp’s *ex parte* contact

declaration at the meeting, although the applicant did raise the issue of *ex parte* contact during testimony at the April Planning Commission hearing. See page 6 of 8 in the April 12, 2022 minutes at https://www.ashland.or.us/SIB/files/2022-04-12_Planning_MIN.pdf.

Procedurally speaking, Chair Hovenkamp declared the *ex parte* contact prior to the Historic Commission's April meeting, as recognized in the appellants' appeal notice, and explained both the substance of the contact and that it would not bias her moving forward. Her declaration went unchallenged and on that basis staff recommends that the Council reject this fourth appeal issue and uphold the Planning Commission's decision with regard to this third appeal issue.

- 4) **That the standard in AMC 18.4.2.050.B.1 addressing Transitional Areas (“*For projects located at the boundary between zones or overlays, appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment may be considered to address compatibility with the transitional area while not losing sight of the underlying standards or requirements applicable to the subject property.*”) was misapplied by the Planning Commission.**

The appellants cite Overlay Development Standards (AMC 18.5.2.050.B) and Historic District Development Standards (AMC 18.4.2.050) and specifically reference the ‘Transitional Areas’ standard in AMC 18.4.2.050.B.1 which reads:

For projects located at the boundary between zones or overlays, appropriate adjustments to building form, massing, height, scale, placement or architectural and material treatment may be considered to address compatibility with the transitional area while not losing sight of the underlying standards or requirements applicable to the subject property.

The appellants go on to indicate that denial on this basis is an error because the applicable criteria or procedure in the Ashland Municipal Code 18.4.2.050 requires that projects at the boundary between zones or overlays may have appropriate adjustments considered but the underlying zoning standards and requirements applicable to the subject property must be kept in sight.

In considering this final appeal issue, staff would first note that within the adopted findings for their decision, under 2.7 the Planning Commission noted that “... Site Design Review approval requires a demonstration that “*The proposal complies with the applicable Site Development and Design Standards of part 18.4, except as provided by subsection E, below.*” The Planning Commission further noted that the subject properties were located within the Skidmore Academy Historic District and as such were subject to the Historic District Development Standards in AMC 18.4.2.050. As explained in AMC 18.4.2.050.A.2:

The City of Ashland has adopted ordinances to assure that all development in the Historic District overlay remains compatible with the existing integrity of the Historic District...If a development requires a Type I, II, or III review procedure (e.g., Site Design Review, Conditional Use Permit) and involves new construction, or restoration and rehabilitation, or any use greater than a single-family use, the authority exists in the law for the Staff Advisor and the Planning Commission to require modifications in the design to match these standards. In this case the Historic Commission advises both the applicant and the Staff Advisor or other City decision maker.

As provided in AMC 18.2.4.040.D, the Historic Commission is charged *“To review and make recommendations concerning the improvement of designated historic properties in connection with the issuance of building permits, zone changes, conditional use permits, variances, sign permits, and site reviews.”* Here, the Historic Commission reviewed the initial proposal at its March 2, 2022 meeting. During that review, the Historic Commission found that there was no historical precedent in Ashland for three nearly identical, large buildings being constructed side by side in a historic district. The Historic Commission recognized that both the building designs and landscaping here were excellent, and that the high quality of the proposal helped to mitigate the large, identical buildings to a degree, however the Historic Commission ultimately determined that the initial designs were too repetitious, and that this repetition emphasized the significant difference in height and character relative to the residences on the other side of Helman Street. The Historic Commission specifically expressed concerns that in terms of the Historic District Development Standards, the height, scale and massing of the three buildings **(AMC 18.4.2.050.B.2-4)** as initially proposed along Helman Street for Buildings #1, #3 and #4 were out of scale with the one- to one-and-a-half-story historic residential buildings across Helman Street. The Historic Commission recommended that the designs be revisited to look at changing the height of the individual stories, noting that 11-foot ceiling heights seemed excessive where building height was at issue, and also recommended potentially reducing the number of stories on at least the two end buildings (Buildings #1 and #4). The Historic Commissioners explained that if the buildings on Helman were lower, the remaining buildings could cascade around the Van Ness corner as taller buildings there would be mitigated by the grade change and the fact that there was not a single-story, historic residential streetscape across Van Ness Avenue. The Historic Commission concluded their March recommendations noting that the designs would benefit from a greater variety of material treatment and finishes, and greater variations in height and/or number of stories to relieve the monotony as they present to the historic Helman Street streetscape.

At its April 6, 2022 meeting, the Historic Commission reviewed design revisions which had been provided in response to their March 2, 2022 comments. These revisions included stepping the center bay in the façade of Buildings 3 & 4 back three feet from the wall plane of the second floor and adding a shed roof to emphasize this step back; cutting back the roofline to reduce the massing of the overhang; changing some surface and material treatments including adding a brick base, using white and lighter materials to de-emphasize the third story, and using open wire or mesh railings where solid railings were previously proposed; and increasing the length of the pedestrian overhang on the ground floor to add shadow lines and emphasize the pedestrian scale of the building at the sidewalk. After reviewing these revisions, the Historic Commission found that while the incremental changes were effective in addressing some issues with regard to the building façades and pedestrian amenities, the revisions fell short in addressing the larger issues identified in the March meeting, which had to do with the height, scale, and massing of the buildings as they relate to the Historic District Design Standards **(AMC 18.4.2.050.B.2-B.4.)**

The Historic Commission noted that the three buildings facing Helman Street with heights near 40 feet and three stories would overwhelm the mostly single-story historic residences across the street, and that these proposed buildings failed to achieve an appropriate scale and façade compatibility to the adjacent historic streetscape. Additionally, the Historic Commission further noted that the zero setback to the sidewalk exacerbated the building mass and scale and would overwhelm the adjacent pedestrian traffic. The Historic Commission pointed out that by comparison, the Plaza Inn & Suites hotel on the same side of Helman Street, nearer to

downtown, has 15- to 20-foot setbacks and is only two-stories in height at the street. The Historic Commission concluded that while the building architecture and landscape design on this project were very attractive and high quality, the buildings were just not compatible with the scale of the historic district residences in the impact area, directly across Helman Street, and for these reasons, the Historic Commission noted that they could not support the application and recommended that it be denied by the Planning Commission.

In considering the proposal as it relates to the Historic District Development Standards and in light of the Historic Commission's recommendation, the Planning Commission found that the standard addressing "Transitional Areas" in AMC 18.4.2.050.B.1 was of particular importance here. This standard provides that:

For projects located at the boundary between zones or overlays, appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment may be considered to address compatibility with the transitional area while not losing sight of the underlying standards or requirements applicable to the subject property.

In this instance, the subject properties are located at the boundary between E-1 (Employment) and R-3 (High Density Multi-Family Residential), and there is M-1 (Industrial), C-1 (Commercial), and R-2 (Low Density Multi-Family Residential) zoning a short distance away. Similarly, the property is at the outer edge of the Skidmore Academy historic district, with district boundary to the north, the Railroad Addition historic district immediately across Water Street, and the Downtown historic district a half-block to the south. The Planning Commission found that the subject properties were located within a transitional area, and that to address the transitional area standard, the building designs needed to incorporate appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment to address compatibility with the transitional area which includes the existing historic residential block across Helman Street, while not losing sight of the underlying standards and requirements applicable to the subject properties which are zoned E-1 (Employment).

The Planning Commission noted that the applicant had provided a number of examples of more commercial scale buildings in the vicinity, many of which were historical buildings which were no longer standing, to demonstrate compatibility and the applicant also emphasized that the designs proposed were within the maximum allowances of the E-1 zone. The Planning Commission found that the transitional area standard was intended to address compatibility with the transitional area as it exists, rather than with historic buildings which are no longer standing. AMC 18.4.2.050 explains "... *sensitivity to surrounding buildings and the existing land use patterns is essential to the successful development* (AMC 18.4.2.050.A.1, emphasis added)" and "*The City of Ashland has adopted ordinances to assure that all development in the Historic District overlay remains compatible with the existing integrity of the Historic District* (AMC 18.4.2.050.A.2, emphasis added)." The drawings illustrating each design standard are described as applying to historic buildings "*on and across the street* (AMC 18.4.2.050.B.2)" or "*in the immediate vicinity* (AMC 18.4.2.050.B.3 & B.4)."

The Planning Commission further found that considerations of compatibility were not limited to a simple comparison of the allowances of the zoning district (i.e. the E-1 zone allowing a 40-foot height and 85 percent lot coverage where the R-3 zone allows a 35-foot height and 75 percent lot coverage does not mean that any building complying with the allowances of the E-1 zone is

automatically compatible with historic buildings in an immediately adjacent R-3 zone), but for transitional areas require “*appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment*” which address compatibility with the immediate vicinity while still considering the allowances of the underlying zone.

The Planning Commission ultimately concurred with the Historic Commission in finding that the three very similarly designed three-story buildings facing Helman Street with heights of nearly 40 feet failed to achieve an appropriate scale and have heights and massing which, as designed, were not compatible with the adjacent historic streetscape. The Planning Commission noted that these issues were exacerbated by the buildings’ very similar architectural and material treatments. The Planning Commission found that here, measures such as setting the buildings back further and placing plaza space between the buildings and the sidewalk; providing a greater step back of the third-story from the second-story façade to better mitigate the height, mass and scale; providing greater variation in the architectural and material treatments; or placing lower buildings along Helman and taller buildings along Water and Van Ness could constitute “appropriate adjustments” to address compatibility with the transitional area by mitigating the buildings height, mass and scale, and could be accomplished without losing sight of the standards and requirements of the underlying E-1 zone. The Planning Commission further found that the designs as revised failed to address the recommendations provided in March; did not incorporate appropriate adjustments to building form, massing, height, scale, placement, or architectural and material treatment to address compatibility; and failed to satisfy the Historic Development Design Standards for height, scale and massing (AMC 18.4.2.050.B.2-B.4). The Planning Commission concluded that the application as presented had not sufficiently addressed the Historic District Development Standards, and as such could not be found to have fully satisfied the approval criteria for Site Design Review. The application was thus denied without prejudice, which allows the applicant to make a revised application for the same property immediately where they would otherwise be required to wait at least 12 months.

As provided in AMC 18.5.1.060.I.5.b., for appeals on the record “*the Council shall not re-examine issues of fact and shall limit its review to determining whether there is substantial evidence to support the findings of the Planning Commission, or to determining if errors in law were committed by the Commission. Review shall in any event be limited to those issues clearly and distinctly set forth in the notice of appeal.*” In this instance, the Planning Commission considered the application materials and information presented by the applicant during the hearings as well as testimony by neighbors and the recommendations of the Historic Commission. In their decision, the Planning Commission noted specific measures such as setting the buildings back further and placing plaza space between the buildings and the sidewalk; providing a greater step back of the third-story from the second-story façade to better mitigate the height, mass and scale; providing greater variation in the architectural and material treatments; or placing lower buildings along Helman and taller buildings along Water and Van Ness which the Commission indicated constituted “appropriate adjustments” to address compatibility with the transitional area by mitigating the buildings’ height, mass and scale, and which could be accomplished without losing sight of the standards and requirements of the underlying E-1 zone. In staff’s assessment there was ample evidence contained within the record to support the Planning Commission’s decision and staff recommends that the Council reject this fourth and final appeal issue and uphold the Planning Commission’s decision with regard to the application of the transitional area standard.

FISCAL IMPACTS

There are no direct fiscal impacts related to the land use appeal of the planning action for 165 Water Street, 160 Helman Street and 95 Van Ness Street.

STAFF RECOMMENDATION

Planning staff recommends that the Council affirm the decision of the Planning Commission to deny the application without prejudice, reject the appeal and direct staff to prepare findings for adoption by Council. Staff have discussed the project with the applicant and believe that there are acceptable design revisions which can be reached to resolve the issues. A denial without prejudice allows the applicant to redesign the project with amendments to better address compatibility with the transitional area here and reapply immediately.

ACTIONS, OPTIONS & POTENTIAL MOTIONS

Alternative actions:

- 1) I move to affirm the decision of the Planning Commission to deny the application without prejudice, reject the appeal and direct staff to prepare written findings for approval reflecting the original Planning Commission decision from May 10, 2022 for adoption by Council.
- 2) I move to reverse the decision of the Planning Commission and support the written appeal, and direct staff to prepare written findings for adoption by Council (*include specific direction as to where the original decision was found to be in error relative to the four identified appeal issues*).

**Please note that as a quasi-judicial land use application, this project is subject to the '120-Day Rule' under Oregon land use law and has been extended as far as allowed by law by the applicant. A final decision of the City is required by February 10, 2023 with findings to be adopted within 14-days thereafter, and as such remanding the decision back to the Planning Commission is not an option.*

REFERENCES & ATTACHMENTS

The full public record for the 165 Water Street application is posted on-line at:

<http://www.ashland.or.us/165Water>. This webpage includes a list of each of the meetings where the project was discussed with links to meeting packet materials, minutes and audio/video recordings of the meetings which are all included in the record for this appeal review.

Links to select documents including the application submittal, the Planning Staff Reports, Planning Commission Findings, and the appeal request are provided below:

- [Application Submittal](#)
- [Planning Staff Report](#)
- [Planning Staff Report Addendum](#)
- [April 6, 2022 Historic Commission Meeting Recommendation](#)
- [Planning Commission Findings and Orders dated May 10, 2022](#)
- [Appeal Submittal](#)
- [Public Testimony Record](#)