

MEMORANDUM

July 8, 2022

To: Gearhart Planning Commission
From Carole Connell, City Planner
RE: City file 22-04P Cutler Partition - continued Commission discussion

Issue: After the public hearing on June 9 was closed, the Planning Commission requested a legal interpretation regarding the intent of the original road easement, and whether it is a substantial expansion of the road easement to serve two proposed lots. Bryan Evans, owner of adjoining property opposed the partition because the subject parcel was not “intended” to be divided again after the 2005 partition approval and does not comply with Subdivision Ordinance Section 38 Streets and Section 40 Building Sites.

New evidence: Letter from Abigail Germaine, Elam & Burke Attorney at Law 6-30-22
Emails from City Attorney Peter Watts
Email from CKI Land Surveying Scott Cooter 6-14-22
2005 Cutler partition staff report & Planning Commission minutes -
(Available on request)

Additional staff findings and response to new evidence

Gearhart Subdivision Ordinance

Section 38 Streets: A land partition shall conform to the relevant street design standards. Opponents find the proposed partition does not comply with this standard.

FINDINGS: The June 2 city staff report for the proposed partition, it is stated Cutler Lane is not subject to the public street right-of-way road improvements of Section 38 because it is a road and utility easement, not a public street.

Confirming that, the City Attorney said on 7/4/22 “the existing recorded easement is a road and utility easement”; then on 6/21/22 he said that it “doesn’t preclude further land division but seems like they will need to build the street up to code”, and on 7/7 /22 said, “I don’t see a deed restriction and the plat clearly shows a road easement.”

The applicant’s surveyor said on 6/14/22 he “has never seen an easement with an intent for future use, and that a deed restriction would have done that but because we don’t have one, I think we have to go with what the zoning allows.”

History of Cutler Lane creation in 2005 initial partition: In the original 2005 partition request the City approved the replat of the Cutler’s original single parcel on Highway 101 creating three

parcels, adding a 568' x 25' foot-wide portion of land from an adjoining parcel to the north to provide the "Road and Utility easement" for access to the two new parcels.

Although it may have not been the Cutler's intent, at that hearing on 4/13/05 city staff said in the staff report, "the R-2 zone permits 2-3 more lots on Parcel 1 and 2". In fact, that is what the current applicant is proposing now on the rear lot, which could also be done on the middle lot occupied by a residence. Further, in 2005, the City Administrator Mr. McNally said in his comments that "the 25-foot access easement would be sufficient access for two parcels and if additional development were to occur the access would need to be dedicated as a public road and paved to city standards." See the City staff report and 4/13/05 Planning Commission minutes.

Today, the applicant requests two new lots compliant with the R-2 zone lot standards. Based on additional traffic that will be using the gravel easement for access the road should be dedicated as a city street and paved to city street standards, as described to the Cutler's in 2005. The City finds this condition of approval today will assure compliance with city street standards required by Section 38.

Section 40 Building Sites:

Ms. Germaine states in the opening paragraph of her June 30, 2022, "the requirements of Section 40 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 ways."

1) Section 40

- a. 40.2. Access: Each lot shall abut upon a street other than an alley for a width of at least 25 feet.

Ms. Germaine, attorney for Mr. Evans (EPI) states "the partition will not allow for all three lots to abut a street and that the City Staff Report dated June 2, 2022, does not address how this partition satisfies this condition." Although the first 2005 partition did not meet city standards, she says, "the City incorrectly platting this area in the past is not an allowable, or documented, exemption to the requirement that each lot and parcel shall abut upon a street. The Commission must deny this Partition based on the failure to meet criteria Section 40.2. The City incorrectly platting this area in the past is not an allowable, or documented, exemption to the requirement that each lot and parcel shall abut upon a street."

FINDINGS: Staff finds that the proposed partition provides 25' feet of frontage to each of the subject three lots by extending the easement from its current terminus to the new parcels, shown on the Tentative Plan. However, the City now knows in 2005 city staff said the Cutler Lane should be dedicated a public street and paved in the event of further development that complies with the R-2 zone lot standards.

- b. 40.3. Through Lots and Parcels: Through lots and parcels should be avoided...

Ms. Germaine states, this partition is unable to meet the requirements of Section 40.3 which requires that through lots and parcels are to 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 simply was 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.”

FINDINGS: City staff did not address this criterion in the original staff report because the subject partition is not defined as a “through lot”. According to the land use definitions in The Oregon Model Development Code/User’s Guide for Small Cities:

Definitions: **Lot.**

Through Lot. A lot that has frontage on two parallel or approximately parallel streets.

Therefore, the Planning Commission cannot deny the proposed Partition request based on Section 40.3 because the partition does not have frontage on any streets, let alone two.

c) 40.5 Character of the Land: 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.

Ms. Germaine states that “the lots and the Partition create several of the conditions this provision was intended to prevent”.

FINDING: The city staff report “touched on” possible issues such as drainage, steep slopes and the removal of trees. At the hearing Commissioners raised concerns about tree removal, soil stabilization and the surrounding environment and the lack of a geotechnical report. The Commission tentatively agreed trees #2 & 5 should be saved as a condition of approval.

Staff finds the details of drainage and slope are typically addressed at the time of a building permit request based on the specifics of the house plan and construction and its effect on the specific parcel. For example, recent construction on nearby Park Lane involved a very similar need for dune modification and tree removal and was approved by the City Building Inspector based on a grading plan and retaining wall construction in accordance with the state building code.

This “Character of the Land “criterion requires findings that three new homes permitted by the R-2 zone standards will not “create unsuitable land conditions” or “will reasonably be harmful to the safety, health and general welfare of the present or future inhabitants of the partition and/or

its surrounding areas.” Ordinance Section 45 similarly states “The Planning Commission may refuse to approve a subdivision or partition...if the property is deemed unhealthful or unfit for human habitation or occupancy by the county or state health authorities.

However, adequate findings to identify such unstable land conditions or harmful impacts to inhabitants have not been submitted.

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

Ms. Germaine says, “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 purposed and intent.” Her four legal case citations on page 3 of her letter state:

- “An easement owner is limited to the uses of the easement that are reasonably necessary to the scope or purpose, one must look at 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”.
- “The goal is always to give to the parties’ intentions”.

FINDINGS: The “intent” of assuring no future development on Cutler Lane by the prior owner was not presented with the application or found in the 2005 Cutler Partition decision. Typically, a land use intent is addressed in a land covenant at the time of land division decision to assure it is enforced. Evidence has not been provided that the intent from 17 years ago was codified or otherwise made effective by a code, covenant or restriction (CC&R).

Development inside Oregon city urban growth boundaries is based on adopted city comprehensive plan policies and zoning standards. State land use laws are designed to maximize efficient development of urban land, and to provide for affordable housing among many other directives. If the subject land can be physically built on without proven harmful effects to future or existing residents, in compliance with the R-2 zone standards, and based on an existing approved road access, the city is required to approve the partition. It is an unimaginable stretch of the imagination to think that vacant parcels all over Oregon cannot be divided if there is an unrecorded intention that the parcel was not intended to be divided again yet is in compliance with city and state land use laws.

Tentative Partition Decision - Staff Recommendation

Based on the additional findings herein and the findings in the original staff report dated June 2, 2022, staff recommends Planning Commission approve the Tentative Partition #22-04P Cutler Lane Tentative Partition subject to the original conditions of approval modified as follows:

1. Within one year of this tentative approval the Final Partition Plat shall be submitted to the City for Planning Commission approval. If necessary, the applicant may request a one-year extension of the approval.
2. For fire access and safety, the final partition plat drawing shall be modified to indicate that the depth of the hammerhead is at least 70'. Due to the distance of the nearest fire hydrant, the proposed homes must be sprinklered.
3. In the 2005 Cutler Lane partition approval, the City Administrator Dennis McNally said that "if additional development were to occur the access easement would need to be dedicated to the City as a public road and paved to City standards." Therefore, the final plat shall include dedication of the easement to the City of Gearhart as a public street. Prior to issuance of an occupancy permit of the first home construction, Cutler Lane shall be dedicated a public street and paved from Highway 101 to Parcel 3 per City local street specifications.
4. The applicant indicates that the east end of the parcel will need to be leveled and graded to accommodate a dwelling and a septic drain field on Parcel 3. The City finds this needs to be engineered in advance to assure there will be adequate fire access on the east side of the dwelling on Parcel 3 and that there will be no dune sloughing or destabilization, as determined by the City Building Official before final plat submittal.
5. All septic systems shall be installed at least 10-feet from a street. The applicant must obtain Clatsop County Health/DEQ approval to install three new septic systems.
6. Water is available from either Hwy 101 or Park Lane. The owner is responsible for any extra costs of line installation as determined by the Gearhart Public Works Department.
7. The final partition plat shall illustrate a 5'-wide trail access easement on the north property line of Parcel 3 for Cutler Lane property owners to access the future recreation and emergency evacuation path to be located on the railroad bed to the east.
8. Utility improvements: No building permit may be issued until all required improvements are in place and approved by the City Administrator or designee, or otherwise bonded, in conformance with the provisions of the Subdivision Ordinance.
 - a. Improvements shall not be commenced until plans have been approved by the city. Some plans may be required prior to Planning Commission approval of the Final Plat.
 - b. Improvement work shall not be commenced until the City has been notified.

- c. All required improvements shall be constructed under the inspection and to the satisfaction of the City.
 - d. All underground utilities shall be constructed prior to surfacing of the streets.
 - e. A map showing all public improvements as built shall be filed with the Building Official upon completion of the improvements.
 - f. Damage to public streets related to the development shall be restored to existing conditions before the damage.
9. Surveyed monuments shall be set according to ORS 92.060 and city specifications outlined in Section 49 – Monuments. The surveyed plat of the partition shall be set according to ORS 92.060 and city specifications outlined in Section 50 – Survey Requirements.
10. As applicable, the following Subdivision Ordinance Section 48 standards shall be met:
- a. Structures necessary for drainage at the base of the dune, for vehicle and fire access and public safety shall be installed per City Building Inspector approval. If necessary, a drainage easement shall be installed for the safety of an adjoining property.
 - b. Storm water facilities or ground water recharge facilities shall be installed per city specifications approved by the Building Inspector.
 - c. Water mains and fire hydrants shall be installed per city specifications.
 - d. Underground utilities and private easements shall be installed.
 - e. Street lighting per city specifications shall be installed.
 - f. In conjunction with the dedication and improvement of Cutler Lane to city street specifications, if needed “No Parking”, red curbing and any other street signage shall be installed per city specifications.