Gulizia, Andrew

From: Faye Weisler <faye@jeffnet.org>
Sent: Tuesday, February 9, 2021 2:40 PM
To: Gulizia, Andrew
Subject: LU 20-134213 AD Memo in Support of Appeal
Attachments: Memo In Support of Appeal 2-9-21.docx; ATT00001.txt

Hello Andy,

Attached are my Memorandum in Support of my Appeal as well as a photo of the hillside below the subject lot.

Thank you,

Faye Weisler

Memorandum in Support of Appeal

Date: **February 9, 2021**
To: **Adjustment Committee**
From: **Faye Weisler, Appellant**
Re: **LU 20-134213 AD appeal**

At the public hearing on February 2, 2021 I requested that the record remain open. This Memorandum serves to supplement my Appeal and responds, based on my limited notes, to the testimony of City Staff and Applicant as well as the February 5, 2021 Memorandum from the City Planner.

1. The City granted height adjustments to Applicant at both the street 'front' and back of the proposed development. Testimony and statements, verbal and written, reveal that the City subjectively and erroneously interpreted the Code.

The City provided no precedent for its novel interpretation of the City Code. The applicable Code provision for height applies specifically to steeply down-sloping lots. This is certainly not the first time a house has been proposed to be built on a steeply down-sloping lot, even with a setback. Regardless, City Staff have declared a new interpretation as 'a plain reading of the text'. Yet, at the February 2 hearing Adjustment Committee members asked the City questions in an attempt to understand how City Staff reached the height adjustment decision. I appreciated the questions as the explanation in the City's decision was not clear to me. The City acknowledged in their Decision that the determination is an interpretation and is subjective. The City reiterated that it was 'likely' the Code drafters 'must have meant' 23 feet above the street level. However, the 23-foot provision is specifically for 'steeply down-sloping lots'. The drafters of the code, and the City when it adopted the code, presumably after much discussion and analysis, anticipated a house built down a steep slope. They presumably knew how BDS determined the average grade of the street. There is no reason the City should suddenly decide the drafters, and the City upon approval, had no idea how to determine the average grade of the street for a steeply sloping lot, even with a setback, and suddenly invent an imagined intent. There is in fact a 'plain reading' of the Code, which would limit the height at the street level to 23 feet above the average grade of the street. The steep slope of the lot will still accommodate a substantial home as approved in the partition decision. The 'average grade of the street' should be determined as BDS normally has, which would have resulted, as stated by the City, in 7.5 feet over the average grade of the street.

Because the City declared their interpretation as 'plain from the text', they did not address the required Criteria for a height adjustment at the street or the back of the property. They offered no explanation for granting an adjustment for the back of the property that is higher than the front (to be addressed more fully, ante). They said the adjustment met Code so ipso facto they had to approve it. I submit that what is 'plain' from the record is that a novel, subjective interpretation of Code as it relates to the street height, and a total failure to address the height for the rest of the building, does not allow the City to abdicate its obligation to meet the Criteria.

The City claimed at the hearing that the Code had no restriction on height at the back of the development. In the City's memo dated February 5, the City reiterated but modified the claim: "Since the Zoning Code only limits the building height in relation to the street, with no limits on building height above lower ground elevations further from the street, the Zoning Code does **prioritize** the street appearance when regulating building height on steeply down-sloping lots". (emphasis added). There is no dispute that the Zoning Code intends to limit the height of houses other than at the street.

The City granted different adjustments to height at the front and rear of the proposed development. Therefore, it is clear the City acknowledges there is a limit on the allowable height both at the street and for the entire proposed building. Otherwise, it is plausible a developer could build at code at street level but build up, for example, 7 stories at the rear. I posed this question by email to City Staff on February 8, 2012 to which they responded: "The 23-foot height limit that applies to this lot is only applicable to lots that slope steeply downward from the street. On those lots, there isn't any code section that governs height away from the street separately. I don't think we'd ever approve building up 7 stories through an Adjustment Review – our interpretation is only that 2 stories above the street level is consistent with the intent of the code." With all due respect to City staff, the City punted, providing no explanation to support the higher adjustment at the back of the property. Because the City **did** grant the adjustments, all Criteria must be met regarding the impact of the development in toto.

2. Regardless of whether the Adjustment Committee agrees with the reasonableness of the two height adjustments, the relevant Adjustment Criteria must be met. Neither the City nor Applicant have provided evidence that the Approval Criteria for adjustments, including the purposes of the height standards, have been met. All relevant Criteria, 33.805.040. A, B, C, and E, **must** be met.

The relevant Approval Criteria 33.805.040 states:
'All … adjustment requests will be approved if the review body finds that the applicant has shown that either approval criteria A. through F. or approval criteria G. through I., below, have been met.'
Neither Applicant nor the City allege 'G. Application of the regulation in question would preclude all reasonable economic use of the site; and H. Granting the adjustment is the minimum necessary to allow the use of the site.' Neither the City nor Applicant allege D or F are relevant, so the focus is on 33.805.040. A, B, C, and E as follows:

A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; The purposes of the building height regulation to be modified are stated in Zoning Code Section 33.110.215.A: *The height standards serve several purposes:*

- *They promote a reasonable building scale and relationship of one residence to another;*
- *They promote options for privacy for neighboring properties; and*
- *They reflect the general building scale and placement of houses in the city's neighborhoods.*
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B. If in a residential, CI1, or IR zone, the proposal will not significantly detract from the livability or appearance of the residential area …; and

C. If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone; and …

E. Any impacts resulting from the adjustment are mitigated to the extent practical;

The City readily acknowledged the original development plan did not meet the relevant Criteria. It remains open to debate why the City concluded the slightly revised height did meet the Criteria. The fact remains that two different heights were granted adjustments despite claiming the Code only applied to the street. The majority of the Criteria were not addressed, instead relying on their interpretation of the height zoning code, as if that interpretation precluded the necessity of meeting all relevant Criteria. Most Criteria either had no supporting evidence, or worse, misleading or incorrect statements and evidence.

At the hearing, the City stated repeatedly it approved a 'modest' two story home and also stated there was no 'jarring disparity' between the approved development and the surrounding neighborhood. This verbiage reveals both the subjectivity of the decision, and to me, an apparent if subconscious bias towards finding a path to approval of the development. The City's 'modest' 2 story home at the street results in a four-story home that is a contravention of code and Criteria, belies the jarring perspective of multiple parties who submitted comments and is inconsistent with the down-slope homes in the neighborhood as established below, thus in violation of the Criteria.

In the City's December 17, 2020 decision, Staff stated "Neighbors also pointed out that existing homes on steeply down-sloping lots in this area typically have a single story exposed above the street, rather than two stories as proposed by the applicant. **Staff visited the neighborhood and agrees with this assertion. Staff finds the typical building scale for comparably situated lots in the neighborhood is relevant to this approval criterion, since the purpose of the height standard cited above refers to a 'reasonable building scale' and the 'general building scale' in the neighborhood**." (emphasis added) The City then 'balanced' this finding with their novel interpretation of the building code and required only a slightly modified approved height. The entire position of the City hinges on their interpretation of 23 feet above average grade and then uses that interpretation to bypass the requirement to meet the Criteria for the entire building. They erroneously equate their interpretation that the height code 'priority' is the street level, with being able to bypass the Criteria for the entire project.

Applicant relied on their survey of the neighborhood to argue, against the City finding, that their proposal was in keeping with the neighborhood. The facts, consistent with the City finding, and supported by evidence readily available on portlandmaps.com, show that the vast majority of neighborhood down-slope homes are not two-story above the street. Further, granting the adjustments to height both at the street and the back of the property, results in a home approximately 30 percent larger, thus far more massive, than any other down-sloping homes referenced by Applicant.

The Applicant actually proved the point that the proposed two-story street level home does not meet the Adjustment Criteria to *promote a reasonable building scale and relationship of one residence to another; promote options for privacy for neighboring properties; and reflect the general building scale and placement of houses in the city's neighborhoods.* In fact, the Adjustments significantly detract from the livability or appearance of the residential area. In Applicant's January 19, 2021 submittal to the City, which she discussed at the Hearing, she provided a chart and pictures of several homes in an effort to support the contention that their proposed development, with the height adjustment, is in keeping with the neighborhood. However, their samples prove the opposite. They use my home, which is a total of 2 ½ stories including a daylight basement, only 1 ½ stories above my driveway, and lower from the street. They point to 1558 SW Upper Hall, which they admit has only a vaulted roof and not a second story above street level and which is a total of 3 stories and 2500 square feet. They then skip over 1551, 1545 – 1542, 1537 and go all the way down SW Upper Hall to 1531 to find a two-story home, in an area of the street with multi-family dwellings and without a similar architectural feel. Also, 1531 is only 3 stories and 3125 sq feet. Moving down SW College, they similarly skip over 1525, 1505, 1441, 1429, 1333, 1325, finally finding a two-story building at the bottom of the street at 1319, which has three small levels, the top of which is 449 square feet, for a total of 2111 square feet.

Applicant claimed that 'Based on our findings and observing all the homes in the neighborhood, there are numerous 2 level homes above street grade on the downhill side of the streets..." Again, having reviewed their charts and Portland maps, there are not numerous homes with 2 stories above street grade. There is nothing comparable in any of the down-sloping homes on either SW Upper Hall or SW College to the proposed 4 story, 4870 sq ft development. The City's height adjustment at both the street and back of the house lead directly to a massive home that *fails to promote a reasonable building scale and relationship*

of one residence to another, limits options for privacy for neighboring properties; and does not *reflect the general building scale and placement of houses in the neighborhood.* Again, the City acknowledged the failure to meet general reasonableness and building scale, yet claimed to *balance* that with their code interpretation, while failing to *balance* the overall failure of the entire proposed house with *all* the criteria.

The livability focus of the City has been on the view from the street because they claimed that is all the height zoning code addressed. Again, the height requirement must certainly apply to the entirety of developments to avoid towering back-ends. Regardless of height code interpretation, an adjustment to height at the back end was approved, the approval Criteria applies to all adjustments and thus all approval Criteria must be applied to the height of the ***entire home***, not just the street height. The development with height adjustments will significantly detract from the livability and appearance of the residential area.

The City stated the applicant addressed the privacy issue but only upon direction from the City. Limited concessions, while appreciated, do not fully mitigate the impact of this proposed structure as opposed to the impact were the height adjustment not granted. The Criteria requires that "granting the adjustment will equally or better meet the purpose of the regulation to be modified." Further, privacy is only one criteriom. They did nothing to address the livability or appearance, nor attempt to mitigate the impacts resulting from the height adjustment. To the contrary, in Applicants statement, she suggests that I plant screening plants. Mitigation of impacts is not an obligation of the appellant. It is an obligation required by the Criteria for approval of an adjustment.

In the hearing, addressing the second criterion, the City stated there are 'lots of trees on the hillside' below the proposed development. Please see the attached picture showing the hillside below the applicant's lot, taken from my driveway. As you can see, there are very few trees in the lot below the applicant's lot. Existing trees do not mitigate the impact on livability of such a massive structure.

The city addressed the 3rd criterion by concluding the cumulative effect was consistent with the overall purpose of the height requirements, again stating it is a 'modest' two story home. Again, the adjustment results in a 4-story home whose two stories at street level is not consistent with the neighborhood, code or criteria. The two-story adjustment at street level directly results in a house that violates multiple criteria.

The city addressed the 4th criterion regarding mitigating impacts by reciting the 6 foot above floor window requirement. I truly appreciate that. But again, privacy is not fully addressed. The balconies on Applicant's home intrude into privacy and intrude into the 20 percent maximum that she is allowed to block of my north facing windows. She used the windows in the lower garage of my home in her calculation, virtually leaving only the space between the balcony railing and the ceiling above as not blocked. Also, if trees are required for the east end of the development to minimize the visible size of the large house, why not a similar requirement to the west? The applicant complains they might plant trees that grow too tall. I trust that Portland arborists are well-versed in the maximum height that trees can grow and could assist in that. Again, mitigation is required to approve the adjustment, it is not required of an appellant.

In my appeal I remained focused on the adjustments and the Criteria as the only relevant issues under review. However, Applicant made statements that are in the public record and are not accurate. Applicant stated incorrectly that I said if I had known there would be a new development directly north of mine, I would not have bought the home. She stated "We cannot apologize for other people's unknown disappointments." The fact that the property could be developed was disclosed by my seller's realtor prior to signing a sales agreement. Also disclosed was the presence of a small, pie-shaped, less then 3 sq foot driveway encroachment onto Applicant's property. This resulted in provisions in my sales agreement for the seller to remedy the encroachment.

What I did say to Applicant was that I would not have bought the property without the view easement. This statement was made to Applicant when she asked me to agree to an encroachment into the view easement in addition to the financial payment my seller agreed to pay her, for granting the driveway easement. At that time, I sincerely believed we could work out a reasonable agreement for her to grant the easement, as my seller was eager to pay her and resolve the issue. I invited her to my home to discuss the easement. I told her, and meant it, that I sincerely regretted not being able to grant the encroachment into my view easement as I would not have purchased the home without that, and realtors advised me that the value of my home would be greatly reduced if I did so.

After almost a year of changing demands for the driveway easement, and after I refused to sign a development plan that would have waived protections for my property, I told my seller to tear down the retaining wall and rebuild the driveway as I felt we would not get a reasonable easement agreement. The contractor who was ready to perform the work stated he needed permission of the Applicant to stand on her empty lot to perform the work. In response to that request, she said the seller would have to pay her many thousands of dollars.

I recognize that none of this is relevant to the review by the Committee of whether the City met the Adjustment Criteria in granting the height adjustments. I did not want to bring in theses interactions with Applicant, and fear by doing so it might cause some to believe the appeal is because of the unpleasantness. However, I feel I must correct erroneous statements made about me. I have no doubt the past few years have been stressful for Applicant as well as me, as she has tried to maneuver through the many demands of developing the lot. I remain open to the possibility of repairing the damage done over the past two years if she becomes my neighbor. I am grateful for incredibly friendly, lovely neighbors and want more than anything for my love of my neighborhood to not be marred by these protracted issues.

This appeal is rooted in the facts, the building code and adjustment Criteria. This appeal is about my opposition to the City's height adjustments and the failure to meet the Criteria. I reiterate all the arguments from my comments, appeal and hearing testimony to establish that the City failed to meet the Adjustment Criteria and the decision should not be confirmed.