

NOTICE

The appeal hearing previously scheduled for June 21, 2022 has been rescheduled until 6:00 p.m. on Tuesday, January 3, 2023. The hearing was rescheduled at the request of the applicant/owner/appellant, and an appropriate extension was granted.

Oral argument before the Council in an appeal on the record is permitted only from parties to the original decision and only if written arguments were timely submitted. Oral arguments at Council will be limited to ten minutes for the applicant/appellant, and three minutes for any other party who participated. Oral arguments on the appeal shall be limited to those issues clearly and distinctly set forth in the attached Notice of Appeal, and shall be confined to the substance of the written arguments previously provided.

The written argument deadline detailed in the attached original notice has passed, and the record on this matter remains closed. *No new evidence may be submitted.*

The appellants here are Gil Livni of Magnolia Investments and Eric Bonetti, and the only other party to timely provide written arguments was Mark Brouillard, a neighbor of the project who participated in the original hearings. Only the appellants and Mr. Brouillard are able to provide oral arguments to the Council during the appeal hearing.

This hearing will be conducted in person at the City Council Chambers/1175 East Main Street, but there will be an option to participate via Zoom; if you'd like to participate via Zoom please contact derek.severson@ashland.or.us for the zoom link.



PLANNING ACTION: PA-T2-2022-00037/PA-APPEAL-2022-00015
SUBJECT PROPERTY: 165 Water St., 160 Helman St. and 95 Van Ness Av.
APPELLANTS: Gil Livni/Magnolia Investments & Eric Bonetti
APPLICANT/OWNER: Rogue Planning & Development Svcs., *agent for* Gil Livni/Magnolia Investments
DESCRIPTION: An appeal of the Planning Commission’s denial of a six-lot commercial subdivision to accommodate a phased mixed-use development for the three properties at 165 Water St., 160 Helman St. and 95 Van Ness Av. The applicant’s Phase I requests Site Design Review approval for five mixed-use commercial buildings with ground floor commercial spaces and two residential units above in each building, as well as 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 includes 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. **COMPREHENSIVE PLAN DESIGNATION:** Employment; **ZONING:** E-1; **ASSESSOR’S MAP:** 39 1E 04CC; **TAX LOTS #:** 2000, 2100 & 7100

This appeal will be processed on the record according to AMC 18.5.1.060.I. The grounds for the appeal as identified by the appellant 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; and 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 will be limited to these four grounds for appeal identified in the appeal request.

ASHLAND CITY COUNCIL MEETING: ~~Tuesday, June 21, 2022 at 6:00 PM, Ashland Civic Center~~
RESCHEDULED HEARING: Tuesday, January 3, 2023 at 6:00 PM, Ashland Civic Center



Notice is hereby given that the ASHLAND CITY COUNCIL will meet to consider an Appeal on the Record for Planning Action #2022-00037 on the meeting date and time shown above. The meeting will be at the ASHLAND CIVIC CENTER, 1175 East Main Street, Ashland, Oregon.

Review of a decision of the Planning Commission by the City Council shall be confined to the record of the proceeding before the Planning Commission in accordance with 18.5.1.060.I. The record shall consist of the application and all materials submitted with it; documentary evidence, exhibits and materials submitted during the hearing or at other times when the record before the Planning Commission was open; recorded testimony; (including DVDs when available), the executed decision of the Planning Commission, including the findings and conclusions. In addition, for purposes of City Council review, the notice of appeal and the written arguments submitted by the parties to the appeal, and the oral arguments, if any, shall become part of the record of the appeal proceeding. The record and appeal materials are available for review at <http://www.ashland.or.us/165Water> or can be reviewed in the Planning Department offices at no cost. Copies will be provided at a reasonable cost, if requested.

Oral argument on the appeal shall be permitted before the Council. Oral argument shall be limited to ten minutes for the applicant, ten for the appellant, if different, and three minutes for any other Party who participated. A party shall not be permitted oral argument if written arguments have not been timely submitted. Written arguments shall be received in the Planning Department on or before 4:30 p.m., June 10, 2022. Written and oral arguments on the appeal shall be limited to those issues clearly and distinctly set forth above in this Notice of Appeal; similarly, oral argument shall be confined to the substance of the written argument. Statements of support or opposition are not argument. The record on this matter remains closed and no new evidence may be submitted. Argument may be submitted only by parties to the planning action and is to be directed to the Ashland Planning Department, Community Development and Engineering Services Building, 51 Winburn Way, Ashland, Oregon 97520 or e-mailed to PC-public-testimony@ashland.or.us. Submissions which do not constitute legal argument on identified issues in the notice of appeal will not be forwarded to City Council.

In compliance with the American with Disabilities Act, if you need special assistance to participate in this meeting, please contact the City Administrator’s office at 541-488-6002 (TTY phone number 1-800-735-2900). Notification 72 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to the meeting. (28 CFR 35.102-.35.104 ADA Title I).

If you have questions or comments concerning this request, please feel free to contact the assigned staff planner, Derek Severson in the Ashland Planning Department at 541-552-2040 or via e-mail to derek.severson@ashland.or.us. Participating parties wishing to provide their oral testimony electronically can contact the assigned staff planner after June 10th to make arrangements.

PRELIMINARY SUBDIVISION PLAT APPROVAL CRITERIA (AMC 18.5.3.070)

- A. *Approval Criteria.* The approval authority, pursuant to subsection 18.5.3.030.A, may approve, approve with conditions or deny a preliminary subdivision plat on findings of compliance with all of the following approval criteria.
1. The subdivision plan conforms to applicable City-adopted neighborhood or district plans, if any, and any previous land use approvals for the subject area.
 2. Proposed lots conform to the requirements of the underlying zone, per part 18.2, any applicable overlay zone requirements, per part 18.3, and any applicable development standards, per part 18.4 (e.g., parking and access, tree preservation, solar access and orientation).
 3. Access to individual lots necessary to serve the development shall conform to the standards contained in section 18.4.3.080 Vehicle Area Design.
 4. The proposed streets, utilities, and surface water drainage facilities conform to the standards in chapter 18.4.6, and allow for transitions to existing and potential future development on adjacent lands. The preliminary plat shall identify all proposed public improvements and dedications.
 5. All proposed private common areas and improvements, if any, are identified on the preliminary plat and maintenance of such areas (e.g., landscaping, tree preservation, common areas, access, parking, etc.) is ensured through appropriate legal instrument (e.g., Covenants, Conditions and Restrictions (CC&R's).
 6. Required State and Federal permits, as applicable, have been obtained or can reasonably be obtained prior to development.
- B. *Conditions of Approval.* The approval authority may attach such conditions as are necessary to carry out provisions of this ordinance, and other applicable ordinances and regulations.

SITE DESIGN REVIEW APPROVAL CRITERIA (AMC 18.5.2.050)

The following criteria shall be used to approve or deny an application:

- A. **Underlying Zone:** The proposal complies with all of the applicable provisions of the underlying zone (part 18.2), including but not limited to: building and yard setbacks, lot area and dimensions, density and floor area, lot coverage, building height, building orientation, architecture, and other applicable standards.
- B. **Overlay Zones:** The proposal complies with applicable overlay zone requirements (part 18.3).
- C. **Site Development and Design Standards:** The proposal complies with the applicable Site Development and Design Standards of part 18.4, except as provided by subsection E, below.
- D. **City Facilities:** The proposal complies with the applicable standards in section 18.4.6 Public Facilities and that adequate capacity of City facilities for water, sewer, electricity, urban storm drainage, paved access to and throughout the property and adequate transportation can and will be provided to the subject property.
- E. **Exception to the Site Development and Design Standards:** The approval authority may approve exceptions to the Site Development and Design Standards of part 18.4 if the circumstances in either subsection 1 or 2, below, are found to exist.
 1. There is a demonstrable difficulty meeting the specific requirements of the Site Development and Design Standards due to a unique or unusual aspect of an existing structure or the proposed use of a site; and approval of the exception will not substantially negatively impact adjacent properties; and approval of the exception is consistent with the stated purpose of the Site Development and Design; and the exception requested is the minimum which would alleviate the difficulty.; or
 2. There is no demonstrable difficulty in meeting the specific requirements, but granting the exception will result in a design that equally or better achieves the stated purpose of the Site Development and Design Standards.

PHYSICAL & ENVIRONMENTAL CONSTRAINTS REVIEW PERMIT APPROVAL CRITERIA (AMC 18.3.10.050)

An application for a Physical Constraints Review Permit is subject to the Type I procedure in section 18.5.1.050 and shall be approved if the proposal meets all of the following criteria.

- A. Through the application of the development standards of this chapter, the potential impacts to the property and nearby areas have been considered, and adverse impacts have been minimized.
- B. That the applicant has considered the potential hazards that the development may create and implemented measures to mitigate the potential hazards caused by the development.
- C. That the applicant has taken all reasonable steps to reduce the adverse impact on the environment. Irreversible actions shall be considered more seriously than reversible actions. The Staff Advisor or Planning Commission shall consider the existing development of the surrounding area, and the maximum development permitted by this ordinance.

EXCEPTION TO THE DEVELOPMENT STANDARDS FOR HILLSIDE LANDS APPROVAL CRITERIA (AMC 18.3.10.090.H)

An exception under this section is not subject to the variance requirements of chapter 18.5.5 Variances. An application for an exception is subject to the Type I procedure in section 18.5.1.050 and may be granted with respect to the development standards for Hillside Lands if the proposal meets all of the following criteria.

1. There is demonstrable difficulty in meeting the specific requirements of this chapter due to a unique or unusual aspect of the site or proposed use of the site.
2. The exception will result in equal or greater protection of the resources protected under this chapter.
3. The exception is the minimum necessary to alleviate the difficulty.
4. The exception is consistent with the stated Purpose and Intent of chapter 18.3.10 Physical and Environmental Constraints Overlay chapter and section 18.3.10.090 Development Standards for Hillside Lands.

TREE REMOVAL PERMIT APPROVAL CRITERIA (AMC 18.5.7.040.B)

1. **Hazard Tree.** A Hazard Tree Removal Permit shall be granted if the approval authority finds that the application meets all of the following criteria, or can be made to conform through the imposition of conditions.
 - a. The applicant must demonstrate that the condition or location of the tree presents a clear public safety hazard (i.e., likely to fall and injure persons or property) or a foreseeable danger of property damage to an existing structure or facility, and such hazard or danger cannot reasonably be alleviated by treatment, relocation, or pruning. See definition of hazard tree in part 18.6.
 - b. The City may require the applicant to mitigate for the removal of each hazard tree pursuant to section 18.5.7.050. Such mitigation requirements shall be a condition of approval of the permit.

2. Tree That is Not a Hazard. A Tree Removal Permit for a tree that is not a hazard shall be granted if the approval authority finds that the application meets all of the following criteria, or can be made to conform through the imposition of conditions.
- a. The tree is proposed for removal in order to permit the application to be consistent with other applicable Land Use Ordinance requirements and standards, including but not limited to applicable Site Development and Design Standards in part 18.4 and Physical and Environmental Constraints in part 18.10.
 - b. Removal of the tree will not have a significant negative impact on erosion, soil stability, flow of surface waters, protection of adjacent trees, or existing windbreaks.
 - c. Removal of the tree will not have a significant negative impact on the tree densities, sizes, canopies, and species diversity within 200 feet of the subject property. The City shall grant an exception to this criterion when alternatives to the tree removal have been considered and no reasonable alternative exists to allow the property to be used as permitted in the zone.
 - d. Nothing in this section shall require that the residential density to be reduced below the permitted density allowed by the zone. In making this determination, the City may consider alternative site plans or placement of structures of alternate landscaping designs that would lessen the impact on trees, so long as the alternatives continue to comply with the other provisions of this ordinance.
 - e. The City shall require the applicant to mitigate for the removal of each tree granted approval pursuant to section 18.5.7.050. Such mitigation requirements shall be a condition of approval of the permit.

APPEAL OF TYPE II DECISION (AMC 18.5.1.060.I)

Appeal of Type II Decision. The City Council may call up a Type II decision pursuant to section 18.5.1.060.J. A Type II decision may also be appealed to the Council as follows.

1. **Who May Appeal.** Appeals may only be filed by parties to the planning action. "Parties" shall be defined as the following.
 - a. The applicant.
 - b. Persons who participated in the public hearing, either orally or in writing. Failure to participate in the public hearing, either orally or in writing, precludes the right of appeal to the Council.
 - c. Persons who were entitled to receive notice of the action but did not receive notice due to error.
2. **Appeal Filing Procedure.**
 - a. ***Notice of Appeal.*** Any person with standing to appeal, as provided in subsection 18.5.1.060.I.1, above, may appeal a Type II decision by filing a notice of appeal and paying the appeal fee according to the procedures of this subsection.
 - b. ***Time for Filing.*** The notice of appeal shall be filed with the City Administrator within ten days of the date the notice of decision is mailed.
 - c. ***Content of Notice of Appeal.*** The notice shall include the appellant's name, address, a reference to the decision sought to be reviewed, a statement as to how the appellant qualifies as a party, the date of the decision being appealed, and a clear and distinct identification of the specific grounds for which the decision should be reversed or modified, based on identified applicable criteria or procedural irregularity.
 - d. The appeal requirements of this section must be fully met or the appeal will be considered by the City as a jurisdictional defect and will not be heard or considered.
3. **Mailed Notice.** The City shall mail the notice of appeal together with a notice of the date, time, and place to consider the appeal by the City Council to the parties, as provided in subsection 18.5.1.060.I.1, at least 20 days prior to the meeting.
4. **Scope of Appeal.**
 - a. Except upon the election to reopen the record as set forth in subsection 18.5.1.060.I.4.b, below, the review of a decision of the Planning Commission by the City Council shall be confined to the record of the proceeding before the Commission. The record shall consist of the application and all materials submitted with it; documentary evidence, exhibits, and materials submitted during the hearing or at other times when the record before the Commission was open; recorded testimony; (including DVDs when available), the executed decision of the Commission, including the findings and conclusions. In addition, for purposes of Council review, the notice of appeal and the written arguments submitted by the parties to the appeal, and the oral arguments, if any, shall become part of the record of the appeal proceeding.
 - b. ***Reopening the Record.*** The City Council may reopen the record and consider new evidence on a limited basis, if such a request to reopen the record is made to the City Administrator together with the filing of the notice of appeal and the City Administrator determines prior to the Council appeal hearing that the requesting party has demonstrated one or more of the following.
 - i. That the Planning Commission committed a procedural error, through no fault of the requesting party, that prejudiced the requesting party's substantial rights and that reopening the record before the Council is the only means of correcting the error.
 - ii. That a factual error occurred before the Commission through no fault of the requesting party which is relevant to an approval criterion and material to the decision.
 - iii. That new evidence material to the decision on appeal exists which was unavailable, through no fault of the requesting party, when the record of the proceeding was open, and during the period when the requesting party could have requested reconsideration. A requesting party may only qualify for this exception

if he or she demonstrates that the new evidence is relevant to an approval criterion and material to the decision. This exception shall be strictly construed by the Council in order to ensure that only relevant evidence and testimony is submitted to the hearing body.

- iv. Re-opening the record for purposes of this section means the submission of additional written testimony and evidence, not oral testimony or presentation of evidence before the Council.

5. **Appeal Hearing Procedure.** The decision of the City Council is the final decision of the City on an appeal of a Type II decision, unless the decision is remanded to the Planning Commission.

- a. ***Oral Argument.*** Oral argument on the appeal shall be permitted before the Council. Oral argument shall be limited to ten minutes for the applicant, ten for the appellant, if different, and three minutes for any other party who participated below. A party shall not be permitted oral argument if written arguments have not been timely submitted. Written arguments shall be submitted no less than ten days prior to the Council consideration of the appeal. Written and oral arguments on the appeal shall be limited to those issues clearly and distinctly set forth in the notice of appeal; similarly, oral argument shall be confined to the substance of the written argument.
- b. ***Scope of Appeal Deliberations.*** Upon review, and except when limited reopening of the record is allowed, 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. No issue may be raised on appeal to the Council that was not raised before the Commission with sufficient specificity to enable the Commission and the parties to respond.
- c. ***Council Decision.*** The Council may affirm, reverse, modify, or remand the decision and may approve or deny the request, or grant approval with conditions. The Council shall make findings and conclusions, and make a decision based on the record before it as justification for its action. The Council shall cause copies of a final order to be sent to all parties participating in the appeal. Upon recommendation of the Administrator, the Council may elect to summarily remand the matter to the Planning Commission. If the Council elects to remand a decision to the Commission, either summarily or otherwise, the Commission decision shall be the final decision of the City, unless the Council calls the matter up pursuant to subsection [18.5.1.060.J](#).

6. **Record of the Public Hearing.** For purposes of City Council review, the notice of appeal and the written arguments submitted by the parties to the appeal, and the oral arguments, if any, shall become part of the record of the appeal proceeding.

The public hearing record shall include the following information.

- a. The notice of appeal and the written arguments submitted by the parties to the appeal.
- b. Copies of all notices given as required by this chapter, and correspondence regarding the application that the City mailed or received.
- c. All materials considered by the hearings body including the application and all materials submitted with it.
- d. Documentary evidence, exhibits and materials submitted during the hearing or at other times when the record before the Planning Commission was open.
- e. Recorded testimony (including DVDs when available).
- f. All materials submitted by the Staff Advisor to the hearings body regarding the application;
- g. The minutes of the hearing.
- g. The final written decision of the Commission including findings and conclusions.

7. **Effective Date and Appeals to State Land Use Board of Appeals.** City Council decisions on Type II applications are final the date the City mails the notice of decision. Appeals of Council decisions on Type II applications must be filed with the State Land Use Board of Appeals, pursuant to ORS 197.805 - 197.860.

Appeal on the Record Frequently Asked Questions

A recent land use decision of the Planning Commission has been appealed to the City Council. The appeal of a Planning Commission decision is handled according to the procedures found in AMC 18.5.1.060.I as “*An Appeal on the Record.*”

What is “An Appeal on the Record”?

An “*Appeal on the Record*” is an appeal of a land use decision where the City Council must consider the same facts and information (i.e. “the record”) that the Planning Commission saw. The City Council may not consider new facts or information.

Prior to 2008, City Council appeals were handled through a *de novo* hearing process and the City Council was able to consider new information during an appeal that was not previously included in the record upon which the Planning Commission based their decision. *Since 2008, City Council appeals have been handled through an appeal on the record.*

What are the steps to appeal?

Once the Planning Commission makes a decision on a land use matter, a party to the original decision may appeal that decision to the City Council. The appellant must identify, in writing, specific areas where they think the Planning Commission made a mistake. The mistake has to be an error in interpretation of a fact, an interpretation of a rule or regulation, or in procedure. *The City Council will review only those specific issues raised as “errors.”*

The Council will decide: 1) whether there is substantial evidence to support the decision of the Planning Commission, and 2) if the Planning Commission committed an error.

What will happen at the hearing?

At the City Council meeting, the only people who will be allowed to talk directly to the Council will be the City staff; the applicant; people who have filed the written appeal; and participants who provided oral or written testimony during the original Planning Commission hearing and who submit written arguments at least 10 days in advance of the City Council meeting. The applicant will be allowed 10 minutes and the people who have filed the written appeal will be allowed 10 minutes. Participants who have filed written arguments will be allowed 3 minutes to summarize their argument for the City Council. *No one can introduce new information or facts.*

What may the Council consider in reaching a decision?

Except when limited reopening of the record is allowed as provided in AMC 18.5.1.060.I.4.b., 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. City Council review is limited to the issues clearly and distinctly set forth in the notice of appeal. No issue may be raised on appeal to the Council that was not raised before the Planning Commission with sufficient specificity to enable the Planning Commission and the parties to respond.

Ultimately, the Council may:

- Affirm the decision of the Planning Commission and reject the appeal;
- Reverse the decision of the Planning Commission and support the written appeal;
- Modify the decision of the Planning Commission; or
- Send the decision back to the Planning Commission with instructions for further proceedings. In this case, subsequent actions by the Planning Commission will be the final decision of the City.

The final decision of the City can be appealed to the State Land Use Board of Appeals (LUBA).