

Baker City Planning Commission Meeting  
August 15, 2007  
Baker County Courthouse

Commission members present included: Wayne Burnside, Ken Rockwell, Rob Ellingson and Sharon Rudi. Alan Blair, Rick Rembold and Ryc Rienks were not present at the meeting. City staff present included City Attorney David Fine, Planning Director Evan MacKenzie and Planning Technician Jennifer Bachman.

Vice Chair Ellingson called the meeting to order at 7:00 p.m.

**Approval of July's Meeting Minutes**

All present commission members indicated that they had read July's meeting minutes. Rudi MOVED to approve July 12th's and 18th's meeting minutes. Burnside seconded the motion. The motion CARRIED with all members in favor.

**Planning Commission Case 07-AP-18**

City Attorney David Fine explained the Type III hearing procedure to the audience.

Commission members indicated that there had not been any ex parte contacts and that all had viewed the site prior to this meeting.

Prior to hearing the appellant's testimony, Rockwell asked staff about the appeal that the commission is hearing tonight, if it only includes the points submitted in the appellant's letter and only that information. MacKenzie confirmed that it does only address the points addressed in the letter and also indicated that additional points could be considered in this hearing if brought forth tonight.

Rockwell indicated that he had a question regarding the 300-foot requirement (a property having to tie into city utilities if the property is within that distance from a sewer or water main). He did not see anything in the development code referring to the 300-foot requirement. Rockwell asked where the 300-foot limit requirement is addressed. MacKenzie indicated that to his knowledge it has been addressed by Technical Services Department and that it has not been addressed by the Planning Department

At that time Ms. Fleming came forward, Ilena Fleming 3405 Court Street, Baker City, Oregon. Michelle Hampton, 1970 1<sup>st</sup> Street, Baker City, Ms. Fleming's attorney, also came forward. Addressing Rockwell's last question, Ms. Hampton indicated that her understanding is that if there was already partitioned pieces of land, that the 300-foot rule would be available and this appeal would not be coming up. She indicated that she feels that Evan has addressed several of the ordinances, and one heavily relied upon was 4.3.110.G of the development code and the need for providing adequate public utilities. Ms. Hampton indicated that the section has the word "shall," which is mandatory. Reading further, it reads "such as sewer, gas, and water systems". Hampton stated that

wording “such as” versus “including” gives discretion, especially in light of the development which has occurred in this area.

The commission was shown pictures of 1820 20<sup>th</sup> Street, a neighbor of Ms. Fleming’s which was a home that was recently put on the site, sharing a well and a septic system with the adjacent property, put in July of 2006. Hampton stated that the fence in the photo abuts Ms. Fleming’s property.

Hampton then went over the assessor’s map with the commissioners and how Ms. Fleming would like to divide the property. Hampton indicated that all neighbors have septic and well water in this area. Hampton indicated that 20<sup>th</sup> Street in this area is pretty much a grassy field. She indicated that there is a dispute as to where the utilities will come from, and that is the main part of the appeal tonight.

Ms. Hampton stated that Ms. Fleming feels that things are not being applied equally, and then noted Article 1 of Section 20 of the Oregon Constitution. She stated that in situations like this it prevents government from distributing privileges or immunities in a purely half hazard manner and requires government to use criteria consistently applied and achieve a coherent policy. Hampton stated that, to staff’s credit, there has been a transition, so they are dealing with decisions that were made previously, so it is not entirely their fault that things have been applied in a half hazard manner. Hampton stated that there is a manufactured home that was put in approximately a year ago with a septic system and a well, and she thinks that poses some problems for the city and thinks it invites a suit under the privileges and immunities claim for equal application.

Hampton stated that with regard to goal setting, to install public utilities, water and sewer being one of the five pieces required in the preliminary and final plat approval, would cost close to \$56,000, which is cost prohibitive and encourages Ms. Fleming to either file an appeal before the planning commission, to file a suit with the state regarding the constitutional argument, to not sell the land or to sell the entire piece of land. Hampton indicated that this requirement is prohibitive.

Ellingson asked how far the sewer is from Fleming’s property. Hampton indicated that to Fleming’s house it is under 300 feet but to the other property it is over 300 feet. Hampton indicated that what they understood from Gary VanPatten of Tech Services is that services to this property would be brought in from Broadway on 20<sup>th</sup> Street. Fleming indicated that what Joyce Curtis at the engineering department told her was that sewer goes north and south and water goes east and west. Ellingson asked Al McCauley, a member of the public in the audience, if he was on sewer and water. McCauley indicated that sewer and water was brought in from Broadway Street to serve his property.

Ms. Hampton indicated that the points mentioned summarize Ms. Fleming’s argument - In 1997 Steve Waggoner was allowed to put a home on the property being served with a septic system and sharing a well, and Ms. Fleming is asking to do it with an equal opportunity ordinance. Ellingson asked staff if they know how many feet it would be to bring the sewer down to Fleming’s from Broadway. Staff indicated that they do not

know. Rudi asked why a member from Technical Services Department is not here. Fine indicated that this is a land use decision, that the question is not what it will cost to install these services. Fine stated that it is Fleming's lawyer's contention that Fleming has legal grounds regarding Oregon constitution, etc. to ask for a waiver of this code requirement.

Rockwell indicated that he has not heard anything from staff thus far with regard to the development code not being followed, or something that has been processed in excess of what is set out in the code. With regard to Section 4.3.110.G and the need for utilities, Hampton stated that staff is interpreting other than what was done in past. She believes there is discretion. She indicated that there should be more mandatory language. Hampton stated that staff is relying on final plat provisions, that when public utilities are a part of application, they have to be done before the final plat. She indicated that those provisions leave it up for discretion. Hampton indicated that if she finds that there is discretion, coupled with due process, and that others have been able to put in septic and not tie into city utilities, that the plat needs to be modified for Ms. Fleming to proceed.

Ellingson asked that if what is being said is that Section 4.3.110.G of the code has wording "such as" rather than "shall", that it reads, "shall, for example, these..." Rockwell referenced Section 4.3.160, numbers 5 and 8, of the code including similar language that applies to sewer and water services being available to a site. Hampton indicated that she understands that once the service is there you grant it over, she doesn't think it says you have to put it in. Rockwell then read #8 of Section 4.3.160 of the development code aloud. Rockwell indicated that there is other language in this ordinance that reflects that those are things that should be included. Hampton indicated that staff referenced ORS Chapter 92 in its report, and she did not see anywhere in ORS Chapter 92 that requires city utilities to serve properties within city bounds.

Appellant's testimony concluded at 7:27 p.m.

Ellingson asked if there was anyone else asked to speak in favor. No one came forward.

Ellingson asked if there was anyone to speak in opposition to this case. No one came forward.

Ellingson asked if there was anyone that would just like to speak in general.

Alan McCauley, 3755 Court Street, Baker City, approached the commission. McCauley indicated that when he and his wife constructed their home, they were given the option to put in well or septic system. They chose to bring in city sewer and water to serve the property. McCauley indicated that he wanted to come off of 18<sup>th</sup> to serve the property but that the city indicated that they would have to come off of Broadway, and the sewer was extended 180'. McCauley indicated that he was told that if anyone was to hook on to that line, that he would get reimbursed. McCauley indicated that Fleming's current residence could hook onto that line now which was extended by the McCauley's. The commission discussed with Mr. McCauley the reimbursements available to hook into existing lines. McCauley stated that he has not received any reimbursements thus far.

Ellingson asked a question of David, when there is an existing house that is not involved with development and the sewer runs down that street, does that existing houses have to tie in to the city main line. Fine indicated that if you are on an existing well or private septic system and you develop additional parcels, it would be required. MacKenzie indicated that he understands that if you have a septic and it fails, you would then be required to tie into the city's line.

Brian England, 224 Main Street, Unity, Oregon approached the commission. England stated that Ms. Fleming asked him to come in and discuss the situation he went through last year. England indicated he went through city services and did receive a quote and was told that the general rule of thumb is that if you are more than 300 feet from sewer and water that you aren't required to tie in. He stated that he wanted to put in duplexes at Ms. Fleming's property, and that staff indicated that with duplexes he wouldn't have enough room on the land to have a septic system. England indicated that staff told him that he would have to leave the site big enough to have a septic system, but dividing the land into smaller portions, he would be required to bring city sewer and water to the site.

Regarding Section 4.3.110.G of the development code, Fine indicated that when it states, "such as" and not "including", that it is meant to mean the same thing - it is meant to be a document that if somebody of the public were to read it they would understand it. Fine stated that it would be highly unusual for the word "shall" to be used as discretion. Fine stated that "shall" means that it has to be done. Fine mentioned that DEQ has its own rules when you may use a septic system, but that cities are allowed to have their own rules. Fine stated that policy may be the reason the city asked to have water and sewer provided from the city.

Regarding reimbursement Fine stated that rather than sprawl we want to maintain the land, to ensure that when someone has to extend utilities, they will have a reasonable expectation to get reimbursed.

Fine indicated that staff is sensitive to the equal protection argument raised. Fine indicated that if staff believed there was an equal protection argument that could be made, staff would be very hesitant to suggest that the ordinance be enforced against Ms. Fleming. Fine referred to another partition case where city utility extension was required, 07-Type II -01.

Rudi asked staff how Mr. Waggoner's home was put at that site without requiring city services to be extended. Bachman indicated that she could possibly give some insight as to how the Merrill's, Mr. Waggoner's daughter, home was put on the land to the west of Mr. Waggoner's home, but that she was not involved with Mr. Waggoner's building permit.

Going over the map for this property, Bachman explained to the commission that at the time the Merrill's applied for their building permit, Tim Collins (former city attorney and

city planner) had explained that if Mr. Waggoner deeded lots 35 to 45 in their entirety to his family members, that a partition would not be necessary – that those lots were included in the original subdivision of Block 25 of Stewart’s 2<sup>nd</sup> Addition. Bachman indicated that her previous supervisor and her supervisor of today have a different interpretation as to how land can be divided. She indicated that because the lots deeded to the Merrills included the west half of the vacated alley of this block and that the alley was not a part of these originally platted lots, this land division should have been required to go through the partition process. MacKenzie stated that you cannot transfer property that is not a part of the original subdivision.

MacKenzie indicated that even if all conditions of the approval were dismissed, the final plat requirements would still require that the public improvements be installed.

Fleming indicated that Tim Collins indicated that it would need to be surveyed, because some day she wanted to divide it.

Hampton indicated that an ordinance that applied last year or whether there is some leeway in this language to interpret it differently, that it is an equal protection scenario – fundamental fairness. Bachman then referenced other planning dept partition cases that were done in the last year which required utility extensions.

Ilena Fleming indicated that no one will buy the property with \$56,000 to pay in utilities. Fleming stated that MacKenzie told her that she could go ahead with a septic because the 300-foot language could go into practice. Fleming indicated that he stated that she was making enough money off of the land that she could afford to do this.

Public hearing closed at 7:59 p.m.

Burnside indicated that if she was required to put the utilities in that she would consider dividing it into several lots, and that precedence has been set with Waggoners. Burnside stated that he doesn’t see why she should be treated any differently.

Rockwell indicated that based upon the info provided by the staff report, it appears that staff applied the development code appropriately. Rockwell indicated that would be his finding for this appeal, that staff applied the appropriate sections and conditions. Regarding the equal treatment clause, Rockwell stated that every case that comes to the commission is different and using the same development code and that the same decision is not made.

Rudi indicated that she agrees with Rockwell’s comments. She indicated that the planning requirements have been applied as necessary through the ordinance. Rudi indicated that this Planning Department is new and they can’t help it, that they have to go by the code and the code has to be addressed, and that it must be moved forward. Rudi indicated that she has recently sold property with 40 K, 50K assessments, and properties are continuing to sell.

Ellingson stated that in reading the information given, he doesn't see a lot of flexibility, which the department has applied as they seem fit. As far as equal treatment, he feels that there have been poor decisions made in the past, and that he'll be do his best to make sure that they are not done in the future.

Reading through Fleming's appeal letter, Rockwell indicated that the first sentence stating that she has been given numerous things, Rockwell indicated that it appears that was the case. Regarding the comments in the letter about the ex-city attorney, Rockwell indicated that he agrees with what is said in the letter but that the city's resolution to that is to apply the development code. Regarding the applicant's financial status, Rockwell stated that he agrees that it's not the planning director's business but that it has no bearing in the decision in this case.

Ellingson indicated that he agrees with what Rockwell said. And that staff not getting back to Fleming for a month is not excusable, but that the development code was followed in this case.

Rockwell MOVED to deny the appeal and affirm the staff decision in this case. Burnside seconded the motion. The motion CARRIED with all members in favor.

The meeting adjourned at 8:34 p.m.