

MINUTES

CANBY PLANNING COMMISSION

7:00 PM November 22, 2004
City Council Chambers, 155 NW 2nd

I. ROLL CALL

PRESENT: Chairman Jim Brown, Commissioners John Molamphy, Tony Helbling, and Dan Ewert

STAFF: John Williams, Community Development and Planning Director, Darren Nichols, Associate Planner, Carla Ahl, Planning Staff

OTHERS PRESENT: Linda Smith, Mary Johnson, Jim Wisely Voni Wisely, Rod Craig, Lana Krishchenko, Alex Krishchenko, Brett Laney, DeAnna Ball, Joni Heller, Bob Heller, Connie Kealey, Richard Ball, Florence Ball, Lee Evans, Rodney Corbin, Rick Reeder, Christian Smith, Craig Finden

II. CITIZEN INPUT

None

III. NEW BUSINESS

None

IV PUBLIC HEARINGS

MLP 04-03 The applicant is seeking approval to partition one 12,532 square foot parcel into two separate tax lots of approximately 6,275 and 6,278 square feet located on the northeast corner of SW 13th and Cedar Loop. An existing house is proposed to remain on the front lot, creating one buildable lot to the rear of the existing home. The applicant proposes to provide access to a newly created lot by means of a curb cut and access drive off SW 13th Avenue.

Mr. Brown read the public hearing format. When asked if any Commissioner had a conflict of interest, none was expressed. When asked if any Commissioner had ex-parte contact, none were stated. No questions were asked of the Commissioners.

Darren presented the staff report. He explained that the property to the north east and south are all zoned R 1.5 (medium density) property to the east is

zoned R 1 (low density), and contains the Church of Jesus Christ of Later Day Saints, the church parking lot abuts the rear parcel.

Darren explained that a portion of the parcel is in the Cedar Ridge Planned Unit Development, which was approved in 1992. According to the CC&Rs no lots within the original PUD can be divided to provide additional residences. He explained that the rear half of this property contained a triangle piece of property that originally was intended to help the Rackleff House meet their open space requirements.

Mr. Brown asked if the triangle piece of property was on the other side of 13th St. Darren explained that it was part of a larger development. 13th St. extended through that development leaving part of it across the street from the Radcliff House.

Darren explained that the Radcliff House decided not to increase their development so the additional open space was not needed. They then transferred ownership of the triangle piece to Mr. Krishchenko. Darren questioned whether the transferred piece became part of the Cedar Ridge neighborhood association. He stated the City Attorney commented that the Planning Commission should look at the application according to the City's criteria.

Mr. Brown questioned if the parcel still exists. Darren explained that a lot line adjustment had been done and there is just one parcel at this time. Darren stated that the City Attorney has stated that CC&Rs are a private agreement and need to be enforced in a different jurisdiction.

Darren stated that there is an issue with the proposed access. The church parking lot has 2 access drives on SW 13th, which are about 60' apart. The proposed driveway would be about 25' from the western most church access. He stated that SW 13th St. is classified as an arterial in the TSP. The City standard for an arterial calls for 300' between driveways, streets or access points. He stated that 13th St. has been developed over a period of time and parts do not comply with that standard. He stated that the existing church access points, the Radcliff House and Cedar Loop do not comply with the 300' spacing standard so the Commission needs to decide if it is appropriate to add one driveway or not.

Darren explained that the TSP gives the Planning Commission or the City the right to approve access points that don't meet the spacing standard if indirect access cannot be obtained, if there isn't an engineering or construction solution that can easily be applied or if alternative accesses are not available from a street with a lower function classification. Darren stated this application meets that requirement if the Planning Commission finds the application is appropriate to approve.

Darren stated that the applicant would be required to provide a new curb cut and maintain the existing sidewalks. Most of the comments were received after the staff report had been written. The comments in the staff report were from Mr. Ball, who is a neighbor and an active member of the Cedar Ridge Home Owners Association. It was Mr. Ball who informed the City regarding the language in the CC&Rs preventing division of lots within the subdivision. He believed that this issue would be discussed later.

Darren stated that with the Planning Commission's decision on the access point the application could meet the criteria for a minor land partition.

APPLICANT:

Alex Krishchenko explained that there are 13 people living in his house and plans to build another 2-story home on the new lot for his older children to live in.

PROPONENTS:

Jim Wisely stated he is in favor of this application. He believes that even if the application goes against the CC&Rs if the property had been available at the time of development, there would be another house there. He doesn't see where the driveway would be a safety issue. The extra home would put more money in the Home Owner Association coffers and does not believe the house would look unappealing since there are smaller lots inside the subdivision. He explained the school has built a huge maintenance shed and it is not offensive.

Kyle Bogardus stated he found it hard to believe that a Home Owners Association could override what the City says is okay. He believes there is no problem with what Mr. Krishchenko wants to do and believes he has met the criteria.

Rick Reeder stated he sees no problem with another house in the neighborhood. The Krishchenko family has been an asset to the neighbors. He believes that if the application is within the guidelines of the City anything above or beyond those guidelines infringes upon the applicants property rights.

Voni Wisely stated that the Krishchenko family has been an asset to the neighborhood and have maintained their home nicely. Even though they are a large family they have always been mannerly and she is glad they are her neighbors.

OPPONENTS:

Mary Johnson, Land Use Attorney representing Mr. & Mrs. Ball. Ms. Johnson requested longer than the 5 minutes time frame that had been established. Mr. Brown agreed to extend the time to 10 minutes.

Ms. Johnson explained that Cedar Ridge is a PUD (Planned Unit Development) that was approved in 1992. She showed that the applicant lives on lot 1, which is on the north side of SW 13th and on the east side of Cedar Loop. The Balls live on the lot next door to the north. She explained how the lots were shaped prior to Mr. Krishchenko obtaining the property from the Radcliff House and obtaining a lot line adjustment and how Mr. Krishchenko plans to divide the property to create the second lot she stated that a 2-story house would look directly into the private part of the Ball's home.

Ms. Johnson stated that in 1992 when this plat was approved the Planning Commission required that the City Attorney approve the CC&RS. She stated the CC&Rs state that no lot in Cedar Ridge will be rezoned or subdivided further to accommodate construction of additional residences, which is what Mr. Krishchenko intends to do.

John Williams, Community Development and Planning Director stated that the City required CC&Rs be created but did not require all of the regulations that are inside them. Mr. Helbling stated his belief that the requirement for the City Attorney to review the CC&Rs was to be sure they do not conflict with City ordinances. Ms. Johnson believed if the City requires the CC&Rs then they have a duty to uphold them. She stated she is not asking the City to enforce the CC&Rs but she is asking them to uphold their conditions of approval.

Ms. Johnson stated that Mr. Krishchenko asked the Home Owners Association for a waiver of the regulation regarding dividing the property and the Home Owners Association had denied the request. She did not believe the City has the authority or the jurisdiction to overrule the Association on this point.

Ms. Johnson stated the lot line adjustment application that Mr. Krishchenko had submitted stated the property was to be added to the homeowner's yard, which was appropriate. Mr. Krishchenko did not state on the application that he was coming back in a year to create another building lot.

Ms. Johnson stated the City does not have jurisdiction or authority to modify conditions of approval of the Cedar Ridge PUD unless there is an application to modify them. The City has the duty to assure conformity to prior conditions in derivative development.

Ms. Johnson stated her belief that the Commission has constitutional limitations against impairment of contractual obligations. *(At this point Ms. Johnson asked for a few more minutes, which was granted by the Chairman)* She explained that the constitutional prohibition upon impairment of contracts is a limitation on the

authority of the Planning Commission because they do not have authority to change anybody's contractual obligation or rights. By allowing the applicant to subdivide the parcel the Planning Commission would be impairing the declaration of CC&Rs and Mr. Krishchenko obligation is to follow the deed restrictions.

Ms. Johnson said the staff report had stated that it was unclear whether the CC&Rs apply; she explained that it was their position that the CC&Rs absolutely apply. Adding the triangular piece to lot 1 did not nullify the conditions of approval or lessen the deed restriction. Staff also found that the decision has to be based solely on the criteria of the land development and planning ordinance. She stated that it is not correct; they also have to enforce their prior conditions of approval and abide by constitutional limitations.

Ms. Johnson stated this application does not comply with the Transportation System Plan (TSP) or the Comprehensive Plan. SW 13th is designated an arterial street, whose function is to provide through movement of traffic and does not permit private driveways serving less than 5 dwellings. She stated the minimum driveway spacing requirement is 300', if the minimum standard is not met then shared driveway accesses have to be required. This parcel abuts Cedar Loop and there is another driveway 25' to the east of this property. She believed that the applicant must show that there is no reasonable engineering or construction measure to make a connection to SW 13th and that an exception or variance to the TSP had not been noticed for this hearing. She stated there is a curve on SW 13th and there is no evidence that there is adequate sight distance to make a safe entry onto SW 13th.

Ms. Johnson stated that Mr. and Mrs. Ball had the expectation that there would not be another house on lot 1 which is what this application is proposing so there could be a Measure 37 issue if putting a house there lessens the Ball's property value.

Mr. Brown explained there are conditions which require CC&Rs exist, but they did not trump existing planning code. Ms. Johnson believed that because the condition states CC&Rs were to be created, reviewed and approved by the City Attorney then recorded as a deed restriction, the Planning Commission has to acknowledge it. She stated this will become more of a problem in the future as there becomes more and more privatization of governmental functions where there are lots of easements and conditions of approval that are enforceable by the City and the City has a duty to enforce, derivative development must go along with prior decisions the Commission has made.

Deanna Ball, Treasurer of Cedar Ridge Home Owner's Association introduced herself and stated she would be assisting with the presentation from Richard Ball.

Richard Ball, Member Cedar Ridge Home Owner's Association stated he is the neighbor to the north of the applicant. He explained he would be giving a power point presentation.

Mr. Ball explained the location of his home and why it was specifically chosen as their retirement home. When he purchased his home there was the church behind his property a neighbor to the north, a common area between his home and SW 13th and the Krishchenko property next door. He believed it was a reasonable expectation that there would not be another building lot next door to his home.

Mr. Ball stated no driveways were allowed onto 13th St. by either the Tofte Farms or Valley Farm subdivisions. The only existing driveways are ones that were created prior to SW 13th becoming a truck route.

Mr. Ball stated allowing an access at that location would not be safe since the roadway curves and has an impaired view. Mr. Ball stated that he had discussed with Mr. Krishchenko the possibility of adding onto his current home to create more room for his family, and Mr. Krishchenko explained he was going to create this lot and then sell both homes.

Florence Ball, next-door neighbor stated that when they looked for a retirement home they wanted one in a nice neighborhood with CC&Rs, which would assure their investment and their enjoyment of life.

Joannie Heller, President Cedar Ridge Home Owners Association, addressed the Commission. She stated that the association takes full responsibility for the management and administration of the lands inside the development. She stated that people who purchase homes in Cedar Ridge are active in the homeowners association and believe their investment in the neighborhood would be protected.

Ms. Heller stated that this request to subdivide an existing lot was voted on and opposed on September 9th. The issues were the safety concerns of adding a lot at that location, jurisdictional concerns of adding and deleting land currently within the boundaries and the economic impact on the association which would be incurred since each homeowner would have higher assessments, aesthetic concerns from neighbors and the administrative burdens placed on Cedar Ridge.

Ms. Heller stated the homeowners expect that the CC&Rs be in order. She stated she had contacted 40 of 56 homeowners 29 stated they did not want Mr. Krishchenko to build, 8 were undecided and 3 who approved.

Mr. Brown asked if there were any other lots in Cedar Ridge that could be dividable. She believed there were 2 or 3 lots that could be divided. Mr. Brown

asked how this subdivision would prevent them from having barbeques and such. Ms. Heller stated they would still have barbeques but their concern is that it is against the CC&Rs and the Board has already voted no. She explained that Mr. Krishchenko had requested a waiver without explaining what he wanted to do. She explained that if the proposed lot came into the HOA there would be additional fees paid, but there would be a cost in changing the CC&Rs and that is a cost to the homeowners. If the lot is outside the HOA then there are concerns about aesthetics of the potential home.

Rod Craig stated he is an 11 year resident and past President of Cedar Ridge Home Owners Association. He stated the HOA had jurisdiction while dealing with the developer regarding having streets repaved and flooding problems. He stated that when it was replatted and it was mandated that they had CC&Rs it was logical to think that since the City wanted the CC&Rs that they could assume they would enforce them as well.

Mr. Craig stated that the HOA had looked at the issue and had decided it was not applicable for that neighborhood. He hoped the Planning Committee would support the decision of the Board of Directors since it is their conditions that required the CC&Rs.

Darren stated that a letter had also been received from Mr. Craig.

Brett Laney explained that his name appears on both lists the one for the application and the one against it. After going over the evidence he has decided that he is no longer in favor of this application. He stated he has lived in the subdivision for a year but he believes that it is crucial to the HOA that the members strictly abide by the CC&Rs to protect the integrity of them.

Mr. Laney stated the CC&Rs were agreed to when people purchased their property. He believes to rule against this issue would undermine the CC&Rs and provide a way for homeowners who want to get around the CC&Rs. It should be considered that not only this issue is at stake but the integrity of the homeowners association in regards to the CC&Rs as they are.

John explained that it is the City's position is not that the City is trying to override their CC&Rs; the City's Attorney's position is that it is not our responsibility to enforce the CC&Rs. He explained that the remedy the HOA has is in court and John believed they would have a very good chance in court with the issues that have been discussed. The City does not have the legal authority to step in and enforce their CC&Rs. For example the City does allow political signs on private property but the CC&Rs don't, someone couldn't come to the City to enforce the CC&Rs; the remedy is in court. He did not want them to feel their HOA is threatened.

Mr. Laney stated he was not a lawyer, but if that is the case, then why were they here? He believed that the arguments presented by the Land Use Lawyer were very strong.

Robert Heller, stated he has lived in Cedar Ridge for a year but has been in Canby since 1976. When he purchased his home the lender, realtor and everyone involved made sure he understood the CC&Rs and signed that he would abide by them. If the rules are out there but not enforceable, what is the use of having them? His understanding is that the HOA is recognized as a smaller jurisdiction of the City and as such can make stricter laws but not loosen the laws. We are at the point where we have stricter laws than the City and the City has to make a decision whether they will try to override the HOA's regulations.

Mr. Heller stated he understood that the Planning Commission was not there to enforce the CC&Rs but they shouldn't authorize someone to break the CC&Rs. He stated that the majority of the residents in Cedar Ridge did not want additional houses built in the community.

Mr. Heller stated that when the school is having training practice it is very crowded and difficult to get home at times because of the number of people parked there.

Darren presented the Commission with new material that was received that day.

Christian Smith stated the HOA has been responsible for the community; they take care of their needs such as roads, lights and parks because it is their agreement with the City. He expressed his concern that the City does not help their community such as assistance during the Fourth of July fireworks when people jam the streets and leave garbage all over. Mr. Smith believes the HOA is it's own entity and the City should respect them for what they do.

Mr. Smith stated the HOA is an entity and the City should respect them for what they do. He stated this is not a partisan issue, it was never intended that a house be there. When Mr. Krishchenko obtained the property he stated his intention was for a garden/yard area. The elected officials of the HOA decided this was not in the best interest of the community and now the City is going to override them.

Mr. Smith stated his concern regarding what this will do to their corporate structure and what it will do to their community. When the City made the approval for the original plan, the sewage system was undersized, and that is why the City won't deal with us. If the HOA ceases to exist as a management body then who will be responsible for the maintenance?

Linda Smith stated she owns rental property in the Cedar Ridge Subdivision. She stated that she is not for or against this application and understands both sides of the issue and in her opinion it will not affect anyone but Mr. and Mrs. Ball. She stated she was at the meeting and that there had been a lot of discussion, and at first the Board had decided to approve the waiver, then decided to help Mr. and Mrs. Ball by denying the waiver.

Matt Tremble stated he was the Vice-President of the HOA. He wanted to explain that at the meeting Ms. Smith spoke about, he was the only one who voted for granting the waiver. He explained that he now stands behind the Board because it was the decision that was made. He agreed that no access should be allowed onto SW 13th.

Mr. Ewert asked if hot tubs need to be approved before they are put in the neighborhood. Mr. Tremble stated that every structure since he has been on the Board has been approved.

Mr. Ewert asked if there was a copy of the letter from the HOA denying the waiver. Darren explained that it had not been included in the evidence that was received. Mr. Tremble stated that the HOA's secretary had drafted the letter, and she has been out of the state for a couple of months

REBUTTAL:

Mr. Krishchenko read from the CC&Rs the section that states a lot could not be subdivided in order to accommodate construction of additional residences. He believed that meant a duplex, he is planning to build a single family home with an attached garage. He stated that if he added onto his home it would block more of Mr. Balls view than a separate home would do. He addressed the traffic safety issue and stated that there is over 100' of open space along SW 13th that does not even have a sidewalk.

Lana Krishchenko assisted her father in his rebuttal. She stressed that her Father was building the house for his older children so they could study more and get better grades in school.

Mr. Ewert questioned where the location of the driveway would be. Mr. Krishchenko stated it would be maybe 10' from property line. He explained that there are other driveways that have less sight distance than the proposed driveway would.

Mr. Brown closed the public hearing and opened Commissioner deliberations.

Mr. Helbling addressed Ms. Johnson's statement that the City was bound to uphold the CC&Rs. His understanding was the Planning Commission directed

the CC&Rs be filed with the County and reviewed by the City Attorney was to assure that the CC&Rs didn't conflict with the City and were legal. It does not bind the Planning Commission to uphold their CC&Rs Mr. Helbling stated that the CC&Rs were valuable but the Planning Commission was not the body to enforce them.

Mr. Helbling stated that once the property was given to Mr. Krishchenko it became his property and he has the right to do what he will with it. Mr. Helbling stated that Ms. Johnson had a point regarding accessing 13th St. and recommended contacting the LDS Church about sharing access or that the Planning Commission not take action until the access could be reviewed.

Mr. Molamphy agreed that it is not the Planning Commission's job to enforce the CC&Rs; it is to look at the land partition and see if it fits within the rules, regulations and laws. Mr. Molamphy believed it did fit the criteria and sharing a driveway with the Church should be looked into.

Mr. Ewert agreed with the comments from the other Commissioners. He stated CC&Rs are great, but you can't use them to pick who your neighbors will be. He stated that the Planning Commission is not here to enforce CC&Rs they are here to make decisions on criteria. He stated he had no problem with this application and the only problem would be the access and recommended exploring alternative access onto SW 13th.

Mr. Brown stated the Planning Commission routinely requires CC&Rs, generally for maintenance issues. He explained it is done because the Commission is fearful of areas of the City where there are facilities that need to be installed that we don't see how they can be maintained. They are also used so local citizens can have control over their own community and gives them input into the governance of their own property.

Mr. Brown stated after looking at the pictures presented to the Commission and because of the setbacks that need to be met, the impact to Mr. & Mrs. Ball was minimal. He stated this property was unusual since a large portion of it lies outside of the original PUD.

Mr. Brown believed the Commission needed to discuss the future of SW 13th; it will become wider and busier and be a major arterial road to access all of the south side of town that is headed for I-5.

Mr. Brown stated he has some degree of authority with the LDS Church and did not believe they would allow Mr. Krishchenko access to his lot through their parking area. He believed that if the Commission approved this application they would be creating a nonconforming lot that could not find an access the Planning Commission could be happy with. He believed the applicant is within his rights to divide the property; the Commission would be creating a problem that

could not be fixed. He believes the application fails on condition B, not in conformance because it fails on the TSP aspect

Mr. Ewert agreed that the applicant needed to find another access for the lot since SW 13th will be the I-5 connection. He believed putting another access onto 13th would be a disaster waiting to happen.

Darren stated that on the east side of the property there is a triangle piece of property left over from the old design of SW 13th, that belongs to the City of Canby. There have been some discussions with the Church about what to do with that piece since it is a non-functional property. So there are other access possibilities instead of going across the LDS property.

Mr. Helbling suggested delaying the decision to give the applicant an opportunity to explore access options. Mr. Brown explained that the applicant would have to use the existing driveway or something within 300' of that site. Mr. Brown questioned the Commission if they wanted to postpone the hearing until the December 13th meeting. The Commission chose not to postpone.

It was moved by Mr. Ewert to approve MLP 04-03 with the condition that no additional accesses are allowed onto SW 13th. Seconded by Mr. Helbling. Mr. Molamphy clarified that the Commission would be approving the division if access can be obtained from either the Church or the City property. Darren asked if staff can make that determination, it was agreed that staff could make that decision. John clarified that the finding is, the criteria can't be met with an additional driveway.

Darren asked for a decision on whether the new lot should be part of the Cedar Ridge Home Owners Association. Mr. Helbling asked if the Planning Commission could decide that. Mr. Brown stated the whole thing was designed under a PUD and they would be modifying the map of the PUD. Darren stated that the Ratcliff House could have done a LLA and a MLP and never been a part of the civic association, so the question is whether this area, this lot should be included or excluded. Mr. Ewert believed that was a separate question. Mr. Brown did not see how it could be excluded, there would be 56 lots included with one that was not. Mr. Ewert stated that it is separate since the access would not be in the PUD. John suggested that staff look into the issue and bring something back with the Findings. Motion carried 3-1-2 with Mr. Brown voting no and Mr. Tessman and Mr. Manley absent.

John explained that either party could appeal the decision to the City Council. The forms are located in the Planning Office and it would require another public hearing with the Council. He explained that after the December 13th Planning Commission hearing anyone who testified at this meeting would be getting a copy of the approved Findings and a letter explaining the procedure for appealing the decision.

Mr. Ewert stated the Planning Commission is creating a situation where if the City Attorney says the Commission has the ability to take this out of the Cedar Ridge HOA and they do it, then any objection or appeal based on the CC&Rs would not affect the Commission. So what will they appeal, that the Commission is taking it out.

Mr. Brown believed there was a bigger problem; they have created an action for the LDS Church. There is a piece of property they have been using and may have adverse possession since they have been using it for a long time.

VI MINUTES

11-8-04 It was moved by Mr. Ewert to approve the minutes as amended. Seconded by Helbling. Motion carried 4-0-2.

7-12-04 It was moved by Mr. Molamphy to approve the minutes with corrections. Seconded by Mr. Ewert. Motion carried 3-0-1-2 with Mr. Helbling abstaining.

It was moved by Mr. Ewert to modify the approval of the minutes for 11-8-04 as submitted. Seconded by Mr. Helbling. Motion carried 4-0-2.

DIRECTOR-S REPORT

John stated there will be a workshop for the Arndt Rd project on December 8th regarding the Arndt Rd extension from Hwy 99E to I-5. John explained it would be presented by Clackamas County and City Staff and attended by City Council, Planning Commission, Parks and Rec, Traffic Safety Committee and Bike and Ped Committee.

John explained that purpose of the meeting is to have the advisory committees submit recommendations on the project to the Council. There will be a presentation and then the committees would have an opportunity to discuss the issue amongst themselves and bring a recommendation to the Council.

John explained he has not seen the final product from Clackamas County showing the cost and how it is going to look. If it is not received in time for it to be reviewed then this workshop won't work.

John stated that one person requested a public hearing for the modification

John explained that the City had requested that ODOT install "No U-Turn" signs at Territorial and Hwy 99E. He stated that ODOT refused to install them because they believe there is adequate sight distance to allow U-Turns. Mr.

Helbling stated there is a double yellow line and it is illegal to make U-turns over double yellows. John stated that it is not illegal in Oregon, and ODOT has taken a wait and see attitude about the U-Turns.

VIII ADJOURNMENT