



Angoleana Brien <planning@cityofgearhart.com>

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## File#22-04P Land Partition

1 message

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**Abbey R. Germaine** <arg@elamburke.com>

Thu, Jun 30, 2022 at 1:05 PM

To: "planning@cityofgearhart.com" <planning@cityofgearhart.com>

Cc: "connellpc@comcast.net" <connellpc@comcast.net>, Bryan Evans <bryan@evansplumbinginc.com>

City of Gearhart Planning Commission:

We represent Mr. Bryan Evans who is the owner of the adjacent property at [3767 North Highway 101](#). Based on the comments and questions presented at the Public Hearing on June 9<sup>th</sup>, 2022, Mr. Evans submits the attached formal comments for consideration by the Planning Commission at the continued hearing on July 14<sup>th</sup>, 2022. Please confirm you have received these.

Thank you for your time and consideration.

Abbey Germaine



**Abigail R. Germaine**

**Attorney**

[251 E. Front St., Ste. 300](#)

P.O. Box 1539

Boise, ID 83701

(208) 343-5454

(208) 384-5844 (fax)

[arg@elamburke.com](mailto:arg@elamburke.com)

<http://elamburke.com>

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**From:** Bryan Evans <[bryan@evansplumbinginc.com](mailto:bryan@evansplumbinginc.com)>  
**Sent:** Wednesday, June 8, 2022 4:30 PM  
**To:** [planning@cityofgearhart.com](mailto:planning@cityofgearhart.com)  
**Cc:** Abbey R. Germaine <[arg@elamburke.com](mailto:arg@elamburke.com)>  
**Subject:** File#22-04P Land partition request.

Dear Planning commission,

I own EPI Properties, LLC which owns the adjacent property to parcel 1, the subject property of the land partition request. I am planning to attend the meeting tomorrow at 6 PM on June 9 in person and testify. I wanted to submit my objection and reasons for it in writing so they would be part of the record and I am traveling from out of state to attend this meeting and wanted to submit this in writing in case I encounter any travel complications and can not make it to the meeting.

Thank you,

**M. Bryan Evans--President**

**Evans Plumbing, Inc**

[www.evansplumbing.com](http://www.evansplumbing.com)

Office 208-726-5261

Cell 208-720-1595

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ABIGAIL R. GERMAINE

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Boise, Idaho 83701  
Telephone 208 343-5454  
Fax 208 384-5844  
E-mail [arg@elamburke.com](mailto:arg@elamburke.com)

June 30, 2022

**VIA EMAIL AND HARD COPY TO FOLLOW: [planning@cityofgearhart.com](mailto:planning@cityofgearhart.com)**

City of Gearhart  
Planning Commission  
698 Pacific Way  
Gearhart, OR 97132

RE: File 22-04P Land Partition  
Public Hearing Continued to July 14<sup>th</sup> – addendum to formal comments submitted  
on June 8, 2022.

Dear Planning Commission,

Elam & Burke, PA represents Mr. Bryan Evans. These comments supplement those provided to the Gearhart Planning Commission (“Commission”) on June 8, 2022, in opposition to Land Partition request File #22-04P (“Partition”). As stated previously, Mr. Evans is the owner and resident of Parcel 2 and Track A, located at 3767 North Highway 101. In addition to the reasons provided by Mr. Evans’ June 8, 2022, comments, and as further supplemented by the testimony provided on record at the public hearing on this Partition on June 9, 2022, the following is provided in support of the request to deny the Partition.

- 1) Section 40 of the Gearhart Subdivision Ordinance Prohibits Approval of this Partition.

The requirements of Section 40 of the Gearhart Subdivision Ordinance provide for the conditions a land partition must satisfy in order to be approved by the Commission. The Partition fails to meet these requirements in several different ways.

- a) Section 40.2 – Access

The Gearhart Subdivision Ordinance, Section 40.2 provides, “each lot and parcel shall abut upon a street other than an alley for a width of at least 25 feet.” As proposed, the Partition will not allow for all three lots to abut a street. The City Staff Report dated June 2, 2022, by Carole Connell, City Planner, does not address how this Partition satisfies this condition. Instead, the Staff Report states, “FINDINGS: The City finds the proposed parcels are appropriately sized

and shaped to satisfy the basic street access and R-2 minimum lot size, shape, and setback standards.” Staff Report, pg. 8. This statement does not clearly address how the Partition and the three potential lots meet the requirement that all lots abut a street.

At the public hearing on June 9, 2022 (“Public Hearing”), the City Planner admitted that the easement used by Mr. Evans to access his property is not a street and is not suitable for additional traffic. Testimony by the City Planner at the Public Hearing confirmed that the easement was not suitable for street access for several reasons, including the approach and angle from the highway, the gravel surface of the easement, and the necessary width that would be needed to make this an actual street. Furthermore, as will be discussed later in these comments, this easement was never intended to be dedicated as a street and was provided for ingress and egress access to a single lot and residence.

When questioned regarding the ability of these lots to abut a street, the City Planner acknowledged that this was not possible due to the location of these lots. The City Planner mentioned that this subdivision was historically inaccurately platted and divided, thereby leaving street access to these proposed lots impossible. However, the City Planner seemed to imply that the mistake that had been historically made regarding this plat, justified failing to comply with Section 40.2 of the Gearhart Subdivision Ordinance. The City incorrectly platting this area in the past is not an allowable, or documented, exemption to the requirement that “[e]ach lot and parcel shall abut a upon a street...” Section 40.2. The Commission must deny this Partition based on the failure to meet the criteria Section 40.2.

b) Section 40.3 – Through Lots and Parcels

Similarly, to Section 40.2, this Partition is unable to meet the requirements of Section 40.3 which requires that “through lots and parcels” be avoided. Like was the case related to Section 40.2, the City Planner’s Staff Report does not explain how this condition is met with the circumstances of this Partition. This is simply not addressed in the Staff Report and was not articulated in the Public Hearing. The Commission should deny this Partition based on its failure to meet the criteria of Section 40.3.

c) Section 40.5 – Character of the Land

Equally as important are the criteria set forth in Section 40.5. Section 40.5 provides:

Land which the Planning Commission finds to be unsuitable for subdivision or partitioning due to flooding, *improper drainage, steep slopes, adverse soil conditions or topography, utility easements, or other features which will reasonably be harmful to the safety, health, and general welfare of the present or future inhabitants of the subdivision or partition and/or its surrounding*

***areas, shall not be subdivided or partitioned*** unless adequate methods are formulated by the developer and approved by the Planning Commission, upon recommendation of the City Staff, to solve the problems created by the unsuitable land conditions. ***Such land shall be set aside for uses as shall not involve such a danger.***

Section 40.5 (emphasis added). As is evidenced by the Partition and was further illustrated at the Public Hearing, the lots and the Partition create several of the conditions this provision, Section 40.5, was intended to prevent. The Staff Report touches on these issues, “the City finds impacts by the required site alteration, tree removal and grading necessary to accommodate a flat building site for a dwelling on Parcel 3 may create drainage and dune destabilization issues. Other properties in the area that about the dune experience significant drainage puddling at the base of the dune.” Staff Report, pg. 8. Based on these findings alone, the Commission could deny this Partition as creating improper drainage, containing steep slopes, having adverse soil conditions, and being land that should be set aside for uses that do not cause these harmful impacts.

In addition, the testimony at the Public Hearing from the Commission supported the finding that Section 40.5 had not been met. Multiple Commissioners expressed concerns with the intended tree removal and the potential negative impacts removing the trees would have on soil stabilization, and the surrounding environment. It also became apparent through the testimony by the applicant of the Petition, that a geotechnical report had not been conducted related to the anticipated grading of the lots. Given the topography of the site and the excessive material movement, this site is not suitable for the planned 3 lot development. The Commission should deny this Partition based on its failure to meet the criteria of Section 40.5.

- 2) The Evans’ Access Easement may not be used as a Street by the Proposed Partitioned Lots.

The access easement conveyed to Parcel 1, was granted by Ike and Debbie Cutler in 2005 pursuant to their partition and plat 2005-21. As evidenced by a statement given from Debbie and Ike Cutler, when granting this easement their intent was for the easement “to serve one homesite on Parcel 1.” See attached statement. Allowing this parcel to be partitioned into three lots with three additional residences substantially expands the original scope of this access easement.

The scope of the easement cannot be expanded beyond the original intent of the grantor and the original purpose the easement was granted for. In construing an easement, the task is to discern the nature and scope of the easement’s purpose and intent. *Tessel v. Williams*, 291 Or.App. 215, 222, 420 P.3d 31, 35 (Ct.App. 2018) “An easement owner is limited to the uses of the easement that are reasonably necessary to satisfy the easement's intended purpose.” *Tooker v. Feinstein*, 131 Or.App. 684, 687, 886 P.2d 1051 (Ct.App. 1994). If the easement language itself has ambiguity related to the scope or purpose, one must look to relevant surrounding circumstances for evidence of the original parties' intent; relevant considerations may include the easement's purpose, the circumstances existing at the time of the grant, and the manner in which

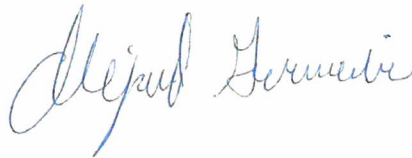
the original parties used the easement. *Tipperman v. Tsiatos*, 327 Or. 539, 545, 964 P.2d 1015 (1998). The goal is always to give effect to the parties' intentions. *Bloomfield v. Weakland*, 224 Or.App. 433, 447, 199 P.3d 318 (Ct.App 2008).

This easement was originally granted with the intent to provide a single residence access on Parcel 1. The Partition attempts to expand the scope of the easement beyond what was originally intended by the grantor. As discussed at the Public Hearing by the City Planner, the applicant is attempting to utilize this access easement as a street for purposes of this new development. This was not the intent of the original easement. The easement does not meet the requirements of a street and cannot be enlarged to provide this necessary street access. The Commission should deny this Partition based on the scope of the access easement granted to Parcel 1.

Based on the foregoing, we respectfully request the Commission deny this Partition.

Sincerely,

ELAM & BURKE  
*A Professional Association*



Abigail R. Germaine

ARG/ksk  
Attachment



Angoleana Brien <planning@cityofgearhart.com>

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## 22-04P Land partition request

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**debbi cutler**

To: planning@cityofgearhart.com

Tue, Jun 7, 2022 at 5:03 PM

RE: File #22-04P Land partition request

we are the former owners of this property Ike and Debbie Cutler we would like to make it know that when we partitioned the property in 2005 on plat 2005-21 and granted an access easement through tract A and parcel 2 for access to parcel 1 the intended scope of this easement was to serve one homesite on parcel 1.

Debbi & Ike Cutler



Angoleana Brien <planning@cityofgearhart.com>

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## File#22-04P Land Partition

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Angoleana Brien <planning@cityofgearhart.com>

Thu, Jun 30, 2022 at 2:08 PM

To: Peter Watts <peter@peterowattspc.com>

Cc: Chad Sweet <chadsweet@cityofgearhart.com>, Carole Connell <connellpc@comcast.net>

Good afternoon Peter,

I received this today regarding the upcoming meeting. Can you please review this at your earliest convenience and let Carole and Chad know your thoughts and or concerns you may have. We would like to be prepared for this.

----- Forwarded message -----

From: **Abbey R. Germaine** <arg@elamburke.com>

[Quoted text hidden]

[Quoted text hidden]

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Thank you,

Angoleana Brien  
City of Gearhart  
Planning Assistant  
698 Pacific Way  
Gearhart, OR. 97138  
(503)738-5501

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Angoleana Brien <planning@cityofgearhart.com>

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## File#22-04P Land Partition

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**Peter Watts** <peter@peterowattspc.com>

Mon, Jul 4, 2022 at 4:48 PM

To: Angoleana Brien <planning@cityofgearhart.com>

Cc: Chad Sweet <chadsweet@cityofgearhart.com>, Carole Connell <connellpc@comcast.net>

The attached easement says "road and utility easement"

[Quoted text hidden]

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Peter O. Watts

Peter O. Watts P.C.

(503) 657-0406 Ext 29

1969 Willamette Falls Dr. Suite 260

West Linn OR., 97068



Angoleana Brien <planning@cityofgearhart.com>

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## Interpretations needed please

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connellpc@comcast.net <connellpc@comcast.net>  
To: Angoleana Brien <planning@cityofgearhart.com>

Thu, Jul 7, 2022 at 1:52 PM

**From:** Peter Watts <peter@peterowattspc.com>  
**Sent:** Thursday, July 7, 2022 10:31 AM  
**To:** Carole Connell <connellpc@comcast.net>  
**Subject:** Re: Interpretations needed please

That seems accurate to me. I don't see a deed restriction and the plat clearly shows a road easement.

**From:** Peter Watts <peter@peterowattspc.com>  
**Sent:** Wednesday, July 6, 2022 4:11 PM  
**To:** Carole Connell <connellpc@comcast.net>  
**Cc:** Chad Sweet <chadsweet@cityofgearhart.com>; Angoleana Brien <planning@cityofgearhart.com>  
**Subject:** Re: Interpretations needed please

If you guys look at the Cutler easement it says "road and utility easement." Does that road easement not meet the minimum standard for a road, because it is described as a road easement? The fact that it is unimproved wouldn't matter. We vacate unimproved right a way from time to time. I'm not clear why she says the lots wouldn't abut a road if they abut a road easement. Granted the road would need to be built but that seems like it could be a condition of approval.

[Quoted text hidden]

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