

APPEAL APPLICATION 2021

FILE # MISC221-0002

TYPE - PLEASE CHECK ONE:

- Appeal of a Type I Decision (i.e. Design Review for a Duplex, Sign, or Single Family Residence)
- Appeal of a Type II Decision (i.e. Variance, or Design Review, Subdivision)
- Appeal of a Type III Decision (i.e. Conditional Use Permit)
- Appeal of Peddler, Solicitor, or Temporary Merchant
- Other (explain): _____

APPLICANT INFORMATION:

APPLICANT: Paul Chiu - Appellant and Property owner is Dan Dhondt

ADDRESS: Appellant's Address is 807 N Elliot Rd

PHONE: 503-266-5590 MOBILE: _____ FAX: _____

CO-APPLICANT (if applicable): _____ PHONE _____

ADDRESS: _____

GENERAL INFORMATION:

PROJECT NAME: N Elliot Road

FILE NUMBER OF PROJECT BEING APPEALED: MISC221-0002

PROJECT LOCATION: N Elliot Rd

PROJECT DESCRIPTION / USE: Residential/Street

BRIEFLY DESCRIBE THE REASON FOR YOUR APPEAL:
 This determination is a Type II application. See decision Section I (C). Type II applications for development permits require all of the materials required by the Newberg Code 15.100.090.
NMC 15.100.090 requires proof that the property affected is in the exclusive ownership of the applicant, or the applicant has the consent of all owners. NMC 15.100.090. The City has not provided proof that it owns Mr. Dhondt's property at 807 N Elliot Rd. The City does not have the consent of Mr. Dhondt. Therefore the application does not contain proof that satisfies NMC 15.100.090(B). That is a violation of NMC and of the case law in Johnston v. City of Albany, 34 OR LUBA 32 (1998)

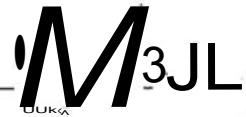
SPECIFIC APPEAL REQUIREMENTS ARE ATTACHED

General Checklist: Fees Notice Information Written Response Supporting Appeal.

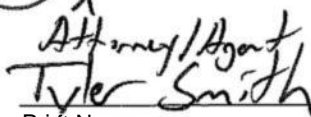
THE ABOVE STATEMENTS AND INFORMATION HEREIN CONTAINED ARE IN ALL RESPECTS TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. I AFFIRM THAT I WAS PARTY TO THE INITIAL PROCEEDINGS.

Applicant Signature _____ Date _____


Owner Signature



Print Name _____


Print Name



Community Development

January 14, 2022

Mr. Paul Chiu
City of Newberg
414 E First Street
Newberg, OTR 97132

Parties Providing Comments: Gerry Avoilo, Miguel Gonzales, Brandy Crockett, James Talt, Tyler Smith

Dear Mr. Chiu,

The Newberg Community Development Director has provided a determination based on your application MISC221-0002 Elliott Road Improvement Project. The decision will become effective on January 28, 2022, unless an appeal is filed.

You may appeal this decision to the Newberg Planning Commission within 14 calendar days of this decision in accordance with Newberg Development Code 15.100.170. All appeals must be in writing on a form provided by the Planning Division. Anyone wishing to appeal must submit the written appeal form together with the required fee of \$550.20 to the Planning Division within 14 days of the date of this decision.

The deadline for filing an appeal is 4:30 pm on January 27, 2022

If you have any questions, please contact me at doug.rux@newbergoregon.gov or 503-537-1212.
Sincerely,

Doug Rux, AICP
Community Development Director

Attachment

Tyler Smith

From: Tyler Smith
Sent: Wednesday, December 1, 2021 9:55 AM
To: Paul Chiu; Doug Rux
Cc: Tyler Smith; Dan Dhondt
Subject: Comments, objections and legal arguments about File No. MISC221-0002

(Via US Mail and e-mail)
City of Newberg
Community Development
PO Box 970
Newberg Oregon 97132

RECEIVED

Off. - 6 2021

Initial: _____

File No. MISC221-0002 (Elliot Road Variance Request)

Dear Community Development Director, Newberg City Council and Staff:

I write to you today to note a few legal reasons why your proposed Application must be denied. As you are aware our law firm represents Mr. Daniel Dhondt and Cedar Terrace, LLC in relation to their property rights.

- 1) Newberg Municipal Code requires the Owner of the real property in question to approve of the application or be the applicant. Rajiv Jain and Cedar Terrace, LLC as well as Dan Dhondt; own 704 N Elliot Rd, and 807 N Elliot Rd respectively. They are not the applicant, nor do they approve of land use actions covering their property.
- 2) Your application does not meet any of the criteria of NMC 15.505.030(h)

There are other options, such as downgrading the street category of Elliot Rd., delaying this action, and reducing the impacts and condemnations of the owners' property that are preferred. While we appreciate this attempt to minimize the taking of private property for public use, nonetheless we oppose your attempts to condemn and take my client's private property for your preferred use and plan. My clients and other interested community members have suggested alternatives, and alternate plans.

This application was just discovered by my clients so this is a rushed response. However points 1 and 2 above are elaborated as follows:

- 1) Newberg Municipal Code 15.100.090 (b) bars this application from being approved. NMC 15.100.090 requires that land use application provide PROOF that the property affected by the application is in the exclusive ownership of the applicant, or otherwise have the consent of all owners of the property.
 - a. Newberg does not have the consent of my clients Daniel Dhondt, nor Rajiv Jain who is the managing member of Cedar Terrace LLC. The property that they own as fee simple title owners is included as a part of your application. See Exhibit A-█ of your application packet shows the portion owned by Mr. Dhondt, and See Exhibit D-█ of your application, which shows the portion owned by Cedar Terrace LLC. Thus Mr. Chiu (the Applicant) nor the City of Newberg is the

"exclusive owner" of the property, nor does the Applicant have the consent of these two owners. The application must therefore be denied under the NMC. Oregon law is clear on this point. Where a local code provision requires the consent of all property owners affected by a land use application, a present owner must sign the application. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

- b. Furthermore, the application page itself, shows that no-owner has signed the application. Mr. Chiu apparently signed for the applicant on October 20, 2021 but he is neither the owner nor the owner's agent.

2} Newberg Municipal Code 15.505.030(h) is not met here.

NMC 15.505.030 is cited as the basis for this variance. Modification of Street Right-of-Way and Improvement Width. The director, pursuant to the Type II review procedures of Chapter 15.220 NMC, may allow modification to the public street standards of subsection (G) of this section, when the criteria in both subsections (H)(1) and (2) of this section are satisfied:

" The modification is necessary to provide design flexibility in instances where:

- a. Unusual topographic conditions require a reduced width or grade separation of improved surfaces; or
- b. Lot shape or configuration precludes accessing a proposed development with a street which meets the full standards of this section; or
- c. A modification is necessary to preserve trees or other natural features determined by the city to be significant to the aesthetic character of the area; or
- d. A planned unit development is proposed and the modification of street standards is necessary to provide greater privacy or aesthetic quality to the development."

Each of those four possible alternatives is not met

(a) Here, there is no unusual topographic condition, the City is simply proposing to widening the street against the wishes of these owners. Proposing to enter onto these owners lots, take their property for public use and establish wider easements and rights of way over Cedar Terrace.

(b) The lot shape and configuration is not affective access at all since the access will exist either way and these properties are already street frontage properties.

(c) There have not yet been any findings nor assertions about which trees are being determined to be significant, but the opponents agree there are some important and significant trees that should not be disturbed by the proposed plan.

(d) No planned unit development is proposed.

CONCLUSION

This application cannot be approved because the owners of at least some of the the property in question are not the applicant, and have not consented to this application. This violates the NMC and Oregon law.

Tyler Smith | Owner and Founding Attorney
Tyler Smith & Associates P.C.
503-266-5590 (work) | 503-266-5594 (work)
503-212-6392 (fax)