

RESOLUTION NO. 1737

A RESOLUTION ADOPTING FINDINGS DENYING A ZONE MAP AMENDMENT FROM RESIDENTIAL AGRICULTURE – HOLDING (RA-H) TO PLANNED DEVELOPMENT RESIDENTIAL 1 (PDR-1), AND DENYING A TENTATIVE PARTITION PLAT TO CREATE THREE PARCELS, WHICH IS PART OF THE RIVER ESTATES II SUBDIVISION PLAT ON 3.01 ACRES OF PROPERTY. THE SUBJECT PROPERTY IS MORE PARTICULARLY IDENTIFIED AS BEING TAX LOT 500 IN SECTION 23A T3S-R1W, OR LOT 5 IN RIVER ESTATES II, CLACKAMAS COUNTY AND WILSONVILLE, OREGON. LEONARD AND KATHY MYERS, APPLICANTS.

WHEREAS, Leonard and Kathy Myers have submitted a full and complete application together with planning exhibits in accordance with the procedures set forth in Sections 4.008, 4.210 and 4.197 of the Wilsonville Code requesting a tentative partition plat and a zone map amendment of the above described property; and

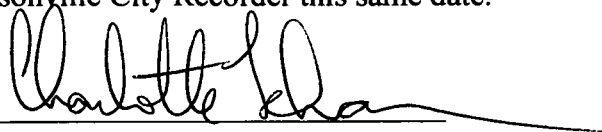
WHEREAS, Panel A of the Wilsonville Development Review Board (DRB) after providing public notice of the hearing in accordance with State law and Chapter 4 of the Wilsonville Code, on September 10, 2001, held a hearing on this request, and after taking public testimony, gave full consideration to the matter and recommended approval to City Council of the request with conditions, adopting Resolution 01DB25 and staff report dated September 10, 2001; and

WHEREAS, planning exhibits and staff report were duly considered by the City Council at public hearings held on October 15, 2001, at which time exhibits, together with findings and public testimony were entered into the public record; and

WHEREAS, interested parties have had the opportunity to be heard on the subject.

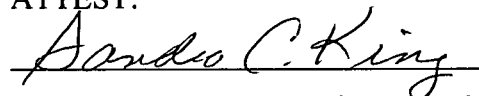
NOW THEREFORE, BE IT RESOLVED that the City Council of the City of Wilsonville does hereby deny the application as submitted and hereby adopts the attached findings and conclusions, marked Exhibit A, Final Findings and Conclusions, attached and incorporated herein together with the minutes of the denial motion marked Exhibit B, attached and incorporated here. The City Council further finds and concludes that the applicant failed to carry their burden of persuasion by a preponderance of the evidence on the record as a whole.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting thereof
this 5th day of November, 2001, and filed with the Wilsonville City Recorder this same date.



CHARLOTTE LEHAN, MAYOR

ATTEST:



Sandra C. King, CMC, City Recorder

SUMMARY OF VOTES:

Mayor Lehan	Yes
Councilor Helser	Yes
Councilor Barton	Abstain
Councilor Holt	Excused
Councilor Kirk	Yes

**EXHIBIT A
FINAL FINDINGS AND CONCLUSIONS**

REQUEST: 01DB25 Leonard and Kathy Myers. Review a proposed zone map amendment from RA-H to PDR-1. Review a proposed tentative land partition to create 3-parcels.

ACTION

The City Council denied the proposed tentative partition plat and the proposed zone change from RA-H to PDR-1.

LEONARD AND KATHY MYERS

Review Criteria:

The applicable review criteria are:

Zoning

Section 4.013: Hearing procedures.
Section 4.015: Findings and conditions
Section 4.034: Application procedures-general.
Section 4.031: Authority of the Development Review Board
Section 4.033: Authority of the City Council
Section 4.124: Planned Development Residential standards.
Section 4.120: Residential Agriculture-Holding (RA-H) zone.
Section 4.124.1: PDR-1 zone
Section 4.140: Planned Development
Section 4.155: Off-street parking.
Subsection 4.171: General regulations-Protection of natural features and other resources.
Section 4.172: 100-year flood plain.
Subsection 4.177.01(B): Sidewalks.
Section 4.197.02: Zone Map Amendment.
Sections 4.200 to 4.260: Subdivisions.
Subsection 4.421(l)(a): Requiring preservation of landscape insofar as practical, by minimizing tree removal.
Sections 4.400 – 4.450: Site and Design Review
Sections 4.600 – 4.630.20: Tree preservation and protection.

Statewide Planning Goals

Comprehensive Plan:

Applicable Implementation Measures for Residential Development found on pages 65 to 71.

Implementation Measure 4.1.5.aa: Secondary Open Space

Title 1, Metro's Urban Growth Management Functional Plan

Natural Resources Ordinance #516

Ordinance # 464,

Ordinance No. 514: Public Facilities Water Strategy.

Ordinance No.463: Public Facilities Transportation Strategy.

Submittal date: June 6, 2001

120-day review limit: October 5, 2001

Property Owner: Leonard and Kathy Myers

Applicant: Same

Surveyor: Centerline Concepts

Wetland determination and delineation: Pacific Habitat Services, Inc.

FINDINGS

Vicinity Information:

1. The subject property is located along the East Side of Rose Lane. The Myer residence is on the very south end of the subject property. Adjacent to the north is single family homes on +/- 3-acre lots. The subject property is more particularly identified as being Tax Lot 500 in Section 24A, T3S, R1W or Lot 5 in River Estates II, Clackamas County, and Wilsonville, Oregon.

Property Description:

2. The subject property comprises slight slopes. The subject property is designated Residential 0 to 1 du per acre on the Comprehensive Plan Map. The north end of the subject property is designated Secondary Open Space, which is 100-year floodplain and is a wetland.

Proposal:

3. The applicant is requesting approval of a tentative partition plat for three-(3) lots, one of which is include the applicant's existing house.

Project Data:

Gross site area.....130,999 SF or 3.01 acres
Area within existing SOS (wetland)...approximately .4 acres
Net building area.....2.51 acres
Gross residential density.....1 dwelling unit per acre
Net residential density.....1.2 dwelling units per acre.

Proposed Parcel 1 (existing house): 36,818 SF.

Proposed Parcel 2 (existing barn): 36,313 SF

Proposed Parcel 3 (vacant): 57,868 SF

ZONE MAP AMENDMENT

Zoning:

4. The property is currently zoned Residential Agriculture Holding 1-acre minimum (RA-H). The purpose of the RA-H Zone is set forth in Section 4.120, Chapter 4 of the Wilsonville Code.

Section 4.120.01: The purpose of this zone to serve as a holding zone to preserve the future urban level development potential as undeveloped property designated for industrial or more intensive residential development. This zone shall be applied to all urbanizable properties within the City which are planned for development and which have not previously received development approval in accordance with the Comprehensive Plan.

The proposed Zone Map Amendment from RA-H to PDR-1 is intended to serve as a procedure to evaluate the conversion of urbanizable land to urban land consistent with the Comprehensive Plan. Because the service levels vary throughout the City, the zoning process allows for a case-by-case analysis of the

availability of public facilities and services and to determine specific conditions related to needed public facilities improvements. All land development proposals are reviewed for conformity with the Comprehensive Plan and specific standards set forth in zoning ordinance. As set forth in Section 4.197.02 of the Wilsonville Code, in recommending approval or denial of a proposed zone map amendment, the City Council must at a minimum, adopt findings addressing Criteria A - G.

Criterion A:

That the application before the Commission or Board was submitted in accordance with the procedures set forth in Section 4.008 or, in the case of a Planned Development, Section 4.140.

Response Finding:

5. The applicant has provided findings in Exhibit 'D' addressing the tentative plat criteria and the zone map amendment criteria does not meet Criteria A.

Criterion B:

The proposed amendment is consistent with the Comprehensive Plan map designation and substantially complies with the applicable goals, policies and objectives (implementation measures) of the Comprehensive Plan.

Response findings:

6. The applicant has provided findings in Exhibit 'D' addressing the Comprehensive Plan Map and with the Comprehensive Plan Goals, Policies and Implementation Measures, which are not included into this report for findings of denial. The applicant's findings do not meet Criterion B.
7. The subject property is 3.01 acres. For the purpose of developing the property the Comprehensive Plan Map density is Residential 0 to 1 du/ac. Proposed are three parcels at 1 dwelling unit per acre, which is consistent with the Residential 0 to 1 dwelling units per acre density.
8. This application was submitted prior to the adoption of the Natural Resources Plan (Ordinance No. 516). Ordinance No. 516 has replaced Primary Open Space and Secondary Open Space with a new Significant Resource Overlay Zone (SROZ). Thus the Comprehensive Plan Map in effect at the time the application was submitted designated the north part of the subject property in Secondary Open Space (SOS). In considering the Zone Map Amendment and the Tentative Partition Plat and structures, the characteristics for Secondary Open Space found on Pages 74 and 75 in the Comprehensive Plan are applicable. Furthermore, Implementation Measure 4.1.5.aa defines the types of areas that constitute SOS. This part of the property is a relatively low depression with slight gradients. It functions as a wetland and as 100-year flood plain.

9. The applicant did not demonstrate that future development (house site) on proposed parcel No. 3 would not impact the .4 acre wetland found on the North Side of the subject property. Thus the application fails because the evidence supplied does not meet Section 4.171.06(A)(1 to 3). Furthermore, proposed parcel's No. 2 and 3 are within 100-year flooding. The Building Code and Section 4.172WC regulates development within the flood plain.
10. The applicant did not demonstrate that house sites on proposed parcel's No. 2 and 3 would not impact 100-year flooding measured at 90 foot base flood elevation referenced to the National Geodetic Vertical Datum of 1929. Furthermore, the applicant did not demonstrate that house sites on proposed parcel's No. 2 and 3 would minimize private losses on surrounding properties due to flood conditions in flood prone areas. Thus, the application fails because the evidence supplied does not meet Section 4.172.01(A to E).
11. Sections 4.124.1: Planned Development Residential standards, Section 4.124.1: PDR-1 zone sets forth the minimum residential development standards.

Criterion C:

In the event that the subject property, or any portion thereof, is designated as "Residential" on the City's Comprehensive Plan Map; specific findings shall be made addressing substantial compliance with Goal 4.3, Objective 4.3.3, Objective 4.3.4, Policy 4.4.2 and Policy 4.4.8 of Wilsonville's Comprehensive Plan text.

Response Findings:

12. The applicant has not provided adequate findings in Exhibit D, which demonstrate that Criterion 'C' is met.

Criterion D:

That the existing primary facilities, i.e., roads and sidewalks, water sewer and storm are available and are of adequate size to serve the proposed development; or, that adequate facilities can be provided in conjunction with project development. The Planning Commission and the Development Review Board shall utilize any and all means to insure that all primary facilities are available and are adequately sized.

Response Findings:

13. Ordinance No. 514 Public Facilities Water Strategy: The proposed land partition qualifies as a Category 1 because it has a "de minimus" water impact (less than 2,000 gallons/peak summer day). Proposed parcel #1 has an existing house with well water and proposed parcels 2 and 3 will be sold for new home sites. There is an 8" trunk line at the north property line to service the subject property.

14. 8" sanitary sewer line is immediately available at Rose Lane.
15. In condition No. 10 of Resolution 01DB25, the Development Review Board conditioned the applicant to: "The applicant shall submit a proposed storm drainage plan (to the City Engineer) before the City Council meeting of October 15, 2001." The applicant did not provide a storm drainage plan to the City Council. The applicant did not demonstrate to the City Council that house sites on proposed parcel's No. 2 and 3 can be adequately served by public storm drainage system or dry wells. Thus, the application fails because the evidence supplied does not demonstrate that Section 4.140.09(J)(3) is met.

Criterion E:

16. *That the proposed development does not have a significant adverse effect upon Primary Open Space or natural hazard, and/or geologic hazard. When Primary Open Space or natural hazard, and/or geologic hazard are located on or about the proposed development, the Planning Commission shall use appropriate measure to mitigate and significantly reduce conflicts between the development and identified hazard or Primary Open Space.*

Response Finding:

17. The record indicates that .4 acres of delineated wetlands are located on the North Side of the subject property. Those wetlands are part of a larger wetland, which is next to the north and east sides of the subject property. The wetlands are identified in Secondary Open Space on the Comprehensive Plan Map. The City Council heard considerable public testimony with regards to new residential development on proposed parcels No's 2 and 3 in the flood plain and on the wetlands. The people that testified living in the neighborhood believe that the wetlands are delicate and are worthy of protection. Council believes the testimony that those wetlands are delicate and are worthy of protection and perhaps as a neighborhood they should improve those wetlands so their functional value is greater than it is. The applicant failed to carry the burden before the Council as far as dealing with 100 year flooding and protecting wetlands as no specific house plans were proposed to measure their development impacts. Therefore, the evidence supplied did not demonstrate that Criterion E is met.

Criterion F:

That the applicant is committed to a development schedule demonstrating that development of the property is reasonably expected to commence within two (2) years of the initial approval of the zone change.

Response Finding:

18. The applicant intends to develop parcels within 2-years of the initial approval of this application. The parcels will be sold to a homebuilder. However, the applicant testified he has not entered into any development or sale agreement at this time.

Criterion G:

That the proposed development and use(s) can be developed in compliance with the applicable development standards or appropriate conditions are attached that ensure that the project development substantially conforms to the applicable development standards.

Response Findings:

19. Density calculation:

Gross site area.....130,999 SF or 3.01 acres
Area within existing SOS (wetland)...approximately .5 acres
Net building area.....2.51 acres
Gross residential density.....1 dwelling unit per acre
Net residential density.....1.2 dwelling units per acre.

Proposed Parcel 1 (existing house): 36,818 SF.
Proposed Parcel 2 (existing barn): 36,313 SF
Proposed Parcel 3 (vacant): 57,868 SF

The maximum housing density on the gross site area allowed by Code is 3 acres x 1 = 3 dwelling units, which is being proposed here.

Furthermore, Title #1 of the Urban Growth Management Functional Plan (UGMFP) seeks 80% maximum density at build-out of any particular parcel. In this instance 3 units (1 unit per acre max. planned density x 3 acres = 3 units x 80% = 2.4 dwelling units). The proposal would otherwise meet the Title #1, 80% rule.

TENTATIVE PLAT REVIEW
Sections 4.200 to 4.260

20. The applicant has met the submittal criteria in Section 4.210(.01).

Furthermore, Subsection 4.140.09(1): Location, design, size and uses, Subsection 4.140.09(2): Traffic "D" LOS and Subsection 4.140.09(3): Public facilities are applicable to this request.

Subsection 4.140.09(J)(1): The location, design, size and uses, both separately and as a whole, are consistent with the Comprehensive Plan, and with any other applicable plan, development map or Ordinance adopted by the City Council.

Subsection 4.140.09(J)(2): That the location, design, size, and uses are such that traffic generated by the development can be accommodated safely and without congestion in excess of level service D defined in the highway capacity manual published by the National Highway Research Board on existing or immediately planned arterial or collector streets and will, in the case of commercial or industrial developments, avoid traversing local streets.

Subsection 4.140.09(J)(3): That the location, design, size and uses are such that the residents or establishments to be accommodated will be adequately served by existing or immediately planned facilities and services.

Response findings to Subsection 4.140.09(J)(1):

21. The entire property is currently zoned Residential Agricultural 1 -acre (RA-H). Proposed is PDR-1 zone to allow three proposed home sites.

Comprehensive Plan Designations:

22. As stated in previous findings, the subject property is Residential 0-1 du/acre and the far north end of the subject property is designated Secondary Open Space (SOS).

Area of Special Concern:

23. The Comprehensive Plan does not identify the subject property in an area of special concern.

Residential Development Standards.

24. Section 4.124.1 and 4.113 sets forth the minimum residential development standards: The tentative plat shows large lots. The applicant anticipates that all residential requirements of the Zoning Code will be met.

The operable review criteria for the proposed tentative partition is found in Sections 4.120 to 4.220 Section 4.210 refer to creation of road or street shall prepare application for partition, complete application is reviewed by the Development Review Board, and final plat is reviewed by the Planning Director. The proposed application has not met Subsection 4.210.01(B)(20), which is compliance with Section 4.172 (100 year flooding); 4.210.01(B)(21) proposed use or treatment of any property designated as open space (the on-site wetland); and Section 4.210.01(B)(25) showing storm drainage.

Subsection 4.236 Streets:

25. Rose Lane and Montgomery Way are not constructed to the City Public Works Standards. Refer to the City Engineer's PF conditions of approval for street improvement requirements (Exhibit E).

Parking Minimum:

26. Section 4.155 (Table #5): Each home site shall provide 1 parking space per dwelling unit, which should not be a problem with the proposed large parcels.

Outdoor Living Area

27. Subsection 4.113.02 requires 25% of the property be devoted to open space, which is met by rear yards and the wetland.

Response findings to Criteria Subsection 4.140.09(J)(2) Traffic:

28. Since this project is located south of Boeckman Road it is not exempt from the traffic restriction at the Wilsonville Road/I-5 intersections. However, a traffic report was not required because only two homes are proposed, which would have a "de minimus" (3 or fewer PM peak hour trips) impact on the Wilsonville Interchange. Therefore, the project at approximately 1.3 PM peak hour trips (.65 trips per new dwelling) has an acceptable traffic level and can be accommodated safely and without congestion.
29. The Transportation Master Plan requires that local residential streets be designed for 1,200 vehicles per day, consist of 32 feet of pavement within a 52-foot right-of-way. The Transportation Master Plan (Figure 20) identifies Rose Lane as a local residential street. See the City Engineer's (Exhibit E) proposed conditions for half-street improvement.

Driveways:

30. The house on proposed parcel No. 1 has driveway access at Montgomery Way. Proposed parcels 2 and 3 show direct access at Rose Lane, which is allowed at a local residential street.

Sidewalks / Bikeways:

31. Subsection 4.177.01(B) of the Zoning Code:

All streets shall be developed with curbs, utility strips and sidewalks on both sides; or a sidewalk on one side and a bike path on the other side.

1. Within a Planned Development the Development Review Board may approve a sidewalk on only one side. If the sidewalk is permitted on just one side of the street, the owners will be required to sign an agreement to an assessment in the future to construct the other sidewalk if the City Council decides it is necessary.

32. Required is a 5-foot concrete curb tight sidewalk along Rose Lane and Montgomery Way. Sidewalks are not proposed. The applicant sought a waiver from improving a sidewalk along Montgomery Way and at Rose Lane. Staff supported the applicant's request for the waiver because the DRB did not require sidewalk improvement in the approval for the adjacent Buck's Landing subdivision. The proposed subdivision is immediately north of Buck's Landing subdivision. The DRB found that sidewalk improvement along Montgomery Way was out of character with the other residential homes as none exists. However, Rose Lane serves as a minor collector street for the subdivision and the neighborhood would benefit from a sidewalk.

Response findings to Subsection 4.140.09(J)(3) Public Facilities:

33. The applicant has failed to meet this criteria. See response finding 15.

Tree Preservation:

34. Sections 4.600 – 4.630.20 Tree preservation and protection. Specifically, it clearly states in the City of Wilsonville Tree Ordinance No. 464 that "application of the standards of this section shall not result in a reduction of square footage or loss of density" (Section 4.610.40). In addition, "no development application shall be denied solely because trees grow on the site...tree preservation and conservation as a development principle shall be equal in concern and importance to other design principles" (Section 4.610.10)
35. The proposal fails Subsection 4.171(.01)(B) as it does not encourages site planning and development practices, which would protect and enhance the natural wetland.

Site and Design Review

- 36. Sections 4.400 – 4.450: Site and Design Review. Except for street trees, this project does not require Site and Design review. There are no common areas to be landscaped. However, the applicant has not otherwise sufficiently addressed the wetlands. The wetland will not be disturbed or improved. The applicant is not proposing a sign to identify the project.

The following decision criteria were listed in the Public Hearing Notice for the Development Review Board and City Council public hearings. The proposed addendum findings are intended to address issues raised at the Development Review Board for the City Council relative to protecting natural resources found on the subject property.

Comprehensive Plan:

Implementation Measure 4.1.5.aa: Secondary Open Space

Zoning

Subsection 4.171: General regulations-Protection of natural features and other resources.

Sections 4.172: 100-Year Flood Plain regulations

Secondary Open Space Analysis:

The Comprehensive Plan Map designates the North End of the subject property in Secondary Open Space. Implementation Measure 4.1.5.aa of the Comprehensive Plan defines the types of areas that constitute SOS.

Project Data:

Gross site area.....130,999 SF or 3.01 acres
Area within existing SOS (wetland)...approximately .4 acres
Net building area.....2.51 acres
Gross residential density.....1 dwelling unit per acre
Net residential density.....1.2 dwelling units per acre.

Proposed Parcel 1 (existing house): 36,818 SF.

Proposed Parcel 2 (existing barn): 36,313 SF

Proposed Parcel 3 (vacant): 57,868 SF

Implementation Measure 4.1.5.aa: Secondary Open Space:

c. Secondary open space is intended to serve as a buffer to primary open space areas. They may be developed in accordance with special development standards and shall be evaluated through a conditional use and design review process, except when the proposal is a part of a planned development process. These areas include the following:

1. *Land within the Willamette River Greenway boundary, but beyond the 150-foot line.*
2. *High voltage power line easements.*
3. *The 100-year flood plain.*
4. *Slopes between 12% and 20%.*
5. *Designated historic sites.*
6. *Small stands of trees and heavily vegetated (with native vegetation) adjacent to primary open space areas.*

Criterion c.1:

Land within the Willamette River Greenway Boundary, but beyond the 150-foot line.

Response Finding:

37. The subject property is not within the Willamette River Greenway; therefore this criterion is not applicable.

Criterion c.2:

High voltage power line easement.

Response Finding:

38. High voltage power lines do not impact the subject property; therefore this criterion is not applicable.

Criterion c.3:

The 100-year flood plain.

Response Finding:

39. There was an air photo submitted into the record (Exhibit 'Y') showing extensive flooding of most of the subject property (proposed parcels No's 2 and 3) during the 1964 flood. The 1964 flood was a 100-year event. Furthermore, the Federal Emergency Management Agency Flood Mapping indicates that portions of proposed parcels No's 2 and 3 are within 100-year flooding, which is Zone AH of Community Panel No. 410025 0005B of the Flood Insurance Rate Map. Zone AH is 100-year shallow flooding where depths are between on (1) and three (3) feet. The base flood elevation is 90 feet referenced to the National Geodetic Vertical Datum of 1929. The balance of the property is in Zone 'B', which are areas between limits of 100-year flood and 500-year flood. The applicant has not delineated building footprints of future home sites to show potential impacts on 100-year flooding. While it may appear that there is adequate space for the

proposed two homes sites to avoid the 100-year flooding to ensure that there is the Building Official in Condition No. 4 of his report is requiring that:

Both parcel numbers 2 and 3 are located in the 100-year flood plain. Any new development proposed for these parcels shall comply with the Flood Plain Ordinance, and Metro's Standards for balance cut and fill.

The applicant has agreed to the above condition. Furthermore, Sections 4.172.06 and .07WC sets forth-general standards for flood proofing residential construction within 100-year flooding The development review board was concerned and required the applicant to provide a water storm drainage plan. The applicant failed to carry the burden before the Council as far as dealing with 100 year flooding and protecting wetlands as no specific house plans were proposed to measure their development impacts, nor was there a master storm drain plan provided. Therefore, the evidence supplied did not demonstrate that SOS Criterion No. 4 is met.

Criterion c.4:

Slopes between 12% and 20%.

Response Finding:

40. The subject property is relatively level with slopes less that 12%.

Criterion c.5:

Designated historic sites.

Response Finding:

41. The subject property is not a designated historic site; therefore this criterion is not applicable.

Criterion c.6:

Small stands of trees and heavily vegetated (with native vegetation) adjacent to primary open space areas.

Response Finding:

42. The subject property is generally void of significant trees and it is not adjacent to Primary Open Space. Significant trees on-site are located outside Secondary Open Space. In the event the applicant removes trees a City Type 'A' or 'B' tree removal permit is required.

Conclusion finding to Implementation Measure 4.1.5.aa: Secondary Open Space:

43. The areas of the property identified in Zone AH of Community Panel No. 410025 0005B of the Flood Insurance Rate Map is Secondary Open Space, which is also wetlands. The applicant has not predetermined two home sites to review development impacts on 100-year flooding. While it may appear that there is adequate space for two home sites, the Building Official in Condition No. 4 of his report is requiring flood proofing. However, the evidence regarding 100- year flooding did not assure City Council that the public safety, welfare and health is protected to approve this application at this time.

Subsection 4.171.06: General Regulations-Protection of Natural Features and Other Resources/Wildlife Habitats and Distinctive Resource Areas.

(.06) Wildlife Habitats and Distinctive Resource Areas: In order to minimize adverse impacts on wildlife and sensitive areas, riparian areas and wetlands, no development shall occur in an area designated as primary open space on the Comprehensive Plan shall further be planned, designed and constructed as follows:

- A. All developments proposed in or near [within one hundred (100) feet] natural wetlands shall be designed to:*
- 1. Preserve functions of groundwater recharge, water storage, turbidity reduction, nutrient filtration, biologic or botanical production, and protective habitat cover.*
 - 2. Limit uses to those compatible with the continued performance of wetland functions, such as:*
 - a. Conservation of soil, vegetation, water, fish, and wildlife.*
 - b. Low intensity, "dispersed" outdoor recreation (hiking, nature study).*
 - c. Utility easements, but only on peripheral areas and where alternative alignments are impractical.*
 - 3. Maintain the runoff coefficient and erosion equilibrium for lands bordering the wetland substantially the same as if such lands were undeveloped. Pier construction, elevated pedestrian boardwalks, semi-impervious surfacing, bridging of natural drainage ways, and retention of vegetation in areas not intended for buildings or roads are recommended design methods.*

Response Findings:

44. The applicant has not done any analysis regarding this criterion. The applicant in the project narrative only provides:

"The proposed land division provides for large lots with adequate space to coincide with the goals of this measure. In addition, there is existing wetland area, which will also act as open space. We will be twenty-five feet from this area as to not impact it."

45. Subsection 4.174.06: Generally, any development could impact wildlife, since there is a direct loss of habitat. However, the functional value and balance to the wetland is critical as two neighbors horses have suffered and died from salmonella poisoning. Therefore, without addressing the functional value and balance of the wetland, residential development would adversely affect the water and food supply for livestock and wildlife. Section 4.171.05(D): The siting/construction of subsurface sewage disposal fields within one hundred-(100) feet of any watercourse is prohibited.
46. The applicant is requesting a 25' buffer from the determined wetland boundary for two future home sites shown on proposed lot No's 2 and 3. This wetland has not yet been determined to be jurisdictional by the State of Oregon. Pacific Habitat Services, Inc., has prepared a wetland determination and delineation report for the wetland (Exhibit 'H'). Subsection 4.171.06(A)WC regulates new development in wetlands or within 100 feet of a wetland which is intended to minimize the adverse impacts on wildlife and sensitive areas, riparian areas and wetlands. Section 4.171.06(A)(1): Development on parcels No 1 and 2 must preserve ground water recharge, water storage, turbidity, reduction, nutrient filtration, biologic or botanical production, preserve productive habitat cover and maintain runoff and erosion equilibrium. The application fails because the applicant did not show plot plans of new home sites, decks, patios, landscaping and driveways on proposed lots No's 2 and 3 to determine if wetlands in or near [within one hundred (100) feet] of development will be protected.
47. Section 4.171.06(A)(2): Again, the proposal to add two homes is relatively low intensity development but this cannot be demonstrated until plot plans are provided to show the placement of houses, decks, patios, landscaping and driveways.
48. There is no Primary Open Space up to the edge of the property on the Comprehensive Plan Land Use Map. The subject wetland serves as a minor drainage basin and as 100-flood detention for contributing properties at the north. Proposed are on-site storm soakage systems or dry wells, which must be approved by the Building Division and City Engineering Division prior to issuance of a building permit for each respective house. The design shall take into account 100-year flooding and soil conditions on the home sites. Thus, the evidence supplied does not demonstrate that Section 4.171.06(A)(3) is met to show that two future homes and dry wells will maintain the runoff coefficient and erosion equilibrium for lands bordering the subject wetland will be substantially the same as if such lands were undeveloped.

Statewide Planning Goals

1. *Citizen Involvement: To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.*
49. The review and decision to be rendered on this application adhered to all public notice requirements of ORS 197 and WC 4.013.
2. *Land Use Planning: To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.*
50. This application is being reviewed using the City of Wilsonville Comprehensive Plan and Development Code which implements the City's land use-planning process.
3. *Agricultural Lands: To preserve and maintain agricultural lands.*
51. The subject property is zoned RA-H and it does not propose to make use of any viable agricultural land.
4. *Forest Lands: To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.*
52. The proposal will not disrupt any forest land base.
5. *Natural Resources, Scenic and Historic Areas and Open Spaces: To conserve open space and protect natural and scenic resources.*
56. The proposal does not sufficiently protect the natural wetland resources as recited above.
6. *Areas Subject to Natural Disasters and Hazards: To protect life and property from natural disasters and hazards.*
57. The proposal may pose a threat of to 100-year flooding on private properties in the vicinity Proposed parcel No. 2 and 3 are within the 100-year flood plain. The Building Code and Section 4.172WC regulates development within the flood plain. The applicant has not predetermined the two home sites to review development impacts on 100-year flooding. Thus, the evidence regarding 100-year flooding did not assure City Council that the public safety, welfare and health is protected to approve this application at this time. Statewide Goal No. 6 is not met.

7. *Recreational Needs: To satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts.*
58. The proposal will not detract from the recreational needs of the citizens of the state and visitors.
8. *Air, Water, and Land Resources Quality: To maintain and improve the quality of the air, water, and land resources of the state.*
59. The proposal will pose a threat to water and land resources quality. As stated in the finding for Goal No. 4 development will occur within 100-year flooding and near wetlands. The application fails because the evidence supplied did not demonstrate that Goal No. 8 is met.
9. *Economic Development: To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.*
60. The proposal will provide the citizens of the City of Wilsonville and the State of Oregon two single-family home sites with accessory units that will help benefit their health, welfare and prosperity.
10. *Housing: To provide for the housing needs of the citizens of the state.*
61. The proposal for two single-family home sites will help meet the housing needs of the city.
11. *Public Facilities and Services: To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.*
62. There are currently adequate public facilities along Rose Lane. The applicant will be required to pay the applicable system development charges for the utilities that will be used as part of this project. However, in condition No. 10 of Resolution 01DB25, the Development Review Board conditioned the applicant to: "The applicant shall submit a proposed storm drainage plan (to the City Engineer) before the City Council meeting of October 15, 2001." The applicant did not provide a storm drainage plan to the City Council. The applicant did not demonstrate to the City Council that house sites on proposed parcel's No. 2 and 3 can be adequately served by public storm drainage system or dry wells. Thus, the application fails because the evidence supplied does not meet Goal 11.

12. *Transportation: To provide and encourage a safe, convenient and economic transportation system.*
63. The addition of two home sites will have very low traffic impact. ***Goal No. 12 is met.***
13. *Energy Conservation: To conserve energy.*
64. The proposed parcels will allow for solar access.
14. *Urbanization: To provide for the orderly and efficient transition from rural to urban land use.*
65. The subject property is currently zoned RA-H. The proposed zone map amendment will provide two additional single-family housing units. However, storm drainage has not been adequately addressed as recited above.
15. *Willamette River Greenway: To protect, conserve, enhance, and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway.*
66. The subject property is outside of the Willamette River Greenway and will not diminish the natural, scenic, historical, agricultural, economic or recreational qualities of lands along the Willamette River.
67. Statewide Goals 16 to 19 are not applicable to this request.

Metro's Urban Growth Management Functional Plan.

68. The proposal is consistent with Title #1 of Metro's Urban Growth Management Functional Plan in exceeding 80% of the maximum residential density for the subject property.

CONCLUSIONS

This application was submitted prior to the adoption of the Natural Resources Plan (Ordinance No. 516). Ordinance No. 516 has replaced Primary Open Space and Secondary Open Space with a new Significant Resource Overlay Zone (SROZ). The Comprehensive Plan Map in effect at the time the application was submitted designated the north part of the subject property in Secondary Open Space (SOS). In considering the Zone Map Amendment and Tentative Partition Plat and -structures, the characteristics for Secondary Open Space found on Pages 74 and 75 in the Comprehensive Plan are applicable. Furthermore, Implementation Measure 4.1.5.aa defines the types of areas that constitute SOS. This part of the property is a relatively low depression with slight gradients. It functions as a wetland and as a 100-year flood plain.

The application fails because the evidence supplied does not demonstrate that Sections 4.197.02(A to D) are met, which are the zone map amendment standards.

The application fails because the applicant did not demonstrate that future development (house site) on proposed parcel No. 3 would not impact the .4 acre wetland found on the North Side of the subject property. Thus, Section 4.171.06(A)(1 to 3) is met.

The application fails because the evidence supplied did not demonstrate that house sites on proposed parcel's No. 2 and 3 would not impact the 100-year flooding measured at 90 foot base flood elevation referenced to the National Geodetic Vertical Datum of 1929. Furthermore, the applicant did not demonstrate that house sites on proposed parcel's No. 2 and 3 would minimize private losses on surrounding properties due to flood conditions in flood prone areas. Thus, the application does not meet Section 4.172.01(A to E).

The applicant has not predetermined the two home sites to review development impacts on 100-year flooding. Thus, the application fails because the evidence supplied regarding 100-year flooding did not assure City Council that the public safety, welfare and health is protected to approve this application at this time. Statewide Goal No. 6 is not met.

In condition No. 10 of Resolution 01DB25, the Development Review Board conditioned the applicant: "The applicant shall submit a proposed storm drainage plan (to the City Engineer) before the City Council meeting of October 15, 2001." The applicant did not provide a storm drainage plan to the City Council. The application fails because the applicant did not demonstrate to the City Council that house sites and/or development on proposed parcel's No. 2 and 3 can be adequately served by public storm drainage system or dry wells. Thus, the application fails because the evidence supplied does not demonstrate that Section 4.140.09(J)(3) is met.

The application fails because the applicant did not demonstrate to the City Council that house sites on proposed parcel's No. 2 and 3 can be adequately served by public storm drainage system or dry wells. Thus, the application fails because the evidence supplied does not meet Statewide Goal 11.

The record indicates that .4 acres of delineated wetlands are located on the North Side of the subject property. Those wetlands are part of a larger wetland, which is next to the north and east

sides of the subject property. The wetlands are identified in Secondary Open Space on the Comprehensive Plan Map. The City Council heard considerable public testimony with regards to new residential development on proposed parcels No's 2 and 3 in the flood plain and on the wetlands. The people that testified living in the neighborhood believe that the wetlands are delicate and are worthy of protection. Council believes the testimony that those wetlands are delicate and are worthy of protection and perhaps as a neighborhood they should improve those wetlands so their functional value is greater than it is. The applicant failed to carry the burden before the Council as far as dealing with 100 year flooding and protecting wetlands as no specific house plans were proposed to measure their development impacts. Therefore, the application fails because evidence supplied does not demonstrate that Section 4.197.02(E) is met.

The application fails because the evidence supplied did not demonstrate that Statewide Goal No. 8 is met. Development is proposed within 100-year flooding and near wetlands.

The operable review criteria for the proposed tentative partition is found in Sections 4.210 to 4.220. Section 4.210 refers to creation of road or street shall prepare application for partition, complete application is reviewed by the Development Review Board, and final plat is reviewed by the Planning Director. The proposed application fails because the evidence supplied does not demonstrate that Section 4.210.01(B)(20), which is compliance with Section 4.172 (100 year flooding); 4.210.01(B)(21) proposed use or treatment of any property designated as open space (the on-site wetland); and Section 4.210.01(B)(25) showing storm drainage are met.

The application fails because the evidence supplied does not demonstrate that Section 4.171(.01)(B) is met, which in this case does not encourage site planning and development practices, which would protect and enhance the natural wetland on the north side of the property.

The applicant fails because the applicant failed to carry the burden before the Council as far as dealing with 100 year flooding and protecting wetlands as no specific house plans were proposed to measure their development impacts. Therefore, the evidence supplied did not demonstrate that Secondary Open Space Criterion No. 4 is met.

EXHIBITS

The following Exhibits are hereby entered into the public record by the Development Review Board as confirmation of its consideration of the application as submitted:

- A. Findings and Conditions of Approval
- B. City of Wilsonville Comprehensive Plan
- C. Chapter 4 of the Wilsonville Code
- D. Applicant's submittal documents/findings
- E. City Engineer's report.
- F. Building Official's report.
- G. Letter, Eldon Johansen dated May 22, 2001 regarding water.
- H. Pacific Habitat Services, Inc., has prepared a wetland determination and delineation report.
- I. Panel No. 410025 0005 B Flood Insurance Rate Map
- J. Flood photo dated Feb.10, 1996.

New Exhibits:

- K. Fax dated Aug. 13, 2001 received from Helen Burns
- L. Letter dated Aug. 12, 2001 received from Alison Fiamengo
- M. Letter dated Aug. 10, 2001 received from Betsy Ann Yacob
- N. Letter dated Aug. 13, 2001 received from Wayne and Dorothy Bryant
- O. Letter dated Aug. 13, 2001 received from Christian Cudahy
- P. River Estates II Conditions and Restrictions
- Q. Fax dated Aug 13, 2001 received from Scott Smith`
- R. Letter dated Aug. 13, 2001 received from Leonard & Kathie Myers
- S. Affidavits of Mailing and Posting of Notice of Public Hearing

New Exhibits added into the record at the September 10, 2001 meeting:

- T. Letter dated September 13, 2001 from Robert C. Cowger
- U. Letter dated September 10, 2001 from Martin C. Brown
- V. Revised Building Department Conditions of Approval
Dated September 10, 2001
- W. Written testimony from M. Davis
- X. Two photographs of area submitted by Ms. Barton
- Y. Large materials board showing 1996 flood submitted by Ms. Paulson
- Z. City Engineer and Building Official memo dated 9-25-2001.

Exhibits submitted to the City Council at the October 15, 2001 meeting.

- 1. Letter dated October 15, 2001 from Cynthia J. Kresge.
- 2. Letter dated October 15, 2001 from Mark Kresge

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A regular meeting of the Wilsonville City Council was held at the Wilsonville Community Center beginning at 7 p.m. on Monday, October 15, 2001. Mayor Lehan called the meeting to order at 7 p.m., followed by roll call.

The following City Council members were present:

Mayor Lehan
Council President Helser
Councilor Barton
Councilor Kirk
Councilor Holt - Excused

Staff present included:

Arlene Loble, City Manager
Mike Kohlhoff, City Attorney
Eldon Johansen, Community Development Director
John Morgan, Interim Planning Director
Mike Stone, City Engineer
Chris Neamtzu, Associate Planner
Blaise Edmonds, Manager of Current Planning
Sandra King, City Recorder
Starla Schur, Executive Secretary

Motion: Councilor Helser moved to approve the order of the amended agenda. Councilor Barton seconded the motion.

Vote: Motion carried 4 - 0.

MAYOR'S BUSINESS

- A. Upcoming Meetings – Regularly scheduled meetings were announced.

The Mayor said a successful dedication ceremony for the new Boones Ferry Primary School was held last weekend. She invited the public to participate in the Fall Colors Walk led by Floyd Peoples, in Memorial Park this coming Saturday. Mayor Lehan noted the open house at the Water Treatment Plant had to be rescheduled due to bad weather and the new open house date will be announced. Mayor Lehan spoke about the Senior Yard Clean-Up event scheduled for November 10.

CITIZEN INPUT – There was none.

COMMUNICATIONS

- A. **Update on the Regional Ecosystem Analysis Project, Gary Moll of American Forests.**

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Chris Neamtzu, Associate Planner, said the City of Wilsonville has been working with American Forests and the Oregon Department of Forestry on a project that is referred to as the Regional Ecosystem Analysis Project. The Regional Ecosystem Analysis Project is a study of the forest canopy in the greater Willamette Valley. The cities that participated in the project include Albany, Beaverton, Corvallis, Eugene, Portland, Salem, Tualatin, Wilsonville, and Vancouver, Washington. Gary Moll will share preliminary results of the study and analysis. The Council will receive a copy of the final report.

Gary Moll, President, American Forests, explained the purpose of the study. The study was conducted in the Willamette Valley over the past 28 years to discover changes in tree canopy and the amount of tree canopy loss. During the study period, a satellite was used to take images of the surface of the earth. These images represent an archival view of the land over time and show how the tree cover has changed significantly in both the urban and rural areas. Urban areas have much more impervious surfaces and not enough tree cover. In an urban area land use planners try to find ways to moderate impervious surfaces in parking lots and the use of tree cover is the ideal way.

Mr. Neamtzu mentioned this information would be helpful in writing the City's landscaping tree canopy ordinance.

COUNCILOR COMMENTS AND LIAISON REPORTS

- A. Council President Helser asked if additional yard debris containers will be placed in the Charbonneau area for the fallen leaves and if additional yard debris pick-ups will be scheduled. Ms. Loble said that additional containers and pick-ups are scheduled and that information would be sent to the neighborhoods.

The other Councilors had no report to make.

CONSENT AGENDA

- A. Approval of the October 1, 2001 City Council Meeting Minutes.
- B. Set a public hearing date for November 5, 2001, on the appeal by Oregon Glass Company (01DB24A) and for a negotiated settlement of the appeal, consider a request for voluntary remand and public hearing of the decision on appeal to the DRB Panel B; and setting a date for such hearing for November 26, 2001. The applicant tolls the 120-day statute to allow for notice and hearing on appeal on remand.

Mr. Kohlhoff read the items of the consent agenda for the record.

Motion: Councilor Kirk moved to approve the consent agenda. Councilor Barton seconded the motion.

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Vote: Motion carried 4-0.

PUBLIC HEARINGS

A. **Resolution No. 1734**

A Resolution Adopting Zone Order Amending The Official Zone Map From Residential Agriculture-Holding (RA-H) To Planned Development Residential 1 (PDR-1), And Approving A Partition Plat For Three Parcels Which Amends The River Estates II Subdivision Plat On 3.01 Acres Of Property On Rose Lane. The Subject Property Is More Particularly Identified As Tax Lot 500, In Section 24A T3S-R1W, or Lot 5 In River Estates II, Clackamas County And Wilsonville, Oregon. Leonard and Kathy Myers, Applicants.

Mr. Kohlhoff read the title of Resolution No. 1734 for the record.

Mayor Lehan opened the public hearing at 7:20 p.m. and read the public hearing format.

Councilor Barton excused himself because he lives in River Estates II and moved to the audience.

The Staff Report prepared by Blaise Edmonds for the City Council packet is included here in its entirety.

PROPOSED ACTION:

Approval of Development Review Board Resolution 01DB25, recommending approval of a land partition to create three parcels and approval of a Zone Map Amendment from **RA-H to PDR-1**; Leonard and Kathy Myers, applicants. Property Description: Tax Lot 500, Section 24A, T3S-R1W, Clackamas County, Oregon. Location: 7355 SW Montgomery Way, Wilsonville, Oregon.

SUMMARY:

The applicants, Leonard & Kathy Myers, are requesting approval of a Zone Map Amendment from Residential Agriculture - Holding (RA-H) to Planned Development Residential (PDR-1) and approval of a Tentative Partition Plat to create three (3) residential parcels. The subject property is 3.01 acres located at the northeast corner of Rose Lane and Montgomery Way.

RECOMMENDATION:

The Development Review Board Panel 'A' is recommending approval of the request. Resolution No. 1734, Zoning Order 01DB25, and additional findings, conclusions and conditions of approval are attached, including recommended conditions of approval as revised.

Staff recommends that the City Council delegate the review of new residential building, driveways, patios, decks, landscaping impacts, which would be next to the wetlands, to the Planning Director for administrative review. Under the applicable code provisions, the proposal does not demonstrate that it may encroach the 100-ft. wetland buffer that applied at time of application. However, the code provisions that would be in place at the time of application for Building Permit would be the Natural Resources Plan,

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which requires a 50' buffer. City staff is proposing to revise conditions of approval 4 and 10 and delete condition 11, based on DRB Resolution 01DB25. As revised, condition 4 delegates authority to the Planning Director to review potential impacts of proposed/future home sites relative to wetlands in an administrative review process. If revised condition 4 is adopted, condition 11 would no longer be required and is proposed to be deleted. The following revisions have been included in Zoning Order 01DB25 and would be adopted by Resolution No. 173:

4. The wetlands *within the subject property boundary on parcel No. 3* shall not be disturbed during construction (i.e. *house construction*, streets, installing utilities, excavation) ~~in creating the lots for sale.~~ The developer shall *protect the wetlands and install temporary fencing along the 50' transition zone with new residential development as determined by the Planning Director in an administrative review process.* ~~of the wetland so that it is not disturbed. No structure and/or grading are allowed within 50' of the edge of the delineated wetland boundary.~~

10. The applicant shall ~~submit a proposed~~ *obtain a storm drainage plan permit to from the City Engineer and/or Building Official prior to issuance of a building permit for residential construction before the City Council meeting of October 15, 2001. This condition requires each lot to provide positive drainage away from all structures greater than 120 SF in floor area. Connection to public storm system is required or as an alternative connection to a public storm sewer, the applicant, at the time of building permits, may submit an engineered dry well system. The design for dry wells shall take into account the area's flood plain and soil conditions.*

~~11. The DRB recommends that City Council consider whether former 4.171.06 applies to this application, which is the secondary open space criteria, and if it does apply to this application, to make appropriate findings.~~

BACKGROUND:

On September 10, 2001, at the meeting of the Development Review Board the following action was granted on the above-referenced proposed development application:

DRB approved a land partition to create three parcels and recommended that the City Council approve a Zone Map Amendment to change the *Residential Agriculture Holding (RA-H) zone to Planned Development Residential-1 (PDR-1)*. The proposal meets the Comprehensive Plan density at 3 units per acre. The DRB approval for the tentative partition is contingent upon City Council approval of the Zone Map Amendment.

The proposed three-lot partition meets the minimum Comprehensive Plan density at 1-dwelling unit per gross acre. Furthermore, Title 1 of the Urban Growth Management Plan (UGMP) seeks 80% maximum density at build out of any particular parcel. Under the 80% analysis the proposal meets Title 1. There is an existing home on the subject property (proposed Parcel #1).

The application was submitted prior to the adoption of Ordinance No.516, the Natural Resources Plan. The Comprehensive Plan Map in effect at the time the application was submitted designated the north part of the subject property in Secondary Open Space (SOS). In considering only the Tentative Partition Plat, the DRB applied the characteristics for Secondary Open Space (SOS) found in the Comprehensive Plan. The DRB recommended that the City Council consider whether the former WC 4.171.06 and the SOS criteria apply or if the Significant Resource Overlay Zone criteria from Ordinance No. 516 applies to the

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proposed/future location of two houses. Under Ordinance No. 516, a setback of 50' from the wetland boundary is required.

The applicant is requesting a 25' buffer from the determined wetland boundary for two future home sites shown on proposed lot No's 2 and 3. This wetland is jurisdictional according to the State of Oregon. Pacific Habitat Services, Inc., has prepared a wetland determination and delineation report (Exhibit 'H'). In the event the Council determines that WC 4.171.06 regulates the future house development, the application must demonstrate that the new houses, driveways, and landscaping will preserve ground water recharge, water storage, turbidity, reduction, nutrient filtration, biologic or botanical production, preserve productive habitat cover, and maintain runoff and erosion equilibrium. Two home sites is low intensity development, but the impact on the 100-foot buffer cannot be demonstrated until plot plans for the future houses, decks, patios, landscaping and driveways are provided. Thus the evidence supplied does not demonstrate that WC 4.171.06(A)(3) is met to show that two future houses and dry wells will maintain the runoff coefficient and erosion equilibrium for lands bordering the subject wetland substantially the same as if such lands were undeveloped. The applicants have indicated to planning staff that they are prepared to show typical house plot plans to the City Council to justify the proposed 25' setback from the wetland boundary. Planning staff has prepared proposed addition findings to the DRB decision adopting a recommendation for approval relative to Section 4.171.06 and the SOS criteria, which may be adopted as part of this staff report.

The proposed PDR zone requires that 25% of the site be set aside into outdoor living area, which can be accomplished with the back yard areas and with the wetland.

Ordinance No. 514 Public Facilities Water Strategy: The proposed partition qualifies as a Category 1 because it has a "de minimus" water wise impact (less than 2,000 gallons/peak summer day). On proposed Lot #1 is an existing house. Proposed Lots 2 and 3 will be sold for new home sites. There is 8" trunk line at Rose Lane to serve the property.

Given the testimony regarding potential for flooding and the fact that there is no public storm sewer system, and that runoff from uplands appears to have increased with the development of the high school and apartments on Wilsonville Road, additional property division could create storm run off to the potential detriment of adjacent property owners. The applicant had no rebuttal and was told to provide additional information in this regard to the City Council. As an alternative to piping storm water to a public system, the City Engineer and Building Official may allow the applicant, at time of building permit, to submit an engineered dry well system. The design shall take into account the area's flood plain and soil conditions on the site. This recommendation is contained in proposed revised condition No. 10, above.

Other standard conditions are recommended as indicated in Resolution 01DB25 and Zoning Order 01DB25, including assignment of approximately two PM peak hour trips through I-5/Wilsonville Road interchange area.

The Development Review Board recommended waiving the requirement for sidewalks based on information from the City Engineer as related through staff that it is unlikely Rose Lane and Montgomery Way would be improved. Any improvement of those streets would remove any sidewalk. Historically development in this area was without sidewalks in keeping with rural aspect.

The testimony submitted in writing by several parties noted that the proposed partitioning is in apparent violation of the CC&Rs for River Estates II subdivision. The CC&Rs read:

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"3. No lot as platted in this subdivision may be further subdivided." The City would have no role or authority to enforce any CC&R provision other than for dedicated property or maintenance of open space, and cannot consider those provisions in evaluating a proposal. Enforcement of CC&Rs would be a private, civil matter among the property owners within the subdivision.

Additional proposed findings, conclusions, and conditions of approval in accordance with recommendation of DRB Resolution 01DB25 relative to Secondary Open Space and protection of natural features: Leonard and Kathy Myers, applicants.

The following decision criteria were listed in the Public Hearing Notice for the Development Review Board and City Council public hearings. The proposed additional findings are intended to address issues raised at the Development Review Board public hearing relative to protecting natural resources found on the subject property.

Comprehensive Plan:

Implementation Measure 4.1.5.aa: Secondary Open Space

Zoning:

Subsection 4.171: General regulations-Protection of natural features and other resources.

Sections 4.172: 100-Year Flood Plain regulations

PROPOSED ADDITIONAL FINDINGS

Secondary Open Space Analysis:

The Comprehensive Plan Map designates the North End and portions of the East Side of the subject property in Secondary Open Space. Implementation Measure 4.1.5.aa of the Comprehensive Plan defines the types of areas that constitute SOS.

Project Data:

Gross site area..... 130,999 SF or 3.01 acres
Area within existing SOS (wetland)...approximately .5 acres
Net building area.....2.51 acres
Gross residential density..... 1 dwelling unit per acre
Net residential density..... 1.2 dwelling units per acre.

Proposed Parcel 1 (existing house): 36,818 SF.

Proposed Parcel 2 (existing barn): 36,313 SF

Proposed Parcel 3 (vacant): 57,868 SF

Implementation Measure 4.1.5.aa: Secondary Open Space:

c. Secondary open space is intended to serve as a buffer to primary open space areas. They may be developed in accordance with special development standards and shall be evaluated through a conditional use and design review process, except when the proposal is a part of a planned development process. These areas include the following:

1. Land within the Willamette River Greenway boundary, but beyond the 150-foot line. High voltage power line easements.
3. The 100-year flood plain.
4. Slopes between 12% and 20%.

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5. *Designated historic sites.*
6. *Small stands of trees and heavily vegetated (with native vegetation) adjacent to primary open space areas.*

Criterion c.1:

Land within the Willamette River Greenway Boundary, but beyond the 150-foot line.

Response Finding:

1. The subject property is not within the Willamette River Greenway; therefore this criterion is not applicable.

Criterion c.2:

High voltage power line easement.

Response Finding:

2. High voltage power lines do not impact the subject property; therefore this criterion is not applicable.

Criterion c.3:

The 100-year flood plain.

Response Finding:

3. The Federal Emergency Management Agency Flood Mapping indicates that portions of proposed parcels No's 2 and 3 are within the 100-year flood, which is Zone AH of Community Panel No. 410025 0005B of the Flood Insurance Rate Map. Zone AH is areas of 100-year shallow flooding where depths are between one (1) and three (3) feet. The base flood elevation is 90 feet referenced to the National Geodetic Vertical Datum of 1929. The balance of the property is in Zone 'B', which are areas between limits of 100-year flood and 500-year flood. The applicant has not delineated building footprints of future home sites to show potential impacts on the 100-year flood plain. While it appears that there is adequate space for the proposed two home sites to avoid the 100-year flood plain, the Building Official in Condition No. 4 of his report is requiring that:

Both parcel numbers 2 and 3 are located in the 100-year flood plain. Any new development proposed for these parcels shall comply with the Flood Plain Ordinance, and Metro's Standards for balance cut and fill.

The applicant has agreed to the above condition. Furthermore, Sections 4.172.06 and .07WC sets forth general standards for flood proofing residential construction within the 100-year flood plain. Therefore SOS Criterion No. 4 can be met.

Criterion c.4:

Slopes between 12% and 20%.

Response Finding:

4. The subject property is relatively level with slopes less than 12%.

Criterion c.5:

Designated historic sites.

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Response Finding:

5. The subject property is not a designated historic site; therefore this criterion is not applicable.

Criterion c.6:

Small stands of trees and heavily vegetated (with native vegetation) adjacent to primary open space areas.

Response Finding:

6. The subject property is generally void of significant trees and it is not adjacent to Primary Open Space. Significant trees on-site are located outside Secondary Open Space. In the event the applicant removes trees a City Type 'A' or 'B' tree removal permit is required.

Conclusion finding to Implementation Measure 4.1.5.aa: Secondary Open Space:

7. The areas of the property identified in Zone AH of Community Panel No. 410025 0005B of the Flood Insurance Rate Map is Secondary Open Space, which is also wetlands. The applicant has not delineated building footprints of two home sites to review development impacts on the 100-year flood plain. While it appears that there is adequate space for two home sites the Building Official in Condition No. 4 of his report is requiring flood proofing.

Subsection 4.171.06: General Regulations-Protection of Natural Features and Other Resources/Wildlife Habitats and Distinctive Resource Areas.

(.06) Wildlife Habitats and Distinctive Resource Areas: In order to minimize adverse impacts on wildlife and sensitive areas, riparian areas and wetlands, no development shall occur in an area designated as primary open space on the Comprehensive Plan shall further be planned, designed and constructed as follows:

A. All developments proposed in or near [within one hundred (100) feet] natural wetlands shall be designed to:

1. Preserve functions of groundwater recharge, water storage, turbidity reduction, nutrient filtration, biologic or botanical production, and protective habitat cover.

2. Limit uses to those compatible with the continued performance of wetland functions, such as:

a. Conservation of soil, vegetation, water, fish, and wildlife.

b. Low intensity, "dispersed" outdoor recreation (hiking, nature study).

c. Utility easements, but only on peripheral areas and where alternative alignments are impractical.

3. Maintain the runoff coefficient and erosion equilibrium for lands bordering the wetland substantially the same as if such lands were undeveloped. Pier construction, elevated pedestrian boardwalks, semi-impervious surfacing, bridging of natural drainage ways, and retention of vegetation in areas not intended for buildings or roads are recommended design methods.

Response Findings:

8. The applicant has not provided any analysis regarding this criterion. The applicant in the project narrative has stated that:

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"The proposed land division provides for large lots with adequate space to coincide with the goals of this measure. In addition, there is existing wetland area, which will also act as open space. We will be twenty-five feet from this area as to not impact it."

9. Subsection 4.174.06: Generally, any development could impact wildlife, since there is a direct loss of habitat. In this request involving two proposed home sites and one existing house, the impact to the wildlife is not anticipated to be significant on water supply, food supply, vegetative cover, human impact values, and habitat features. The subject wetland is generally low with little vegetative cover for habitat significance. Section 4.171.05(D): The siting/construction of subsurface sewage disposal fields within one hundred-(100) feet of any watercourse is prohibited. This needs to be demonstrated at the time each house plan is reviewed by the Building Division.

10. The applicant is requesting a 25' buffer from the determined wetland boundary for two future home sites shown on proposed lot No's 2 and 3. This wetland is jurisdictional according to the State of Oregon. Pacific Habitat Services, Inc., has prepared a wetland determination and delineation report for the wetland (Exhibit 'H'). Subsection 4.171.06(A)WC regulates new development in wetlands or within 100 feet of a wetland which is intended to minimize the adverse impacts on wildlife and sensitive areas, riparian areas and wetlands. Section 4.171.06(A)(1): New homes on parcels No 1 and 2 must preserve ground water recharge, water storage, turbidity, reduction, nutrient filtration, biologic or botanical production, preserve productive habitat cover and maintain runoff and erosion equilibrium. The proposal to add two home sites is low intensity development, but the impact on the 100-foot buffer cannot be demonstrated until the plot plans for the houses, decks, patios, landscaping and driveways are provided. The applicant has indicated to planning staff that he is prepared to show typical house plot plans to the City Council to justify the proposed 25' setback from the wetland boundary.

11. Section 4.171.06(A)(2): Again, the proposal to add two homes is relatively low intensity development but this cannot be demonstrated until plot plans are provided to show the placement of houses, decks, patios, landscaping and driveways.

12. There is no Primary Open Space up to the edge of the property on the Comprehensive Plan Land Use Map. The subject wetland serves as a minor drainage basin and as 100-flood detention for contributing properties at the north. Proposed are on-site storm soakage systems or dry wells, which must be approved by the Building Division and City Engineering Division prior to issuance of a building permit for each respective house. The design shall take into account flood plain and soil conditions on the home sites. Thus, the evidence supplied does not demonstrate that Section 4.171.06(A)(3) is met to show that two future homes and dry wells will maintain the runoff coefficient and erosion equilibrium for lands bordering the subject wetland will be substantially the same as if such lands were undeveloped.

End of Mr. Edmonds staff report.

Mr. Edmonds read the applicable review criteria for the application as presented on pages 3 and 4 of the Staff Report Amended and Adopted by the Development Review Board Public Hearing dated September 10, 2001.

The matter before Council is a Development Review Board recommendation for approval of a 3-lot partition request for property located at the southeast corner of Rose Lane and Montgomery Way in the River Estates II Subdivision. The applicants are also requesting a zone map amendment from Residential Agriculture – Holding Zone to a Planned Development Residential-

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1 Zone. The PDR-1 zone is the lowest residential development zoning the City offers. The applicants meet the minimum density requirements in terms of housing.

Three issues were identified in the City Manager's memo: the divided neighborhood; potential storm drainage problems associated with the site; and whether the new Natural Resources Plan or the primary/secondary open space designation should be applied to the required set back from the wetlands.

At the Development Review Board hearing the question was raised whether the Covenants, Conditions and Restrictions (CC&Rs) for River Estates II applied to a land use decision in this process. The City Attorney provided an interpretation that CC&Rs were a private matter that should be adjudicated in the courts and not by Council. He suggested including this language for the resolution,

"The decision in this matter is not intended as an action by the City to interfere with or abridge any lawful provision of the CC&Rs of the River Estates II, County of Clackamas, Wilsonville, OR, subdivision or to determine any contractual rights or obligations among the parties hereto."

Planning staff encourages applicants to coordinate with their neighborhood associations before they make application to the City. In this case, however, many of the homeowner's feel the applicant did not make enough of an effort to coordinate their partition application with the homeowners association. The City Attorney is of the opinion the enforcement of CC&Rs is a private matter between the homeowner and their association. The Council should review the application on the merits of the City Zoning Code and the Comprehensive Plan and other decision criteria.

The Development Review Board recommended that the applicant submit a plan for handling storm water runoff from the property before the City Council meeting. Mr. Edmonds explained two alternatives were available, storm runoff can be handled by piping the water directly to the Willamette River, or in the alternative, create a dry well system for the proposed home sites. Staff is recommending that the City Council delegate this decision to the Planning Director, the Building Official, and City Engineer. They would review any proposed storm water drainage plan at the time they apply for a building permit.

At the top of the parcel is a delineated wet land. Staff is asking Council to delegate the authority to determine which setback standards are to be applied to the wetland -- the old Primary/Secondary Open Space code requirements, or the new Natural Resources Plan. The applicant has not provided information on the size, location, configuration, and type of housing and supporting structures to be constructed on the proposed lots. Without this information, set backs cannot be determined.

The DRB waived sidewalk requirements since a sidewalk along Rose Lane would not be in keeping with the rural nature and character of the neighborhood.

Councilor Helser asked if the applicant had provided a storm water plan.

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Mr. Edmonds said the applicant had not provided a storm water plan because there is no house design for parcels 1 and 2. The options include a dry well for each house, or piping the storm water to the river.

The Mayor asked the City Attorney to explain the limitations and responsibilities of the City Council relative to the CC&Rs.

Mr. Kohlhoff advised that while this is a de novo hearing the Council has the full record from the Development Review Board hearing. He pointed out two letters were received during the Council work session of October 15, 2001, which will be made part of the record; and the Record Index included a new exhibit AA, letter dated September 13, 2001 from Leonard Myers.

The neighbors in opposition to the Myers' partition and rezoning application raised the issue before the Development Review Board that the Covenants, Conditions and Restrictions (CCR's) prohibit the partitioning of the property, and requested the City to enforce the applicable CC&R provision.

On the face of the CC&R document, it states it applies to "all parcels in River Estates II, County of Clackamas, Wilsonville, Or." Paragraph 3 recites: "3. No lot as platted in this subdivision may be further subdivided". The CC&Rs bear a notarization date of April 19, 1971, and Clackamas County Recorders Fee Number 71-8040, with a stamp date of April 19, 1971. A copy of the River Estates subdivision plat, which includes the Myers' property, was also tendered into the record.

QUESTION

1. Does the City have the jurisdiction to enforce the CC&R provision in paragraph 3?

No. The City of Wilsonville, while a home rule city, is nevertheless an administrative agency of the state of Oregon. For example, its municipal court is limited by Art. VII(O), sec. 1 Or. Const. "to administer the regulations of incorporated towns and cities." The City Council is not a court of general jurisdiction with the authority to enforce private contractual rights. Art. IV(O), Sec. 1, 9, Or. Const. CC&R's are private contractual rights. The only City exception to CC&R enforcement is where a planned unit development is required by the City to have specified open or recreation space and to ensure maintenance of such open or recreation space by the homeowners. Generally, CC&R's are the vehicle for maintenance and are submitted to the City for compliance. The issue of maintaining a specified open or recreation space as part of a planned unit development is not the issue here. The recent case of *Turudic v. Stephens*, 176 Or App 175, 31 P3d 465 (2001) is a prime example of the many legal issues associated with interpreting and enforcing the language of CC&R provisions and why such enforcement is left with the courts. The issues there involved interpretation of language terms such as "nuisance", "residential" and "shack" and the applicability of the legal doctrines of waiver and *laches*. Such could well be the case in this matter, e.g. the term "subdivided". Is it exclusive to the legal term meaning a "subdivision" or does it include all divisions and, therefore, a "partition"?

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2. If the CC&R's provision restricts the current size of the subdivision lots by prohibiting subdivision, does it violate the Comprehensive Plan and Development code which permits one-acre minimum (30,000 sq. feet satisfies one-acre minimum) in an RA-1 zone or rezoning to PDR-1 (25,000 sq. feet minimum)?

No. While the subdivision lots are located currently in an RA-1 zone, that zone provides for a minimum size, not a maximum. Likewise, for a rezone to a PDR-1 zone. The PDR-1 zone also provides a minimum lot size, not a maximum. Thus, neither zone prohibits a larger sized lot as represented by the 1971 subdivision plat.

3. If the City Council finds and concludes that the application with conditions meets the City's requirements, would that decision trump the CC&R's?

No. There are two separate legal rights which are not inapposite to each other. As recommended, the City's decision is simply stating that the partition and rezoning as proposed meets the City's administrative requirements as conditioned. Since the zoning goes to minimum lot standards, there is nothing in the City Code prohibiting private parties agreeing upon the sale from the owner and the purchase by the buyer of a lot in this subdivision that the buyer agrees to the purchase as may be covenanted, conditioned or restricted, including maintaining the lot size as of the time of purchase. Nor is there anything by virtue of the limited number of lots in existence since 1971 in this subdivision that suggest that maintaining the lot size violates the Metro Housing rule for a variety of housing types or violates the City's overall density goals. Conversely, the City's recommended determination to approve would not be an action which would be in violation of an existing contractual right. In other words, a decision to approve with conditions is simply an administrative decision involving the City's land use regulations. It is not a decision which either expressly or impliedly determines the existing private contractual rights and obligations under the CC&R provisions or the enforceability of those rights. Declaratory and/or injunctive relief are the kinds of direct court determination which may be used to determine and enforce private contract rights presented by CC&R's. Thus, the City could legally approve the application based upon municipal land use criteria, and a court could legally disapprove the partition based upon private contractual rights and enjoin the Myers from proceeding.

You may wish to confirm the City's intent in the above regard by making a finding in your adoptive resolution that "The decision in this matter is not intended as an action by the City to interfere with or abridge any lawful provision of the CC&R's of the River Estates II, County of Clackamas, Wilsonville, OR, subdivision, or to determine any contractual rights or obligations among the parties thereto." The decision would be neutral to any conflict or litigation that might arise under the private contractual rights.

Mr. Kohlhoff said Council cannot make their decision based on the CC&Rs. To protect the record though, someone could testify about the CC&Rs. The City Attorney reminded Council they do not have the jurisdiction to make a decision on the CC&Rs.

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Mayor Lehan invited the applicant to make their presentation.

Leonard Myers, 7355 SW Montgomery Way, Wilsonville, OR. Mr. Myers understood approval of his application will be done in two parts – approval from the City first and approval from the neighbors in River Estates II concerning the CC&Rs. Once approval was given by the City, Mr. Myers would work with his neighbors to obtain their approval. Should the neighborhood not support the partition they would not proceed.

R.C. Cougher, 6650 SW Montgomery, Wilsonville, OR, stated all 29 homes on Montgomery Way and Rose Lane were against the subdivision. He asked Council to vote against the measure because of the solidarity of the neighbors.

Morey Conway, 6600 SW Montgomery Way, Wilsonville, OR. Mr. Conway explained in the 1960s this property was farmland rented by Edmunds Rose Growers who never had to irrigate because the water table was so high. Mr. Conway pointed to a photograph of the 1964 flood in the area (Exhibit Y). He explain that River Estates II was developed based on the flood plain information available in 1964. Mr. Conway did not believe a dry well or pipe would work to drain the storm water because of the high water table. The land shown in Exhibit Y is drained by a Corps of Engineer ditch that drains into the Willamette River. When the river is high, as it was in 1995, the ditch backs up into the area and causes flooding. The open space afforded by the River Estates II subdivision should be retained. He asked Council to deny the subdivision because it will set a precedent.

Mark Kresge, 6625 SW Montgomery Way, Wilsonville OR, submitted a letter to the Council that will be made a part of the record. Mr. Kresge is a new resident to the neighborhood who made his decision to purchase in the River Estates II area after many months of investigation and due diligence. He contacted the Planning Department in the City of Wilsonville and asked questions about the area before deciding to purchase. He was told there was a property considering subdivision but because of the wetlands and the CC&Rs a subdivision was unlikely. Mr. Kresge also had to sign the CC&Rs when he purchased the property, which he felt, would protect the uniqueness and value of his property. He asked if the Myers would consider withdrawing their application until the issue with the neighborhood had been resolved.

Laurie Conway, 6600 SW Montgomery Way, Wilsonville, OR opposed the Myers proposal.

Jeris Clark, 7079 Montgomery Way, Wilsonville, OR. Ms. Clark acknowledged there is a water problem in the subdivision that has gotten worse over the past 15 years. She attributes the increase in water from the building that has taken place in the city. Ms. Clark keeps horses on her property and has lost animals due to the salmonella bacteria in the ground. She is concerned that runoff from new homes on the Myers property will be directed to her property and create even worse high water conditions to the detriment of her animals.

Bruce Barton, 7290 SW Wilsonville Road, Wilsonville, OR. Mr. Barton referred to page 2 of 3 of the Resolution, paragraphs numbered 4 and 5 and asked at what point is the plat is recorded with the County, and when is the zone change recorded?

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Mr. Edmonds responded if the application is approved by Council and survives any appeal, it would be recorded with Clackamas County. The County Surveyor would prepare a final plat. The applicant would submit an application to the City Planning and Engineering divisions for final plat approval. The applicant has two years to file a final plat with a one-year extension. The plat must be filed before the applicant can obtain a building permit for residential construction.

Mr. Barton suggested the following language for Condition No. 10; "The applicant shall submit a proposed storm drainage plan to the City Engineer and/or Building Official for approval. The plan to be reviewed and approved by the Development Review Board prior to issuance of a building permit for residential construction." If this new language is adopted in Condition 10, it will allow the neighbors the opportunity to attend a public hearing and see what the proposed storm water runoff solution plan is.

Helen Burns, 6850 SW Montgomery Way, Wilsonville, OR. Over the past 28 year's Ms. Burns has seen a lake of water covering the central portion of the subject property every winter. During particularly wet winters, both sides of Rose Lane and the ditches contain standing water. Should the Myers infill to elevate the foundations of the proposed homes, a dam effect would occur and the water would be directed to their neighbors' eastern property. Ms. Burns thought the only way to mitigate the water is to have a storm water drainage system placed on the east portion of the property draining to the natural drainage area.

The second issue is subdividing a parcel in a subdivision. Ms. Burns was told when she and a neighbor wanted to divide an adjoining parcel that it could not be done. If this partition is allowed, similar partitions would occur in the neighborhood. She asked Council to consider that both ends of Montgomery Way are legally preserved in their natural environment by the state land at the east end, and by the park and Boeckman Creek drainage area at the west end. She asked Council to deny the request for partition.

Mayor Lehan asked for clarification on the state land. Was the property only accessible to residents of Montgomery Way, or was it accessible to the public. Mr. Conway said the state had acquired a half-mile of river frontage property as a greenway easement and thought the property is 400-500 feet deep from the river. The property was accessible from both the river and Montgomery Way.

Councilor Helser asked Mrs. Burns who had told her and Mr. Paulson that the property between them could not be subdivided. Mrs. Burns did not recall.

Alison Fiamengo, 7305 SW Montgomery Way, Wilsonville, OR. Ms. Fiamengo owns the property to the east of the Myers property and she was interested in hearing the plans the Myers had for the storm water runoff. She understood the direction of the DRB was that a storm water plan was to be available at the City Council meeting. Without this information, she felt the request for a zone change is premature. She pointed out her property on an aerial photograph and how the water came up to the foundation and backdoor of her barn during the flood of 1996.

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Ms. Fiamengo felt the cleansing abilities of the wetlands were fully taxed. Additional houses will create more runoff.

Leslie Hildum, 7119 Montgomery Way, Wilsonville, OR, expressed her concerned about the salmonella. Her home, although built as close to the street as possible, has water seeping into the basement during the winter months. Additional water runs off to the area because of the building that has taken place above.

Mr. Kohlhoff pointed out two letters had been received during the Work Session and that Council should take the time to review those two letters.

Mayor Lehan read the two letters into the record in their entirety. The letters will be made a part of the record.

1. October 15, 2001, Cynthia Kresge. Ms. Kresge opposed the partitioning of the Myers property.
2. October 15, 2001, Mark Kresge. Opposed the Myers proposal and felt the Myers will sell their divided property to a developer who will develop and who has not obligation to the neighborhood.

Mayor Lehan invited the applicant to respond to the testimony.

Leonard Myers, 7355 SW Montgomery Way, Wilsonville, OR. To Mr. Myers the main issues expressed in the testimony are wetlands, runoff, and water issues. He said the 1996 flood area, shown in Exhibit J, on page 60 of 82, demonstrates that his property does not flood yearly. Flags indicating the area of flooding during the 1996 flood have been placed on his property. The 1964 flood was an unusual event and Mr. Myers doubted any area in the Portland vicinity could handle such a flood.

Addressing the issue of runoff, Mr. Myers stated houses do not create more runoff and rain; rather housing would help to direct water away from any buildings and avert potential problems in the neighborhood.

Mr. Myers acknowledged wetlands do cause damage to domestic animals and domestic animals cause damage to wetlands, but corrective measures can be taken.

The area has about 30 acres the people on top of the hill can view, including the property in question, and those 30 acres contain about 13 structures that can be viewed now. Adding one more home will not eliminate the view.

Mr. Myers stated that they would not build if the storm water runoff cannot be adequately handled with storm drains or dry wells. He pointed out no money has exchanged hands, and would not, until all of the issues have been resolved. Mr. Myers indicated he would speak one-on-one with Mr. Kresge about the monetary value of their property.

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Mr. Myers said he did attempt to contact the neighbors and his plans for the property have been known for some time. Nothing has been done in secret. He said he will work with his neighbors on the CC&Rs and if they do not agree with the subdivision, it will not be done.

Councilor Kirk referred to the September 10, 2001 report to the DRB, page 17, paragraph numbered 35, "The wetland will not be disturbed or improved." The Councilor questioned who was making the statement and what is it based upon. Mr. Edmonds said he made the assertion based upon the applicant's statements.

Referring to page 20, fourth paragraph and the Goal 5 discussion, the Councilor asked if the applicant met the goal, "...to conserve open space and protect natural and scenic resources." Mr. Edmonds indicated the applicant had.

The Councilor pointed out references to the 100 year flood plain say in some places "may affect plot number 2" and "does number 3" and in other places language says it affects both of them. Which is correct?

Mr. Edmonds identified the 90-foot base flood elevation on Exhibit I of the DRB record. This 90-foot elevation is what the Building Official will use for a base flood elevation for construction of a habitable floor. Various documents show different locations of the 100-year flood plain. Exhibit Y shows the location of the 1964 floodwater. The Flood Insurance Rate Map, Exhibit I, indicates the 100-year flood does not affect the property much. However, the orthophoto shows the 100-year flood is on the property. In addition, Exhibit J shows the 1996 floodwaters on the northern part of proposed parcel 3, and north of the barn on proposed parcel 2. This information indicates there is flooding on the property at least for a 100-year event.

In terms of building a house, the exact boundary cannot be determined until a pre-certification for house construction is completed. To obtain a pre certification the builder must contact the City Building Division, and hire a surveyor to determine where the 90-foot base flood elevation is located. It also must be determined if the 90-foot base flood elevation is inside or outside the 100-year flood plain. If the line is outside flood proofing the house is not necessary. If they are inside the 100-year floodplain a full engineering report to the Building Official is required. Should the applicant propose using fill the applicant must also provide an engineered fill design to both the City Building Official and City Engineer to determine if there will be displacement of the 100-year flooding to surrounding properties. All of this occurs typically at a building permit level and not during a zone change or review type of amendment. The code does allow building within the 100-year flood plain, but not within a 100-year flood way. The applicant must meet the test of the Building Official and City Engineer in terms of a balanced cut and fill engineered solution to allow construction within a 100-year flood. The applicant has not demonstrated meeting this requirement since this happens during the building permit stage.

Mayor Lehan asked what the 90-foot base flood elevation is based upon. Mr. Edmonds responded the National Flood Insurance Rate Map which determines the flood insurance rates. The map was prepared by FEMA in 1982 for zone AH.

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The Mayor wanted to know how high the 1996 flood went. Mr. Stone, City Engineer recalled in 1996 and 1998 floods the 100-year flood elevation in the area was at 90 or 91 feet. The water surface elevation on the property would roughly be the same as the river.

Councilor Helser asked for clarification on the CC&R issue.

Mr. Kohlhoff responded it is a question of jurisdiction. The City has jurisdiction over its own land use ordinances, but does not have jurisdiction over the determination of a CC&R. A court of general jurisdiction, the Circuit Court, has that authority. If Council were to make a determination on the CC&Rs, without jurisdiction, it would be grounds for appeal, and an unlawful act.

Mayor Lehan closed the public hearing at 8:57 p.m. Mayor Lehan asked for a motion on the application.

Councilor Kirk asked the City Attorney for clarification on the vote of the resolution. Mr. Kohlhoff explained Council has the authority to approve, deny or modify a recommendation. The Council was to make two determinations, one is a partition and one is a zoning order. Based on the findings and criteria Council can deny the application, allow the application, or allow the application with conditions.

Motion: Councilor Kirk moved to deny the application. Councilor Helser seconded the motion.

Councilor Kirk responded to Mr. Conway's comments about representation stating that Council represents both the landowners wanting to develop and residents living in the City now. He did not feel the applicant had provided enough evidence that would insure that all regulations, protections, and health and safety issues were met concerning storm drainage, flooding, primary and secondary open spaces and wetlands. The Councilor needed more certainty that these issues had been adequately addressed before he could approve the application; therefore, he voted to deny the application.

Councilor Helser had the opportunity to hear the matter when it came before the Development Review Board Panel A. At that meeting, he explained 25 of the 31 people attending the meeting testified against the proposal, while three spoke in favor. He felt the property owners all had the opportunity to understand the CC&Rs and the flavor of the neighborhood when they purchased their property. The Councilor thought the consensus of the citizens in the area was to maintain what they have. The enforcement of the CC&Rs was a matter between the homeowners in the subdivision and not the City.

Councilor Helser pointed out Diane Seeley, a commissioner for DRB Panel A was quite adamant in her approval that a master storm water plan be submitted for City Council review before the Council meeting. Ms. Seeley was most emphatic, even to the point of asking Mr. Myers "do you understand that you have to submit by October 15 when the Council would meet?" In addition, Mr. Myers was very much in favor and indicated that he would comply; however, tonight we do

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not have that plan. The Councilor agreed with Councilor Kirk's comments on the plan and saw no particular reason to approve the application.

Councilor Helser expressed his concern about the testimony regarding salmonella thought staff should investigate how much of a problem there was.

Mayor Lehan commented she would also vote to deny on this resolution. Her reasons for denial stemmed from the wetlands, building in the flood plain, and general water problems in the area. The Mayor explained the Council is a quasi-judicial body with limited authority to rule on land use issues. The Council does not have any authority to rule on whether or not CC&Rs are appropriate.

The Mayor did not see how a storm drain would effectively direct water away from the property when the river is on 2-3 sides of the site. According to the 1964 flood maps homes were build in locations that should not have been built upon. She agreed with the comments that the wetlands were delicate and should be protected. However, she recalled during the Goal 5 process people from the neighborhood took issue with the protection of Goal 5 resources and the wetlands and did not want any restrictions protecting the natural resources.

Mayor Lehan suggested further investigation might be necessary in correcting the functional value and balance of the wetland to correct the presence of salmonella. If the area is truly a wetland and functioning well, it should not have livestock on it. Restoring the wetland to a more natural state will enable the wetland to do more self-correcting. That is not to say that the flood plain cannot have livestock in it.

The Mayor commented if the neighborhood truly believes those are delicate wetlands and worthy of protection then perhaps the neighborhood needs to look at how to improve those wetlands so their functional value is greater than it is. The Mayor concurred with the comments of the other Councilors.

Mr. Kohlhoff understood the motion to be that the applicant has failed to carry its burden before Council in the areas discussed. In other words, by a preponderance of the evidence they have not convinced Council. He asked Mr. Edmonds for the timing of the 120-day clock.

Mr. Edmonds stated the applicant had requested a 30-day extension making the 120th day November 5, 2001. However, he wanted to review the file to be sure.

Vote: Motion carried 3 -0.
Councilor Holt – excused
Councilor Helser – Yes
Councilor Kirk – Yes
Mayor Lehan - Yes

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Mayor Lehan stated to the audience if they desired to appeal this decision to LUBA they must make application stating the grounds for the appeal and file the appeal with LUBA as proscribed by State Law.

Councilor Barton rejoined the Council on the dais.

LEGAL BUSINESS

Mr. Kohlhoff indicated the petitions filed against the Secretary of States Redistricting Plan had not been dismissed by the Supreme Court. The Supreme Court will ask the Secretary of State to revise the redistricting plan. The new plan must be filed with the Supreme Court by the end of November.

ADJOURN

Motion: Councilor Kirk moved to adjourn the meeting, seconded by Councilor Barton

Vote: Motion carried 4-0.

Mayor Lehan adjourned the City Council meeting at 9:15 p.m.

Respectfully submitted,

Sandra C. King, CMC, City Recorder

ATTEST:

CHARLOTTE LEHAN, MAYOR