

**I. Call to Order**

Chair Daniel McKay called the meeting to order at 6:30 p.m.

**II. Chair’s Remarks**

The Conduct of Hearing and Statement of Public Notice were read into the record.

**III. Roll Call**

Present for roll call were: Daniel McKay, Jean Svadlenka, Kathryn Neil, Ben Yacob, Rachelle Barrett

Staff present: Daniel Pauly, Barbara Jacobson, Miranda Bateschell, Kimberly Rybold, and Shelley White

**IV. Citizens’ Input** This is an opportunity for visitors to address the Development Review Board on items not on the agenda. There were no comments.

**V. Election of 2022 Chair and Vice-Chair**

A. Chair

Daniel McKay nominated Jean Svadlenka as 2022 DRB-Panel A Chair.

Chair McKay confirmed there were no further nominations.

**Jean Svadlenka was unanimously elected 2022 DRB A Chair.**

B. Vice-Chair

Kathryn Neil nominated Daniel McKay as 2022 DRB A Vice-Chair.

Chair McKay confirmed there were no further nominations.

**Daniel McKay was unanimously elected 2022 DRB A Vice-Chair.**

**VI. Consent Agenda:**

A. Approval of minutes of November 8, 2021 DRB Panel A meeting

**Jean Svadlenka moved to approve the Consent Agenda. Chair McKay seconded the motion, which passed unanimously.**

**VII. Public Hearing**

1. **Resolution No. 398. Holiday Inn Fence Appeal: D. Michael Mills Lawyer PC – Representative for Garry LaPoint, LaPoint Business Group – Appellant.** The appellant has filed an appeal of an administrative decision rendered in Case File AR21-0048 which approves construction of a fence at 25425 SW 95th Avenue. The site is located on Tax Lot 800, Section 2CA, T3S-R1W; Washington County; Wilsonville, Oregon. Staff: Philip Bradford

Case Files: DB21-0081

**Chair McKay** called the public hearing to order at 6:38 p.m. and read the conduct of hearing format into the record. All Board members declared for the record that they had visited the site. No board member, however, declared a conflict of interest, bias, or conclusion from a site visit. No board member participation was challenged by any member of the audience.

**Philip Bradford, Associate Planner**, announced that the criteria applicable to the application were stated starting on page 2 of the Staff report, Exhibit A, Attachment 1, which was entered into the record. Copies of the report were made available to the side of the room and on the City's website.

**Mr. Bradford** presented the Staff report via PowerPoint with the following comments:

- He noted the locations of the Holiday Inn, the subject property outlined in white, and the Chevron gas station and convenience store, the Appellant's property outlined in red, as well as the surrounding features. The Holiday Inn, Chevron gas station, convenience store, The Human Bean, and Carl's Jr all shared the access drive that faced SW 95th Ave. (Slide 2)
- The case file subject to appeal was AR21-0048. The Applicant had applied for a 5-ft metal fence to secure their property from the north. The height and design of the fence met the approval criteria. The proposed fence was comprised of one 8-ft long segment and one 49-ft long segment and would be located along the northern end of the Holiday Inn property. The fence segment locations were shown in an aerial photo and on the site plan, as well as a rendering of the proposed fence design. (Slide 4)
- He reviewed the key dates of the review process for the fence application which was originally submitted on October 12, 2021. Staff deemed the application complete on October 18 and the notice of pending administrative decision was sent to property owners within 250 ft on October 20. On November 7, public comment was received from Jason LaPoint and City Staff issued their decision on November 30. The appeal ended on December 14, and the appeal was received prior to the 4 p.m. deadline. (Slide 5)
  - Upon receipt of the public comment on November 7, Staff obtained a copy of the 2012 development agreement and researched surrounding land use applications that may have impacted the subject property and the surrounding properties to see whether there was a requirement to include a pedestrian access and whether approving a fence in the subject location would be an issue based on any of those previous land use decisions along with the development agreement. Staff found nothing that would prevent the installation of a fence and issued the Staff report and decision.

- He reviewed the applicable Code criteria for a fence installation. The property is zoned Plan Development Commercial (PDC), so the development standards in the PDC criteria applied. All the general development regulations applied, along with Site Design Review for the addition of the fence itself.
  - Other Code sections that impacted the proposed fence were within the Landscaping Standards 4.176.04(f) which stated, "In any zone, any fence over 6-ft high measured from soil surface at the outside of the fence line shall require Development Review Board approval." Because the proposed fence was less than 6-ft high, the application was reviewed administratively.
  - Furthermore, Subsection 4.0301(b)1(a) gave further guidelines as to what the Planning Director could approve as a Class II application, stating, "Minor alterations to existing buildings or site improvements of less than 25% of the floor area of the building not to exceed 1,250 sq ft or the addition or removal of 10 parking spaces. Modifications to approved architectural and site development plans might also be approved subject to the same standards." Given that Staff considered the proposed fence a minor alteration/site improvement, Staff processed the application as a Class II Administrative Review.
- Staff had received two public comments on the appeal application DB21-0081. The first was a letter of support for the application received on December 30 from Sungmin Park, the Applicant on the application under appeal.
  - The second comment was additional testimony received today from the Appellant's attorney, Michael Mills, which further detailed their grounds for appeal and outlined the 2000 requirement to include a sidewalk in the subject location, citing the City's rationale for the requirement was 4.154, Onsite Pedestrian Access and Circulation. Staff confirmed that chapter of Code was adopted as Ordinance 719 in 2013, which was after the land use approval and the 2000 date referenced in the testimony letter. Currently nothing in the record indicated the requirement for the subject access and thus any reason the fence should not be approved. Mr. Mills testimony was sent to the Board via email and would be entered into the record.
- In Staff's opinion, the application was under the authority of the Planning Director, and the 2012 development agreement was not part of the review criteria in the Development Code for this type of land use action. The Holiday Inn property owner had requested the proposed fence based on security, and it was reviewed as a Class II application because of the two previously mentioned Code sections.

**Barbara Jacobson, City Attorney**, confirmed there would be additional public testimony and advised DRB to hear that first. Afterwards, stated she would give her analysis of the legal position. She noted Mr. Bradford had covered the facts well.

**Chair McKay** asked Mr. Bradford to reread the Planning Director's authority to make decisions.

**Mr. Bradford** explained he had read an excerpt from a much longer Code section, he read, "A Class II application shall be processed as an administrative action with or without a public hearing, shall require public notice, and shall be subject to appeal or call-up as noted below.

Pursuant to Class II procedures set forth in Section 4.035, the Director shall approve, approve with conditions, deny, or refer the application to the Development Review Board for a hearing." He noted a list of what could be processed as a Class II followed and included, "Minor alterations to existing buildings or site improvements of less than 25% of the previous floor area of the building, but not to exceed 1,250 sq ft or including the addition or removal of not more than 10 parking spaces. Minor modifications to approved architectural and Site Development Plans may also be approved subject to the same standards."

**Chair McKay** understood the Planning Director could make site improvement or minor site design decisions and believed the subject proposal was one of those. However, he did not understand whether that could be done outstanding any existing agreements between the City and other parties. To his knowledge, that was the crux of the issue.

**Ms. Jacobson** replied that was correct. There were several ways for the Applicant to appeal whether the proposed fence was built or not. As the DRB was very limited, the only item from the subject application that could be appealed to the DRB was whether or not the Planning Director followed Code requirements. Any outstanding contracts that had been entered into between the parties were outside the Code; that was contractual, and there were remedies specifically set forth in that development agreement. Additionally, a remedy could be sought through the court. Neither the Planning Director nor the DRB could interpret a development agreement as that required a judge or mediator working with the parties.

- The only item the Planning Director and DRB could look at was what the Code allowed the Planning Director to do or not do. If the Code normally allowed something, in this instance to authorize a fence in a commercial area, notwithstanding any other side agreements, past agreements, or litigation, her decision was proper and should be upheld. If the DRB found that that was not allowed by the specific language of the Code, the Board would decide that the Planning Director had exceeded her authority, rescind the application, and direct that a new application be submitted to the DRB. She empathized that the development agreement did not enter into this decision as it was a separate contractual agreement between the parties that needed to be interpreted by another body in another way.

**Rachelle Barrett** asked whose purview ADA compliance fell under and if that was something DRB should be discussing.

**Ms. Jacobson** replied that was beyond the decision that the Planning Director made. ADA compliance was required under the Code. The question before the DRB was the installation of the fence. She did not believe the issue had been raised that with the fence there was no way to comply with the ADA. The Appellant had stated that the presence of the fence would create a longer path for pedestrians to walk between the Holiday Inn and the Appellant's store. She suggested Mr. Bradford address the other ways in which the site was ADA accessible.

**Daniel Pauly, Planning Manager**, noted there was an ADA space still on the LaPoint site, [27:22] that was reviewed as part of the Building Code review. He did not believe there were any striped ADA parking spaces adjacent on the Holiday Inn site.

**Mr. Bradford** confirmed that was correct. He explained that there was a concrete public sidewalk at the Holiday Inn that transitioned to a striped pedestrian connection to the sidewalk in front of the convenience store at the gas station, so there was an ADA route to that property. (Slide 2)

**Chair McKay** asked Mr. Bradford to outline how somebody in a wheelchair could travel from the Holiday Inn to the convenience store following that path.

**Mr. Bradford** replied that the Holiday Inn was developed prior to the City's current pedestrian access standards, so there was no set-in-stone route. From the main entrance of the hotel, one would have to go around to access the sidewalk on Commerce Circle. He was unsure about other exit and entry points. He confirmed there was no pathway from the hotel entrance directly to the spot where the additional sidewalk was proposed to be blocked by the fence.

- He noted he had visited the site to view how the ADA pedestrian crossing would be installed and displayed the detail for one of the City's options for an ADA compliant pedestrian crossing. (Slide 6). It was clear that an ADA compliant ramp had a slope down to meet the crossing point at an even level. Where the sidewalk terminated at the Holiday Inn property had a hard curb, so it was not an ADA complaint connection.

**Mr. Pauly** clarified the enforcement of ADA policies was under the City's building official's jurisdiction.

**Benjamin Yacob** stated when he walked around the property, he saw three ADA ramps to access the Holiday Inn, but did not see any way for some to get from the Holiday Inn to the convenience store. He had looked at the path Mr. Bradford had referenced and also noticed a ledge. It had not looked like a path, but rather a smoking area for the gas station property similar to Holiday Inn's smoking area on the north side of their building. Even though the documentation stated it was an ADA path, it was clearly not, unless someone was brave enough to use a sidewalk that was not a sidewalk where vehicles were driving back and forth.

**Ms. Jacobson** replied that under ADA regulations, there was no requirement to have an ADA path between Holiday Inn and the Chevron station. There was only a requirement that the Holiday Inn and the gas station be accessible individually. There was no requirement stating that neighboring properties had to have ADA access between the properties.

**Kathryn Neil** asked if there was requirement for communication between the two businesses should there be any access between the gas station and Holiday Inn.

**Ms. Jacobson** replied that was not necessarily necessary, but the Appellant was saying that they had a development agreement that required a conversation or mediation if the agreement were to change; however, Holiday Inn might not interpret the agreement the same way. That said, the agreement was a separate contract, and the DRB did not look at or determine the legality of

a contract or interpret a contract. The contract itself stated that if the parties had a disagreement, they could attend mediation, arbitration, or go to court to resolve the matter.

**Miranda Bateschell, Planning Director**, noted that the City required any ADA accessibility to be developed at the time a site was being developed. The pathway cited by the Appellant was not a City ADA accessibility requirement, and Staff did not review it in terms of construction to ADA standards. If they had, the curb would not be there. Because there was no sidewalk or ADA accessible route to connect to, an ADA connection point would not be made. The City's compliance with ADA standards was done through the Engineering and Public Works departments, and the City only mandated fixes to ADA issues on public property, unless it was at the time of development. Because the subject sidewalk was on private property, the City would not mandate the upgrade to an ADA facility at just any point in time, only at time of development.

**Mr. Yacob** stated that while he was on the site, ~~he noticed~~ the only other fence he could see was on the west side along SW 95<sup>th</sup> that seemed to be only 4-ft high and gray in color. He asked why the proposed fence on the north side would be a different size and color.

**Mr. Bradford** deferred Mr. Yacob's question to the Applicant.

**Ms. Bateschell** requested the City Attorney's direction on the appropriate time for the Applicant to speak to that, as they were not the Applicant, to ensure the proper procedure was followed. Tonight, an Appellant was appealing a decision that had already been made on their site and they would be testifying on the appeal record.

**Ms. Jacobson** confirmed that because this was an appeal, if the Appellant was present and wanted to testify, the Appellant should testify, and the Applicant could respond to that testimony and address the logistics of the design and size of the proposed fence.

**Chair McKay** understood the fence would block the existing sidewalk end from the Chevron location that abutted the Holiday Inn property.

**Ms. Jacobson** replied the fence would block the top of the sidewalk at the Holiday Inn border.

**Chair McKay** understood if pedestrians walking from the Holiday Inn to the convenience store would have to walk out to SW 95<sup>th</sup> and cross through the front of both properties.

**Mr. Bradford** indicated the location of the two fence segments shown in orange. Using the aerial photo, he explained that the public sidewalk connection would require anyone from the Holiday Inn to utilize the sidewalk from SW 95<sup>th</sup> to the sidewalk connection running through the Chevron site that provided pedestrian access to the convenience store. (Slide 4)

**Chair McKay** understood the 8-ft section of the proposed fence would not cover the outlet to the Holiday Inn.

**Mr. Bradford** replied he understood the 8-ft section would cover a gap in the landscaping between the two properties, noting the Applicant could clarify that exactly.

**Chair McKay** called for the Appellant's presentation.

**Shelley White, Planning Administrative Assistant**, stated that neither the Appellant nor the Appellant's attorney were present at tonight's meeting.

**Ms. Jacobson** explained that she had spoken to the Appellant's attorney earlier in the day who had informed her that the testimony the Appellant had wanted to give was what he had been submitted in writing, and that he wanted to ensure it was entered into the record since neither he nor the Appellant would be in attendance. She stated Chair McKay could call for the Applicant to answer any questions.

**Chair McKay** understood the Appellant's appeal via written testimony was the Appellant trying to exercise their rights within the development agreement. He asked Ms. Jacobson for her opinion from the City's perspective.

**Ms. Jacobson** stated she had interpreted it that way as well. She reiterated that was not within the purview of the DRB. It was a binding contract with the parties to the development agreement, which included the owners of the Holiday Inn, the City, and Carl's Jr. There were avenues for them to professionally discuss, outside of litigation, the proposed fence or alternatives to the proposed fence, or to take it to court.

**Chair McKay** called for public testimony in favor of, opposed and neutral to the appeal.

**Sungmin Park** identified himself as the Applicant on behalf of Holiday Inn Portland South, which was adjacent to the Chevron station. The whole purpose of the fence was because of the effects on the hotel and its guests by the Chevron station's clientele, which included years of security issues, constant liability issues, and guest complaints about huge trucks and trailers that came in the morning and afternoon to access the convenience store. He had submitted photos of Republic garbage trucks, landscape trailers and other big trucks coming in that had complete disregard for the property itself by running over planters and crushing the Holiday Inn's curbs. The trucks put potholes all over the Holiday Inn parking lot, especially where they entered and exited. The police had records of the hotel having to deal with vagabonds and other people that frequented the convenience store to purchase drinks and then walked over to the hotel property to drink and leave their trash. Some would sleep near the entrance doors to the hotel or enter the hotel to use the bathroom and linger in the lobby.

- Hotel guests were constantly stating how insecure and unsafe they felt, especially in the parking lot due to the heavy trucks that sped through the lot. The trucks also did not park properly within the lines of the striped parking spaces but parked across them or diagonally because they were only there to run over to the convenience store. Oftentimes, they did not turn off the engines, but left the trucks running.

- After years of tolerating these issues, he had reached out to the owners of the Chevron station on multiple occasions to ask them to help get these issues under control, especially their suppliers. Because it was so cramped at the gas station where there were often lines of cars, the convenience store suppliers could not get to the area needed to park and unload goods. As a result, the suppliers used the Holiday Inn property to park and then used the access where the proposed fence would go to unload their goods and supply the Chevron station. He had complained to the gas station owners on multiple occasions. The truck drivers have been informed that they were on private property and that he was going to call their corporate office because unless they had business at the hotel, they were not to unload there.
- The other big issue was the garbage the hotel had to deal with every day from both the convenience store and Carl's Jr.
- The subject access was the main thoroughfare for all those people who were not using hotel facilities but were there solely for the gas station and convenience store. The hotel's own guests did not even use the access that much. In the development agreement, the Holiday Inn allowed the owners of the Chevron to put that access in; that access was never a part of the deal. The hotel believed it was a nice add-on because it would provide hotel guests an easy way to access the convenience store, so they allowed the gas station to put it in. The hotel would be fine with the access if the owners of the Chevron and convenience store would address the issues that continuously came up. He had asked the owner to clean up the access area, but they do not. It was a total mess. He was sure the Board members who visited had seen the garbage, beer cans, and cigarette butts around the garbage cans and all over. Just beyond that, in the parking area that faced the convenience store, there was gum and litter all over the place. Hotel staff was out there cleaning every day. Whenever he was at the hotel, he was out cleaning it up.
- He had offered to share that portion of the parking lot with the owners of the Chevron if the owners of the Chevron helped pay for landscaping, garbage removal, and keeping the area clean, but they declined. They would not talk about it, refused to cooperate with the hotel, and refused to listen to their complaints. The Chevron owners had stated that per the development agreement, the Holiday Inn had to go through mediation or discuss the proposed fence, the Holiday Inn had tried that for many years to no avail. He had had enough and now wanted to put up a fence. In the late summer of 2021, he informed the gas station owner that he was going to fence off the access, but that if they could come up with a solution other than the fence, he would listen. He received no response from the owner of the gas station, and they had not cooperated in any manner or form.
- All of these issues were affecting his business to a large extent. When inspectors came to inspect the property, they expected everything to be clean and people smoking to be confined to a designated area, but he could not control everything the patrons of the gas station and convenience store did to his property every day.
  - The DRB needed to look at the situation with that kind of perspective. The negligence of the gas station owner was affecting his business, and that was why he wanted to build a fence.
- The fence on the west side of the property was not his fence. It was built by the Oregon Department of Transportation (ODOT) and had nothing to do with him, although he



maintained the area because it was a condition of the development agreement, but ODOT controlled that fence. It was ugly and he did not want to replicate it on the other side, so he had designed his own fence.

- Another problem was that convenience store customers sometimes parked farther away from the access point and trampled through the bushes which had left a big hole. The purpose of the 8-ft portion of fence was to close the hole and allow the bushes a chance to grow back. He also wanted to install plants along the longer portion of proposed fence to block the view of the building because people routinely urinated, and even defecated against the building wall within view of this guests. He wanted a barrier, so his guests did not have to see that happening in front of the hotel. He was pleading with the DRB. He understood the fence would not eliminate all the issues, but it was a start. Eventually he wanted to install gates with a key card for access, but those were very expensive.
- He had pictures of the damage the large trucks had done when using his property to access the convenience store. He wanted to repave and re-asphalt his parking lot, but it was pointless as long as the large trucks still had access to his property. In his front parking lot, he had made it appear as if pothole repair was happening, but the trucks drove right over it. There was total disregard. This had been a long time coming, and he hoped the DRB would consider the suffering he had had to deal with over the years because of the access point and because the Chevron station's ownership was not cooperating at all with their neighbors. It had been horrendous.

**Jean Svadlenka** asked why only an 8-ft fence was proposed instead of installing a fence the entire length of the property because people could come through the hedges, or the hedges could eventually be destroyed over time.

**Mr. Park** replied that because of COVID, the hotel did not have a lot of funds and was doing its best with the limited budget it had to make this happen. He would love to have a fence all the way around, but that was quite expensive. This review cost him more than the fence materials, so they had spent a lot of money. Installing a fence all the way around the property would be his dream and would secure the area a lot better, but he did not have that luxury at this point.

**Mr. Yacob** stated that he had noticed a lot of large vehicles for an arborist company on the southwest side of the Holiday Inn building, as well as a lot of RVs that appeared to have people staying in them in the parking lot. There was a lot of traffic there, but good fences made for good neighbors.

**Chair McKay** confirmed there was no further questions for the Applicant and no further public testimony.

**Ms. Barrett** asked what kinds of rulings the DRB was able to make in this forum.

**Ms. Jacobson** responded that this was an appeal, so DRB would either deny the appeal and find that the Planning Director was within her authority to grant the application, or if the DRB disagreed and found that she was not within her authority, DRB would rescind her approval,

and direct that the Applicant file a new application to be heard by the DRB, stating the basis on which the Board found that her approval should be rescinded.

**Chair McKay** asked what the anticipated timeline was for the fence installation.

**Mr. Park** replied they already had the materials and were ready to install within a week of approval by the DRB. It could wait if DRB needed more time, but the contractor had informed him that they were ready to go.

**Chair McKay** understood if the DRB affirmed the decision, the Applicant would be able build the fence under the Planning Director's decision; however, if it was deemed through mediation or arbitration that the Applicant had erred in its application, or the installation of the proposed fence was in violation of the development agreement, or the City was in violation of the agreement by the Planning Director acting on the City's behalf, monetary damages could be sought or the fence could be ordered to be removed. He was afraid that if DRB upheld the Planning Director's decision and the fence was installed, there could still be an appeal that could result in a disagreement in the request for mediation.

**Ms. Jacobson** noted the development agreement, adding that the burden to request mediation would be on the Appellant and it would be up to the parties to the agreement to decide if there was any merit to whether the language of that development agreement even required mediation. If the parties did not agree to mediate, then the recourse of the Appellant was to file a lawsuit or go to court to ask for an injunction to stop the installation of the fence until the issue was resolved. There were many avenues. If the Applicant went forward with the fence installation, there could be some risk to the Applicant, but the Applicant was a smart businessman and understood that. It sounded like he had tried to connect with the adjoining property owner to work things out. The DRB could not make that decision for them on timing. The Board just had to decide if the Planning Director was within her authority, whether they agreed with her decision or not. If the DRB found that she was within her authority, the Board should affirm her decision. If the DRB believes she overstepped her authority, the Board should rescind her decision and direct the Applicant to reapply with the DRB.

**Chair McKay** confirmed there was no further Board member discussion.

**Mr. Bradford** entered the written testimony dated January 10, 2022 and submitted by D. Michael Mills, Lawyer PC, into the record as Exhibit B.

- He noted Mr. Sungmin's materials were identical to the ones in the packet and were therefore already accounted for.

**Chair McKay** closed the public hearing at 7:39.

Confirmation regarding the inclusion of Slide 6 in Staff's PowerPoint was briefly discussed.

**Ms. Bateschell** recommended that since the memo was Exhibit A, and Exhibit A included the Staff report and all information from Staff, the PowerPoint should be adopted as Attachment 5 to Exhibit A.

**Rachelle Barrett moved to adopt the Staff report with the addition of Attachment 5 to Exhibit A and the addition of Exhibit B. The motion was seconded by Ben Yacob and passed unanimously.**

The following exhibits were entered into the record:

- Exhibit B: Written testimony submitted by D. Michael Mills, Lawyer PC, dated January 10, 2022.
- Attachment 5: Staff's PowerPoint presentation.

**Ben Yacob moved to adopt Resolution No. 398, affirming the Planning Director's decision. Kathryn Neil seconded the motion, which passed unanimously.**

**Chair McKay** read the rules of appeal into the record.

#### **VIII. Board Member Communications**

A. Results of the November 21, 2021 Panel B meeting

**Daniel Pauly, Planning Manager**, stated that the last DRB Panel B meeting was for a Temporary Use Permit. It was also the last meeting of long-serving DRB member Samy Nada and everyone was able to say goodbye to him. He appreciated Mr. Nada's many years of service as a DRB member. Between both Development Review Boards, there was only one new member, John Andrews. Staff had met with him, and he would serve on Panel B.

B. Recent City Council Action Minutes

There were no comments.

#### **IX. Staff Communications**

**Daniel Pauly, Planning Manager**, stated there would be a meeting next month on February 14 because there was a matter that needed to be scheduled.

#### **X. Adjournment**

The meeting adjourned at 7:47 p.m.

Respectfully submitted,

Paula Pinyerd, ABC Transcription Services, LLC. for  
Shelley White, Planning Administrative Assistant