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DATE OF FILING: 5/21/2010
DATE MAILED: 5/21/2010



CITY OF TIGARD
Washington County, Oregon

NOTICE OF FINAL ORDER BY THE HEARINGS OFFICER

Case Numbers:	CONDITIONAL USE PERMIT (CUP) 2009-00003 ADJUSTMENT (VAR) 2009-00021
Case Name:	WILDE RESIDENTIAL CARE FACILITY
Applicant's Name/Address:	Harris McMonagle Associates, Inc. 8740 SW Scoffins Street Tigard, OR 97223
Owner's Name/Address:	Danielle Wilde 12550 SW 134 th Avenue Tigard, OR 97224
Address of Property:	12550 SW 134 th Avenue Tigard, OR 97224
Tax Map/Lot Nos.:	Washington Co. Tax Assessor's Map No. 2S104AC, Tax Lot 02700.

A FINAL ORDER INCORPORATING THE FACTS, FINDINGS AND CONCLUSIONS **APPROVING A REQUEST FOR A CONDITIONAL USE AND DENYING A REQUEST FOR A PARKING ADJUSTMENT**. THE CITY OF TIGARD HEARINGS OFFICER HAS REVIEWED THE APPLICANT'S PLANS, NARRATIVE, MATERIALS, COMMENTS OF REVIEWING AGENCIES, THE PLANNING DIVISIONS STAFF REPORT AND RECOMMENDATIONS FOR THE APPLICATION DESCRIBED IN FURTHER DETAIL IN THE STAFF REPORT. THE HEARINGS OFFICER HELD A PUBLIC HEARING ON **MAY 10, 2010** TO RECEIVE TESTIMONY REGARDING THIS APPLICATION. THIS DECISION HAS BEEN BASED ON THE FACTS, FINDINGS AND CONCLUSIONS CONTAINED WITHIN THIS FINAL ORDER.

Request: ➤ The applicant requests Conditional Use approval to expand an Adult Foster Care facility in an existing single-family dwelling from five to eight beds. The subject site is 0.17-acre. The project includes indoor improvements to accommodate eight beds and outdoor improvements to accommodate an additional parking space. A Special Adjustment for reduction in the minimum parking requirement from four to three spaces is also requested. **At the May 10, 2010 public hearing, the Hearings Officer held the record open for one week, then approved the Conditional Use, subject to conditions of approval; and denied the request for an Adjustment to the parking standards.**

Zone: R-25: Medium High-Density Residential District. **Applicable Review Criteria:** Community Development Code Chapters 18.330, 18.360, 18.370, 18.390, 18.510, 18.705, 18.725, 18.745, 18.765, 18.780, 18.790, 18.795 and 18.810.

Action: ➤ Approval as Requested Partial Approval and Partial Denial

Notice: Notice was published in the newspaper and mailed to:

- | | |
|---|--|
| <input checked="" type="checkbox"/> Owners of Record within the Required Distance | <input checked="" type="checkbox"/> Affected Government Agencies |
| <input checked="" type="checkbox"/> Interested Parties | <input checked="" type="checkbox"/> The Applicants and Owners |

The adopted findings of fact and decision can be obtained from the Planning Division/Community Development Department at the City of Tigard Permit Center at City Hall.

Final Decision:

THIS DECISION IS FINAL ON MAY 21, 2010 AND BECOMES EFFECTIVE ON JUNE 8, 2010 UNLESS AN APPEAL IS FILED.

Appeal:

The decision of the Review Authority is final for purposes of appeal on the date that it is mailed. Any party with standing as provided in Section 18.390.040.G.1. may appeal this decision in accordance with Section 18.390.040.G.2. of the Tigard Community Development Code which provides that a written appeal together with the required fee shall be filed with the Director within ten (10) business days of the date the notice of the decision was mailed. The appeal fee schedule and forms are available from the Planning Division of Tigard City Hall, 13125 SW Hall Boulevard, Tigard, Oregon 97223.

THE DEADLINE FOR FILING AN APPEAL IS 5:00 PM ON JUNE 7, 2010.

Questions: If you have any questions, please call the City of Tigard Planning Division at 503.639.4171.

**BEFORE THE LAND USE HEARINGS OFFICER
FOR THE CITY OF TIGARD, OREGON**

Regarding an application by Steve Bloomquist for a conditional use permit and special adjustment to operate a Residential Care Facility in an existing residence at 12550 SW 134th Avenue in the City of Tigard, Oregon) **FINAL ORDER**
) **CUP2009-00003/**
) **VAR2009-00021**
) **(Wilde Care Facility)**

A. SUMMARY

1. Steve Bloomquist filed the application on behalf of Danielle Wilde (the “applicant”). The applicant currently operates a five-bed Adult Foster Care Facility at 12550 SW 134th Avenue; also known as tax lot 02700 WCTM 2S104AC (the “site”). With this application, the applicant requests approval of a conditional use permit to expand the facility to an eight bed Residential Care Facility. The applicant also requests an adjustment to reduce the number of required on-site parking spaces from four to three. Additional basic facts about the site and surrounding land and applicable approval standards are provided in the Staff Report to the Hearings Officer dated April 30, 2010 (the " Staff Report"), incorporated herein by reference.

2. Tigard Hearings Officer Joe Turner (the “hearings officer”) conducted a duly noticed public hearing to receive testimony and evidence in the matter. At the public hearing, City staff recommended conditional approval of the application. Representatives of the applicant testified in support of the application. Two persons testified in opposition to the application. Disputed issue in this case include:

a. Whether the proposed Residential Care Facility is allowed in the R-25 zone;

b. Whether “The site size and dimensions provide adequate area for the needs of the proposed use.” TMC 18.330.030.A.1;

c. Whether the proposed facility will impact adjacent properties due to increased traffic volume, parking demand, reducing the safety of the neighborhood and requests for assistance from neighbors;

d. Whether the proposed facility will impact the value of surrounding properties and whether such impacts are relevant to the applicable approval criteria:

e. Whether the hearings officer has authority to impose conditions of approval limiting the scope, scale and operation of the facility;

f. Whether future owners of the facility will be bound by the conditions of approval;

g. Whether and how the City will enforce compliance with the conditions of approval;

h. Whether the facility can comply with the minimum parking requirements of TDC Table 18.765.2; and

i. Whether the applicant sustained the burden of proof that the proposed adjustment to the minimum parking requirements complies with the applicable approval criteria.

3. The hearings officer concludes that:

a. The applicant failed to sustain the burden of proof that the proposed adjustment to the minimum parking requirements complies with the applicable approval criteria in Tigard Development Code (“TDC”) 18.370.020.C.7.a, because the applicant did not submit a parking study prepared by a traffic consultant or parking data from comparable sites demonstrating compliance with the criteria listed in TDC 18.370.020.C.7.a(1) and (2); and

b. The applicant sustained the burden of proof that the proposed conditional use permit does or will comply with the applicable criteria of the Community Development Code, based on the findings and conclusions included and incorporated herein and subject to conditions at the end of this final order.

B. HEARING AND RECORD

1. The hearings officer held a duly noticed public hearing on May 10, 2010 to receive and consider public testimony in this matter. The record includes a witness list, materials in the casefile as of the close of the record, including materials submitted after the hearing, and an audio record of the hearing. At the beginning of the hearing, the hearings officer made the declaration required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the hearings officer of selected relevant testimony offered at the hearing.

2. City planner Gary Pagenstecher summarized the Staff Report.

a. He noted that the applicant proposed to limit the use to the residential care of persons over 62 years of age in order to address concerns expressed by neighboring residents. He agreed that a condition of approval is warranted to reflect the applicant’s intent. He noted that TDC 18.330.030.B authorizes the hearings officer to impose conditions of approval “[w]hich are found necessary to ensure the use is compatible with other use in the vicinity, and that the impact of the proposed use on the surrounding uses and public facilities is minimized.” The hearings officer can impose conditions of approval limiting the scope of the use to what is proposed by the applicant or to further restrict the use as necessary to limit its impact on the surrounding area.

b. He noted that the Code requires a minimum 3.2 off-street parking spaces to serve the proposed 8-bed facility. TDC 18.765.070.C requires that “Fractional space requirements shall be counted as a whole space.” Therefore 3.2 spaces must be rounded up to 4 spaces. The applicant requested an adjustment to reduce the required parking to three off-street parking spaces. He recommended the hearings officer approve the adjustment. Three off-street parking spaces are adequate to serve the parking needs of the proposed use. Parking demand is limited to facility staff, visitors and emergency and delivery vehicles. The facility residents do not drive. Additional on-street parking is available along the site’s 134th Avenue frontage. The site has 136 feet of frontage on 134th Avenue. Subtracting the proposed 30-foot driveway leaves 106 feet of frontage for on-street vehicle parking, or five 18-foot parking spaces.

c. He noted that the applicant originally proposed to dedicate an additional two feet of right of way along the site’s 134th Avenue frontage to bring the site into compliance with current City standards. However the proposed right of way dedication would reduce the setback for the existing structure to less than the minimum requirements of the R-25 zone. Therefore the applicant proposed to grant a two-foot wide easement along the site’s 134th Avenue frontage rather than dedicating right of way. Granting an easement would not affect the setbacks to the existing structure. He requested the hearings officer modify recommended condition of approval 1 to that effect as set out in his May 10, 2010 memorandum (Exhibit 1).

d. He agreed that a condition of approval is warranted requiring that the applicant obtain a change of occupancy permit for the existing structure prior final approval of the site permit improvements.

e. He noted that state law regulates the staffing requirements and other operational issues of the proposed Residential Care Facility.

3. City development engineer Gus Duenas agreed with the applicant’s proposal to grant an easement along the site’s 134^h Street frontage. An easement will ensure that the area within the easement is preserved for future street improvements without affecting the setbacks of the existing structure on the site. He agreed with the applicant’s request to change the word “dedicate” to “grant” in revised condition of approval 1.

a. He testified that the existing pavement on 134th Avenue abutting the site is wider than the current street standard requires. The existing street appears to have a 36-foot paved section with curb-tight sidewalks within a 50-foot right of way. The current Street Standards require a 32-foot paved section and sidewalks separated from the roadway by a five-foot planter strip within a 54-foot right of way. The current 32-foot paved section standard allows for two-way traffic and on-street parking on both sides of the street. Therefore the existing 36-foot paved section can easily accommodate two-way traffic and on-street parking.

b. He noted that on-street parking is available for use by the general public. It is not reserved for the use of the abutting property owners.

4. Attorney Andrew Stamp and Planner Steve Bloomquist testified for the applicant.

a. Mr. Stamp noted that the site and surrounding properties were developed under a prior street standard that required a minimum 25-foot right of way. The City's current standard requires a 27-foot right of way. Therefore the applicant originally proposed to dedicate two feet of additional right of way to bring the site into compliance with the current City standard. However such a dedication would make the existing structure on the site nonconforming with respect to setback requirements. Therefore the applicant proposed to grant an easement instead of dedicating right of way. The easement will provide adequate area for future street improvements while maintaining compliance with the setback requirements of the R-25 zone. He agreed with revised condition of approval 1 recommended by Staff in Exhibit 1. However he requested the hearings officer change the word "dedicate" to "grant."

i. He argued that Mr. Roth's concerns about property values are not relevant to the applicable approval criteria.

ii. He noted that the proposed Residential Care Facility is allowed as a conditional use in the R-25 zone. Therefore the City Council has determined that this type of facility is compatible with residential uses. Mr. Moiso's argument that Residential Care Facilities are not allowed in residential zones constitutes a collateral attack on the City's zoning ordinance.

iii. He noted that the applicant proposed to expand the facility to serve a maximum eight elderly residents. That limitation is binding on the applicant and any future owners of the site. They cannot alter or expand the use on the site without further City approval. In addition, the existing building cannot accommodate additional residents, based on the space requirements imposed by state law. He agreed to a condition of approval limiting the use to a maximum of eight residents, not including staff.

iv. He testified that a decision approving a CUP is both an authorization of a particular use and a limitation of the scope of the use. The Code provides the hearings officer a broad grant of authority to impose conditions necessary to ensure that the use is compatible with the neighborhood. Once the 21-day appeal period expires, any conditions of approval imposed by the City are binding on future owners of the site, even though the City's decision is not included in the deed record for the property. Potential buyers have a duty to contact the City to identify any limitations on the use of the property prior to purchase. A future owner could request a modification of the CUP to change the size or scope of the use. However such a modification would require additional City review through a public process. The proponent of the modification would

have to demonstrate that the modification continues to comply with all applicable approval criteria.

v. He argued that any increase in traffic and parking demand generated by the proposed expansion will be de minimis. Parking demand generated by visitors, deliveries and offsite health care providers is generally short term and will have little impact on the neighborhood. On-street parking is available to the general public. He noted that several neighbors submitted letters in support of the application, stating that the current use has little or no impact on the neighborhood.

vi. He noted that the facility will only serve elderly residents who are unlikely to disturb the neighborhood. The applicant requested assistance from the neighbors on one occasion. However such assistance is not a routine practice. The applicant can call other staff persons or 911 if assistance is necessary.

vii. He noted that zoning enforcement is generally a complaint driven process. The City relies on citizen complaints to identify violations. However, once a violation has been identified, the City will enforce the laws, including compliance with any conditions of land use approval. The fact that the applicant is requesting City approval of the proposed expansion indicates her willingness to comply with the law.

b. Mr. Bloomquist summarized the proposed use and his PowerPoint document, Exhibit 2. He accepted the findings and conditions in the Staff Report, as modified at the hearing, including a condition limiting the use to residential care of persons over 62 years of age, a condition requiring that the applicant obtain a change of occupancy permit and revised condition 1 as set out in Exhibit 1 and modified by Mr. Stamp's testimony.

5. Area resident Michael Moiso testified in opposition to the application. He argued that the proposal to change from an Adult Foster Care Facility to a Residential Care Facility is a "huge" change. The existing facility is "already bursting at the seams."

a. He argued that this application violates the legislative intent of the state statute regulating adult care facilities. Adult Foster Care Facilities, which are limited to a maximum five residents, are intended to be located in residential neighborhoods. Residential Care Facilities, which have no limit on the number of residents, are not intended to be located in residential areas. They are intended to be located in commercial areas. If the facility is approved as a Residential Care Facility, the applicant or a future owner could continue to expand the facility, adding additional beds and increasing the impacts of the facility on the neighborhood. The hearings officer has no authority to impose a condition of approval limiting the number of beds.

b. He argued that the hearings officer has no authority to impose a condition of approval limiting the use to the care of elderly persons over 62 years of age as proposed by the applicant. A future owner of the facility could file a lawsuit to

eliminate the condition and use the facility for other types of care. Even if the condition is valid, the applicant or a future owner may ignore the condition and alter the facility to provide other types of care. The City will not inspect the facility in order to ensure continued compliance with the conditions of approval unless it receives a complaint from neighboring residents. The City is shifting the burden of policing the operation of the use onto neighboring residents.

c. He testified that the existing use generates a significant demand for vehicle parking. The applicant, her boyfriend and at least one caretaker are almost always on site. Visitors, deliveries, doctors and ambulances generate additional traffic and parking demand. The proposed expansion will generate additional traffic, further increasing the parking demands of the facility. The applicant's use "consumes more than her share" of the available on-street parking in the neighborhood. He disputed Mr. Pagenstecher's conclusion that there is sufficient area to park five vehicles along the site's 134th Avenue frontage. Vehicles would have to be parked bumper to bumper to fit five cars into 106 feet of frontage. The applicant, her boyfriend and her staff person usually park in the site driveway, consuming all of the on-site parking. Visitors, health care providers and delivery vehicles must park on the street. The additional traffic and parking demand will affect the safety of neighborhood residents and the quiet enjoyment of their properties.

d. He noted that the applicant does not live on the site. She relies on employees to care for the residents when she is away from the site. These unknown persons could potentially pose a threat to the safety of the neighborhood. The applicant may not conduct complete background checks on her employees. Protection of the public health, safety and welfare is an applicable approval criterion.

e. He testified that the applicant and her employees have requested help from neighbors when residents have fallen out of bed or out of their wheelchairs. Although the applicant only requested help on one occasion, her staff have requested his help on other occasions. Increasing the number of residents on the site will increase the need for such assistance.

f. He argued that streets within the neighborhood, which are not constructed to current standards, are too narrow to accommodate the volume of traffic generated by a Residential Care Facility. On-street parking limits traffic to a single through lane. He disputed Mr. Stamp's testimony that the facility will have a de minimis traffic impact. Mr. Stamp has no experience with the existing facility and has never visited the site.

g. He argued that the proposed Residential Care Facility is not compatible with other residential uses in the area. The applicant is asking the hearings officer to exceed his authority by approving the proposed use.

h. He argued that the applicant must offer some compelling reason to justify approval of the facility and its impacts on the neighborhood.

i. He noted that the neighbor comment letters cited by Mr. Stamp were written by the applicant and submitted to neighbors for their signatures. In addition, the letters only address the impacts of the current facility, not the proposed expansion.

6. Area resident Scott Roth agreed with Mr. Moiso's testimony. He also expressed concerns that the proposed use will impact the value of other properties in the area.

7. The applicant, Danielle Wilde, testified that she asked Mr. Moiso for assistance on one occasion, when a resident fell out of bed. She no longer needs such assistance. There are always two staff people on site at night. She has a patient hoist to lift residents into their beds or wheelchairs. She can call her boyfriend or 911 if additional assistance is needed.

a. She argued that the use does not generate a significant amount of vehicular traffic. She and her staff work three or four 24-hour shifts in a row. They park in the site driveway and do not travel back and forth to the site every day. The proposed expansion will not require any additional employees. The residents of the facility all require a high level of care, which makes them unable to drive. Family visits average one visit per week and usually last between 20 minutes and one hour. One resident has a visiting nurse who stays for one hour once a week. She receives deliveries once a month and occasional UPS deliveries, similar to a residential use.

b. She testified that the existing building cannot accommodate more than eight residents. She cannot add a second story to the building because the residents cannot accommodate stairs and there is no room to add an elevator.

8. Michael DeShane testified that he owns and operates a number of assisted living facilities in the area. Almost all of his facilities are located in residential neighborhoods pursuant to CUP approvals. He argued that state laws imposes far more restrictions on the proposed Residential Care Facility than it does on the existing Adult Foster Care Facility. Prior to 1990 Adult Foster Care Facilities were not subject to any regulations. Residential Care Facilities have always been regulated by the state. However state law does not regulate the location of such facilities.

9. At the end of the hearing, the hearings officer held the record open for one week as required by ORS 197.763(6)(e) to allow the applicant to submit a final written argument. The record in this case closed at 5:00 p.m. on Monday, May 17, 2010.

a. Mr. Stamp submitted a written final argument on May 17, 2010, Exhibit 3.

C. DISCUSSION

1. The Staff Report identifies the applicable approval criteria for the application and applies them to the record in the case. The hearings officer agrees that the standards identified in the Staff Report are applicable and finds that they are correctly applied to the facts of the case in the Staff Report. Substantial evidence in the record shows that the proposed use does or can comply with the applicable approval criteria for a CUP, and adoption of recommended conditions of approval as amended will ensure final plans are submitted and implemented as approved consistent with those criteria and standards and will prevent, reduce or mitigate potential adverse impacts of the development consistent with the requirements of the TDC. The hearings officer adopts the findings and conclusions in the Staff Report as his own except to the extent they are inconsistent with the findings and discussion in this final order.

2. The hearings officer finds that there is no support in the record for Mr. Moiso's assertion that this application for approval of a Residential Care Facility in the R-25 zone violates the legislative intent of either the state statute legislature or the City Council. To the contrary, the proposed use is expressly allowed as a conditional use in the R-25 zone.

a. The proposed Residential Care Facility qualifies as a "group living" facility as defined by TDC 18.130.020.A.2:

Group Living: Living facilities for groups of unrelated individuals which includes at least one person residing on the site who is responsible for supervising, managing, monitoring and/or providing care, training or treatment of residents. Larger group living facilities may also be characterized by shared facilities for eating, hygiene and/or recreation. **Examples include** nursing/convalescent homes, **residential care/treatment facilities;** sororities/fraternities and convents/monasteries. Tenancy is longer than one month. Does not include detention and post-detention facilities (see 18.130.020 E.3., Detention Facilities). [Emphasis added]

Group living facilities for up to five people are "permitted by right" in all residential zones. Group living facilities with six or more residents are permitted as a conditional use in all residential zones. *See* TDC 18.510.1.¹

b. This is generally consistent with state law, which requires that residential care facilities be allowed in residential zones. ORS 197.663(4) provides "To

¹ TDC 18.120.030.A.7 defines "conditional use" as:

A use which may be permitted by the approval authority following a public hearing, upon findings by the authority that the approval criteria have been met or will be met upon satisfaction of conditions of approval.

meet the growing need for residential homes and residential facilities, it is the policy of this state that residential homes and residential facilities shall be considered a residential use of property for zoning purposes.” (Emphasis added). ORS 197.667 provides that “(1) A residential facility shall be a permitted use in any zone where multifamily residential uses are a permitted use [and] (2) A residential facility shall be a conditional use in any zone where multifamily residential uses are a conditional use.” As the applicant noted at p 5 of Exhibit 5, the City may be exceeding its authority by requiring a conditional use permit for residential care facilities in the R-25 zone, where multifamily residential uses are a permitted use. See TDC Table 18.510.1.

c. The hearings officer notes that the description of the proposal in the Staff Report is inaccurate. The Staff Report states that “the applicant requests Conditional Use Approval to expand an Adult Foster Care Facility from five to eight beds.” p 1 of the Staff Report. However Adult Foster Care Facilities are, by definition, limited to a maximum five residents. *See* OAR 411-050-0408(1). The applicant is currently operating an Adult Foster Care Facility as a permitted use on the site. With this application, the applicant requests Conditional Use Approval to operate a Residential Care Facility on the site, which can accommodate six or more residents. *See* OAR 411-054-0005(47).

i. The hearings officer finds that this erroneous description of the proposal did not cause significant confusion or prejudice the rights of the public to participate in the review process. The application narrative and application forms clearly state that the applicant is requesting approval of a conditional use permit to operate a Residential Care Facility for up to 8 residents. All of the participants in the hearing clearly understood the scope of the proposed application and the distinction between the existing Adult Foster Care Facility and the proposed Residential Care Facility.

3. The hearings officer finds that the proposed use does or can comply with the approval criteria for a conditional use permit as set out in TMC 18.330.030.A.

a. “The site size and dimensions provide adequate area for the needs of the proposed use.” TMC 18.330.030.A.1.

i. The 0.17-acre site is currently developed with a 2,675-square foot, 5-bedroom, single-family residential structure. The applicant proposes to operate the use inside the existing structure, without any changes to the structure’s size or footprint. State law allows up to two residents per bedroom. OAR 411-054-0200(4). Therefore the existing five bedrooms are adequate to accommodate the eight residents proposed in this application.

ii. The hearings officer finds that the site is large enough to accommodate the additional parking needed to serve the use, based on the discussion below.

iii. The applicant revised the application to replace the right of way dedication along the site's 134th Avenue frontage with an easement. Setbacks are measured from the property line, not the easement. TDC 18.120.030.A.130. Therefore the existing structure will continue to comply with the setback requirements of the R-25 zone.

b. "The impacts of the proposed use of the site can be accommodated considering size, shape, location, topography, and natural features." TMC 18.330.030.A.2. As noted above, the use will primarily be conducted within the existing residential structure on the site. Therefore the majority of impacts will also be confined within the structure. The primary offsite impacts identified in the record are increased vehicular traffic and parking demands.

i. The proposed expansion will increase the capacity of the facility by three residents. The residents of the facility will not generate additional traffic, because they are unable to drive due to their need for care. The applicant testified that the proposed expansion will not require additional staff. Therefore the traffic impacts of the proposed expansion are limited to increased trips by visitors, health care providers and delivery vehicles. There is no evidence that these additional trips, combined with traffic generated by the existing facility and residential uses in the neighborhood, will exceed the capacity of area streets or create a hazard. SW 134th Avenue abutting the site is designated a "local residential street," which is designed to carry a maximum 1,500 vehicles per day ("VPD"). See TDC Figure 18.810.4.A. Based on the assessor's maps, there are roughly 30 existing homes with frontage on SW 133rd/134th Avenue. According to the Institute of Traffic Engineers Trip Generation Manual (the "ITE Manual"), single-family homes generate an average 10 vehicle trips per residence per day. Therefore the 30 homes on this street will generate a maximum 300 VPD, well below the 1,500 VPD this street is designed to carry. The existing 36-foot paved section of 134th Avenue exceeds the current standard for local residential streets and is more than adequate to accommodate two-way traffic with on-street parking on both sides of the street.²

ii. The applicant proposed to provide three off-street parking spaces on the site. These parking spaces will accommodate the parking needs of the facility staff (the applicant and her employees, including her boyfriend), based on the applicant's un rebutted testimony. Visitors, health care providers and delivery vehicles can utilize on-street parking near the site. SW 134th Avenue is a public street with on-street parking permitted on a first-come, first served basis. On-street parking is not reserved for abutting residents and their guests. Excessive use of on street parking by vehicles associated with the facility could conflict with existing residential uses. However the minor increase in the capacity of the facility is unlikely to cause such excessive impacts. Based on the applicant's un rebutted testimony, the majority of visitor, delivery and health

² The current City standard for local residential streets requires a minimum 32-foot paved section, which is adequate to accommodate two-way traffic with vehicles parked on both sides. See TDC Figure 18.810.4.A.

care provider visits are infrequent and relatively short term. There is no substantial evidence to the contrary.

iii. The proposed Residential Care Facility will attract additional people to the immediate area (facility residents, facility staff, health care providers, visitors, etc), which may lead to an incremental increase the amount of litter, vandalism, and illegal activities. However the hearings officer finds that there is no substantial evidence in the record that these persons are any more or less likely to engage in nuisance or illegal activities than other people or that such effects will result from the operation of the facility.

iv. Even if the proposed use will have an adverse impact on property value --- and there is no substantial evidence to that effect in the record --- protection of property value is not expressly relevant to the applicable State or City standards. The hearings officer must base the decision on the laws of the City of Tigard and the State of Oregon.

v. Mr. Moiso testified that the applicant and her staff have called on neighboring residents for assistance with moving residents in the past. Such requests for assistance could arguably constitute an adverse impact on neighboring residents. In addition, the hearings officer opines that such requests may be inappropriate and unsafe. Assistance from neighbors may violate the staffing requirements imposed by state law, as neighboring residents may not have the necessary training in moving patients. Such assistance may expose the applicant and the neighbors to liability for injuries that may occur. However, based on the plain meaning of the words in the law, the past behavior of the applicant is not relevant to the applicable approval standards for a home occupation permit in the TDC.³ The past behavior of the applicant and her staff does not show that the applicant cannot or will not operate the facility in a manner that complies with the TDC. The applicant has not proposed to rely on neighbors' assistance in the operation of the proposed facility. Adequate alternatives are available, including on-call help from the applicant and her staff, use of the applicant's patient hoist and/or emergency assistance through the 911 system. There is no need for the applicant to rely on assistance from neighbors.

vi. There is no substantial evidence that the proposed facility is likely to generate excessive noise or other adverse offsite impacts. Mr. Moiso and Mr. Roth failed to identify any additional impacts at the hearing. Other neighbors stated that

³ ORS 227.173(1) provides as follows:

Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole

the existing Adult Foster Care facility does not generate any impacts on the neighborhood. See the comment letters submitted with the application.

(A) Mr. Moiso testified that many of the letters were written by the applicant and submitted to neighbors for signature. However the neighbors did sign the letters, indicating agreement with the statements in the letters. In addition, many of the letters are handwritten by the individual neighbors.

(B) Mr. Moiso is correct that the neighbors' testimony is based on their observations of the existing Adult Foster Care facility. However the proposed Residential Care Facility will operate in substantially the same manner. Approval of this application will only add three residents to the site. Therefore the hearings officer finds that approval of this application will not cause significant changes in the facilities impacts.

c. The hearings officer finds, based on the findings in the Staff Report, that all required public facilities have adequate capacity to serve the proposal. Therefore the application complies with TMC 18.330.030.A.3.

d. Several persons argued that the facility should not be located in a residential zone. However, as discussed above, group living facilities, including residential care facilities, are permitted as a conditional use in the R-25 zone. TDC Table 18.510.1 Therefore the hearings officer finds that the proposed use is complies with the applicable requirements of the zoning district and the application complies with TMC 18.330.030.A.4.

e. The hearings officer finds that the facility does or can comply with the additional development standards for group living facilities listed in TDC 18.330.050.B.15.

i. Based on the assessor's map in the record, the site contains 7,209 square feet, which exceeds the minimum 5,000 square foot lot size requirement of TDC 18.330.050.B.15.a.

ii. As noted above, the applicant revised the application to replace the right of way dedication along the site's 134th Avenue frontage with an easement. Therefore the existing structure will continue to comply with the setback requirements of the R-25 zone and with TDC 18.330.050.B.15.b.

iii. The existing 1.5-story structure complies with the maximum 45-foot building height limit of the R-25 zone, as listed in TDC Table 18.510.2. No changes are proposed to the building height. Therefore the application complies with TDC 18.330.050.B.105.c.

iv. The applicant has applied to the State Department of Human Services for a license to operate a Residential Care Facility. The applicant should be required to obtain the license prior to accepting any additional residents beyond the maximum five residents permitted under the applicant's existing Adult Foster Care Facility license. A condition of approval is warranted to that effect to ensure compliance with TDC 18.330.050.B.15.d.

v. The proposed facility can and will comply with the off-street parking requirements of Chapter 18.765 based on the findings below. Therefore the application complies with TDC 18.330.050.B.15.e.

f. The hearings officer finds, based on the findings in the Staff Report, that the proposal is or can be consistent with the supplementary requirements set forth in other chapters of the code including but not limited to Chapter 18.780, Signs, and Chapter 18.360, Site Development Review. TMC 18.330.030.A.6. Conditions of approval are recommended to ensure such compliance occurs in fact.

4. Contrary to Mr. Moiso's assertion, the Code does not require that the applicant identify some "compelling reason" for approval of the application. If the application complies with the applicable approval criteria it must be approved. In addition, the state legislature identified a number of "compelling reasons" for approval of Residential Care Facilities in residential areas. *See* ORS 197.663, which provides:

- (1) It is the policy of this state that persons with disabilities and elderly persons are entitled to live as normally as possible within communities and should not be excluded from communities because their disability or age requires them to live in groups;
- (2) There is a growing need for residential homes and residential facilities to provide quality care and protection for persons with disabilities and elderly persons and to prevent inappropriate placement of such persons in state institutions and nursing homes;
- (3) It is often difficult to site and establish residential homes and residential facilities in the communities of this state;
- (4) To meet the growing need for residential homes and residential facilities, it is the policy of this state that residential homes and residential facilities shall be considered a residential use of property for zoning purposes; and
- (5) It is the policy of this state to integrate residential facilities into the communities of this state. The objective of integration cannot be accomplished if residential facilities are concentrated in any one area.

5. TDC 18.330.030.B grants the hearings officer broad authority to impose conditions of approval as necessary to "[e]nsure the use is compatible with other use in the vicinity, and that the impact of the proposed use on the surrounding uses and public

facilities is minimized.”⁴ Those conditions are binding on the applicant and future owners of the site. Absent a timely appeal of this decision, the conditions of approval can only be modified or eliminated through an application for a new or modified conditional use permit, which would be subject to the same review procedures and approval requirements as this application.

6. The hearings officer finds that conditions of approval are warranted to limit the scope of the use consistent with the applicant’s proposal; i.e., by limiting the facility to a maximum 8 residents who must be over the age of 62 and require assistance with “activities of daily living” as defined by OAR 411-054-0005(4). Such conditions are necessary to reflect the applicant’s proposal and to ensure that the use remains compatible with other use in the vicinity.

7. As LUBA noted, suggestions that conditions attached to a land use decision may be violated are speculative, and are not grounds for denial of the application. *Canfield v. Lane County*, 16 Or LUBA 951 (1988). The City will monitor and enforce compliance with the conditions of approval. TDC 18.230 authorizes the Director to identify, respond to and remedy alleged violations. Neighbors can initiate the enforcement process by reporting any violations they observe. If the applicant fails to comply with the

⁴ TDC 18.330.030.B provides:

Conditions of approval. The Hearings Officer may impose conditions on the approval of a conditional use, which are found necessary to ensure the use is compatible with other use in the vicinity, and that the impact of the proposed use on the surrounding uses and public facilities is minimized. These conditions may include, but are not limited to the following:

1. Limiting the hours, days, place and/or manner of operation;
2. Requiring design features which minimize environmental impacts such as noise, vibration, air pollution, glare, odor and/or dust;
3. Requiring additional setback areas, lot area, and/or lot depth or width;
4. Limiting the building height, size or lot coverage, and/or location on the site;
5. Designating the size, number, location and/or design of vehicle access points;
6. Requiring street right-of-way to be dedicated and street(s) to be improved;
7. Requiring landscaping, screening, drainage and/or surfacing of parking and loading areas;
8. Limiting the number, size, location, height and/or lighting of signs;
9. Limiting or setting standards for the location and/or intensity of outdoor lighting;
10. Requiring berms, screening or landscaping and the establishment of standards for their installation and maintenance;
11. Requiring and designating the size, height, location and/or materials for fences;
12. Requiring the protection and preservation of existing trees, soils, vegetation, watercourses, habitat areas and/or drainage areas;
13. Requiring the dedication of sufficient open land area for a greenway adjoining and within the floodplain when land form alterations and development are allowed within the 100-year floodplain; and
14. Requiring the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle pathway plan.

C. Exemptions. Manufactured home parks and manufactured home subdivisions are exempt from the provisions of Subsection B above. Manufactured home subdivisions are subject to approval under the provisions of Chapter 18.430, Subdivisions. Manufactured home parks are subject to approval under the provisions of Chapter 18.340, Site Development Review.

conditions of approval, i.e., by exceeding the number of residents, altering the type of care provided or otherwise expanding or changing the use, the planning director can revoke the Conditional Use Permit. The fact that neighbors can assist in monitoring the use does not shift the responsibility to them to do so. The City continues to bear the responsibility for enforcing its laws. However neighbors may be in a better position to monitor the use on a continuing basis because of their proximity, and it may be in their interests to do so given the complaint-driven nature of the enforcement process.

8. The applicant requested an adjustment to the minimum off-street parking requirements of TDC 18.765.070 and Table 18.765.2.

a. Table 18.765.2 requires a minimum 1.0 parking space per bedroom or 1.0 space per 2.5 beds for Group Living Facilities. The proposed facility will provide a maximum eight beds. Therefore Code requires a minimum of four parking spaces (8 rooms/2.5 spaces = 3.2 spaces, rounded up to 4 spaces per TDC 18.765.070.C).

b. TDC 18.765.070.F.2 authorizes up to a 20-percent reduction in the total required off-street parking spaces pursuant the adjustment criteria in TDC 18.370.020.C.7.a. The hearings officer finds that the applicant is requesting less than 20-percent reduction in the total number of required parking spaces in this case (3 space proposed, 3.2 spaces required). Therefore the proposed adjustment complies with TDC 18.765.070.F.2.

i. The hearings officer finds that the 20-percent reduction figure must be determined prior to the “rounding up” required by TDC 18.765.070.C. To hold otherwise would prohibit smaller developments, with minimal amounts of parking, from taking advantage of the adjustment provisions of TDC 18.765.070.F.2. Where fewer than five spaces are required, eliminating a single parking space would always constitute a more than 20-percent reduction in the total number of spaces.

c. However the applicant failed to sustain the burden of proof that the proposed adjustment complies with TDC 18.370.020.C.7.a. This section expressly requires the submittal of a parking study prepared by a traffic consultant or parking data from comparable sites demonstrating compliance with the criteria listed in TDC 18.370.020.C.7.a(1) and (2). The applicant did not submit such evidence. Staff argued that such evidence is not necessary in this case, “due to the minimal request...” However the language of the Code is clear and cannot be waived or ignored. The applicant must submit evidence demonstrating compliance with the criteria listed in TDC 18.370.020.C.7.a(1) and (2). Absent such evidence, the hearings officer must deny the requested adjustment to the minimum parking requirements.

d. The hearings officer finds, based on the applicant’s site plan, that there is sufficient area on the site to accommodate four off-street parking spaces on the site. This may require modification of the parking alignment, since the driveway width is limited to a maximum 30 feet. However it is feasible to modify the design of the parking area to meet this requirement. In the alternative, the applicant could submit a separate

Type II adjustment application containing the evidence required by TDC 18.370.020.C.7.a. A condition of approval is warranted to that effect.

D. CONCLUSIONS

1. Based on the findings and discussion provided or incorporated in this final order, the hearings officer concludes that

a. The applicant failed to sustain the burden of proof that the proposed adjustment to the minimum parking requirements complies with the applicable approval criteria in TDC 18.370.020.C.7.a, because the applicant did not submit a parking study prepared by a traffic consultant or parking data from comparable sites demonstrating compliance with the criteria listed in TDC 18.370.020.C.7.a(1) and (2); and

b. The applicant sustained the burden of proof that the proposed conditional use permit does or will comply with the applicable criteria of the Community Development Code, provided development that occurs after this decision complies with applicable local, state, and federal laws and with conditions of approval warranted to ensure such compliance occurs in fact.

E. DECISION

In recognition of the findings and conclusions contained herein, and incorporating the Staff Report and public testimony and exhibits received in this matter, the hearings officer hereby denies VAR 2010-00069 and approves CUP2009-00003 (Wilde Residential Care Facility), subject to the following conditions of approval:

CONDITIONS OF APPROVAL

THE FOLLOWING CONDITIONS SHALL BE SATISFIED PRIOR TO COMMENCING ANY ONSITE IMPROVEMENTS, INCLUDING GRADING, EXCAVATION AND/OR FILL ACTIVITIES:

Submit to the Current Planning Division (Gary Pagenstecher, (503) 718-2434) for review and approval:

1. Prior to issuance of site/building permits, the applicant shall grant a two (2)-foot wide strip along the property's street frontage in the form of an easement reserved for future street and utility improvements. The reserve easement shall be executed on City forms and recorded with Washington County.
2. Prior to site work, the applicant shall submit a revised Site Plan demonstrating that the site contains a minimum of two (2) bicycle parking spaces pursuant to the applicable Bicycle Parking Design standards in TDC 18.765.050.
3. Prior to site work, the applicant shall submit a revised Site Plan demonstrating that the site contains a minimum of four (4) off-street vehicle parking spaces pursuant to the applicable General Design Standards in TDC 18.765.040 *or* obtain City approval of a Type II adjustment reducing the number of required parking spaces on the site, pursuant to TDC 18.390.040 and subject to the approval criteria in TDC 18.370.020.C.7.

Submit to the Development Engineer (Gus Duenas, 503-718-2470) for review and approval:

4. This project does include public facility improvements involving the widening of a driveway and planting of street trees and requires issuance of a PFI permit. Six (6) sets of detailed plans covering the proposed improvements shall be submitted for review to the Development Engineer. PFI permit plans shall conform to City of Tigard Public Improvement Design Standards, which are available at City Hall and the City's web page (www.tigard-or.gov).
5. An erosion control plan shall be provided as part of the PFI permit drawings. The plan shall conform to Clean Water Services Design and Construction Standards (Resolution and Order No. 07-20) Chapter 2. No work on-site shall commence until the erosion control permit is issued.
6. The PFI permit plan submittal shall include the exact legal name, address and telephone number of the individual or corporate entity who will be designated as the "Permittee", and who will provide the financial assurance for the public improvements. For example, specify if the entity is a corporation, limited partnership, LLC, etc. Also specify the state within which the entity is incorporated and provide the name of the corporate contact person. Failure to provide accurate information to the Development Engineer will delay processing of project documents.
7. The applicant shall provide a construction vehicle access and parking plan for approval by the City Engineer. The purpose of this plan is for parking and traffic control during the construction phase.
8. The applicant shall submit a preliminary sight distance certification by a registered professional engineer as part of the PFI permit application.

THE FOLLOWING CONDITIONS SHALL BE SATISFIED PRIOR TO FINAL APPROVAL OF THE SITE PERMIT IMPROVEMENTS.

Submit to the Current Planning Division (Gary Pagenstecher, (503) 718-2434) for review and approval:

9. Prior to final approval of the site permit, the applicant shall obtain final approval of a change of occupancy permit from the City building department, including any required structural, electrical, mechanical, plumbing and site permits.
10. Prior to final approval of the site permit, the applicant shall call for a final planning inspection to ensure the project was completed per the approved plan.
11. Prior to final approval of the site permit, the applicant shall provide a copy of a license for operation of a Residential Care Facility issued by the Oregon Department of Human Services ("DHS").

Submit to the Development Engineer (Gus Duenas, 503-718-2470) for review and approval:

12. Prior to final inspection of the public improvements, the applicant shall provide the City with as-built drawings of the improvements as follows: 1) 3 mil mylar, 2) a disk of the as-builts in "DWG" format, if available; otherwise "DXF" will be acceptable, and 3) the as-built drawings shall be tied to the City's GPS network.
13. Prior to final inspection, the applicant's engineer shall submit a final sight distance certification for the driveway connections to SW 134th Avenue.

14. Prior to final inspection, the applicant shall execute a restrictive covenant with the City for participation in future improvements to expand SW 134th Avenue to the ultimate section.

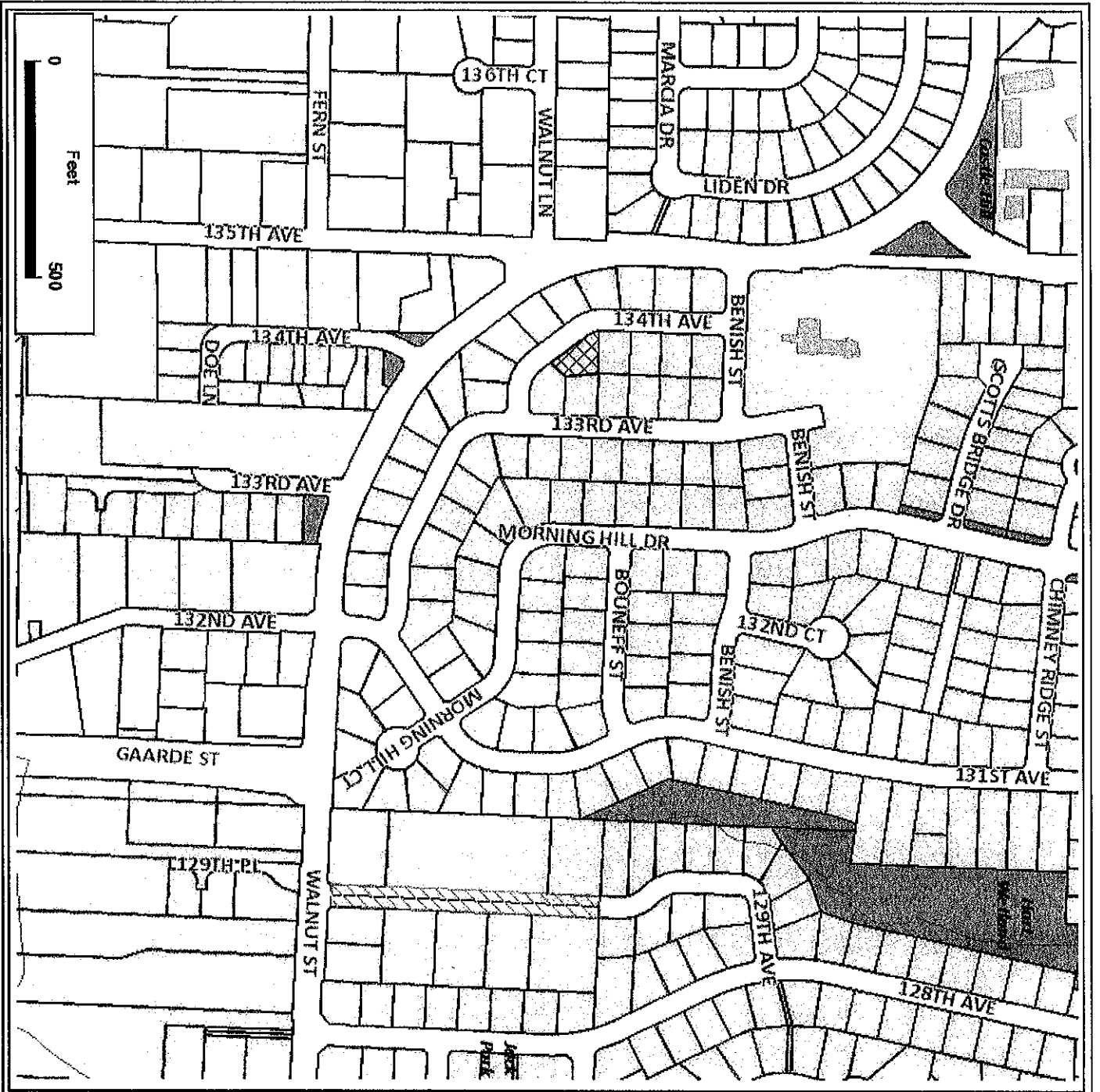
THE ONGOING OPERATION OF THE FACILITY SHALL COMPLY WITH FOLLOWING CONDITIONS.

15. The facility shall be limited to operation of a Residential Care Facility as defined by OAR 411-054-0005(44). The facility shall serve a maximum eight (8) “residents” as defined by OAR 411-054-0005(43). All residents shall be age 62 or older and in need of assistance with “activities of daily living” as defined by OAR 411-054-0005(4).

THIS APPROVAL MUST BE IMPLEMENTED WITHIN 18 MONTHS FROM THE EFFECTIVE DATE OF THE HEARINGS OFFICER’S DECISION.

DATED this 21st day of May 2010.

Joe Turner, Esq., AICP
City of Tigard Land Use Hearings Officer

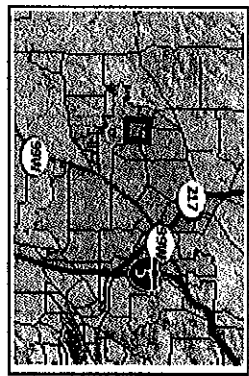


VICINITY MAP

CUP2009-00003
VAR2009-00021

WILDE RESIDENTIAL CARE FACILITY

Subject Site



Information on this map is for general location only and should be verified with the Development Services Division.

Scale 1:4,000 - 1 in = 333 ft

Map printed at 09:09 AM on 19-Mar-10

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