

# REBUTTAL TO PLANNING STAFF FINDINGS RE DENSITY AND PROPOSED R-1 CODE

Paul Conte

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What follows is rebuttal of Planning staff's findings that attempt to justify noncompliance with *Metro Plan* density limitations.

The excerpts cited below are taken from the October 31, 2013 draft ordinance, "Exhibit G – Preliminary Findings / Single Family Land Use Code Amendments / Secondary Dwellings, Accessory Buildings and Alley Access Lots / (City File CA 13-3)," posted on the City website.

## **STAFF RECOMMENDATION: FINESSE THE *METRO PLAN***

Because staff's other arguments do not hold up under any reasonable examination, staff claims the City Council has a "trump card" that it can play to prevail in any appeal:

*"The city is entitled to interpret the Metro Plan and to determine how those [density] calculations are done."* (Findings at page 6.)

Under the "Residential Land Use and Housing Element" of the *Metro Plan*, Policy A.9 states:

**A.9** *Establish density ranges in local zoning and development regulations that are consistent with the broad density categories of this plan.*

*Low density: Through 10 dwelling units per gross acre (could translate up to 14.28 units per net acre depending on each jurisdictions [sic] implementation measures and land use and development codes)*

The *Metro Plan* states:

*Each jurisdiction will be responsible to implement the policies contained in the Residential Land Use and Housing Element.*

Eugene Code (EC) for the R-1 Zone specifically implements the Low Density Residential (LDR) designation and no other designation:

**EC 9.2700 Purpose of R-1 Low-Density Residential Zone.** *The purpose of the R-1 Low-Density Residential zone is to implement the Metro Plan by providing areas for low-density residential use. The R-1 zone is designed for one-family dwellings with some allowance for other types of dwellings, and is also intended to provide a limited range of non-residential uses that can enhance the quality of low-density residential areas.*

Therefore, all provisions of the R-1 zone must be consistent with the LDR designation's maximum density of 14.28 dwelling units per net acre (du/na).

In Eugene Code, Table 9.2740 of Section EC 9.2740 unambiguously states this requirement:

**Dwellings.** (All dwellings shall meet minimum and maximum density requirements in accordance with Table 9.2750 Residential Zone Development Standards unless specifically exempted elsewhere in this land use code. All dwelling types are permitted if approved through the Planned Unit Development process.<sup>1</sup>)

Table 9.2750 of Section EC 9.2750 unambiguously states the R-1 maximum density as 14 du/na:

**EC 9.2750 Residential Zone Development Standards.** In addition to applicable provisions contained elsewhere in this code, the development standards listed in this section and in EC 9.2751 to EC 9.2777 shall apply to all development in residential zones. In cases of conflicts, standards specifically applicable in the residential zone shall apply.

The following Table 9.2750 sets forth the residential zone development standards, subject to the special development standards in EC 9.2751.

**Table 9.2750 Residential Zone Development Standards  
(See EC 9.2751 Special Development Standards for Table 9.2750.)**

	R-1	R-1.5	R-2	R-3	R-4
<b>Density (1)</b>					
<b>Maximum Net Density per Acre</b>	14 units	--	28 units	56 units	112 units

**EC 9.2751 Special Development Standards for Table 9.2750.**

**(1) Density.**

...

(b) For purposes of this section, "net density" is the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities.

...

There are no provisions under EC 9.2751 that exempt secondary dwelling units or alley access lots from the 14 dwelling units per net acre maximum.

Eugene Code is quite clear in how the *Metro Plan* LDR maximum density of 14.28 du/na is implemented, and that is through the R-1 Zone's 14 du/na maximum.

While the City has some latitude in how it implements the *Metro Plan* residential designations through the Eugene Code, the City Council cannot rely on an "seat-of-the-pants" finding that interprets the requirements of the LDR maximum density in an unreasonable way, as staff suggests.

Any attempt by Council to finesse the *Metro Plan* would not only fail to withstand LUBA scrutiny, it would be a clear breach of trust with the public.

<sup>1</sup> Note that PUDs provide a *legal* mechanism by which a development can have smaller individual lot sizes (and therefore higher per lot density), as long as the net density of the development as a whole does not exceed the R-1 maximum.

**STAFF RECOMMENDATION: RELY ON CREATIVE MATH FOR ALLEY ACCESS LOTS**

The proposed code for creating new alley access lots allows new lots as small as 2,250 square feet:

**9.2779 Alley Access Lot Standards**

**(2) Land Division Regulations.**

**(a) Original Lot.** *The original lot or lots shall be a minimum of 9,000 square feet in area prior to the creation of the alley access lot. If the original lot(s) meet(s) the required lot area and dimensions to create a flag lot or an alley access lot, only an alley access lot shall be created.*

**(b) Front Lot.** *The street fronting lot shall meet the lot standards for R-1 lots*

**(c) Lot Area.** *The alley access lot shall be a minimum of 2,250 square feet, a maximum of 5,000 square feet and shall not exceed 40 percent of the area of the street fronting lot.*

One dwelling would be allowed on an alley access lot, which results in a net density of 19.36 du/na, far higher than the R-1 and LDR maximums.

Staff suggests this conflict can be sidestepped by some creative math:

*“When applying the Eugene Code density provisions to a land divisions (partitions and subdivisions), they are applied to the development site being divided. In the case of a 9,000 square foot development site (the minimum proposed size for the original lot prior to creation of an alley access lot) being divided into two lots, the resulting density is 9.68 or 10 (rounded) units per net acre. A net density of 10 units per acre is consistent with Eugene Code density provisions for the R-1 zone, and falls within the appropriate range above.”*  
(Findings at page 6.)

Staff does not accurately state the applicable Eugene Code provisions, which are found in the approval criteria for partitions and subdivisions:

**EC 9.8215 Partition, Tentative Plan Approval Criteria- General.**

...

**(2) The proposed partition will not create a new nonconforming situation.**

and:

**EC 9.8515 Subdivision, Tentative Plan Approval Criteria – General.**

**(1) The proposed subdivision complies with the following:**

**(a) EC 9.2000 through 9.3915 regarding lot dimensions and density requirements for the subject zone.**

As can be seen, the code requires that the newly created lots conform to the density requirements.

Eugene Code provides “cluster subdivisions” as a specific mechanism for relying on the aggregate density of a development site prior to division:

***EC 9.8055 Cluster Subdivision- Approval Criteria - General.***

...

**(5)** *The proposed residential density, accounting for any duplex, tri-plex and fourplex lots, shall comply with Table 9.2750 Residential Zone Development*

*Standards. (d) EC 9.2000 through 9.3915 regarding lot dimensions and density requirements for the subject zone.*

So, to begin with, Eugene Code does not allow staff’s “creative math,” except in Cluster Subdivisions (and PUDs).

Furthermore, staff’s theory is based on an erroneous assumption that the R-1 and *Metro Plan* density maximums would nonetheless be met for a lot that’s divided into an alley access lot and a “street-facing” lot, as long as the original lot were at least 9,000 square feet. This is easily disproved with conventional math, as follows:

1. Start with a 9,000 s.f. lot.
2. Divide this lot to create a 2,250 s.f. alley access lot and a 6,750 s.f. street-facing lot.
3. Add a secondary dwelling unit on the street-facing lot.
4. The three dwellings on the original lot result in net density for the original lot of 14.52, which exceeds the R-1 and LDR maximums.

The proper solution is neither complicated, nor onerous: Simply require alley access lots to be at least 3,050 square feet to be consistent with the LDR maximum or at least 3,125 square feet to meet both the R-1 and LDR maximums.<sup>2</sup>

**STAFF RECOMMENDATION: KEEP IGNORING LAND USE REGULATIONS FOR SDU’S**

The proposed code would allow a second dwelling unit on lots designated LDR and zoned R-1 that are too small to ensure the resulting density is less than the LDR and R-1 maximums.

Staff presents four arguments, which can be summarized as:

- “We’ve always done it.”
- “Lots of other cities do it.”
- “Finesse the *Metro Plan*.”
- “The code has been ‘acknowledged’.”

None of these arguments withstand scrutiny.

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<sup>2</sup> Note that the minimum lot size to allow creating an alley access lot and adding an SDU to the street-facing lot would therefore need to be roughly 9,150 s.f. to be consistent with the LDR maximum, or roughly 9,350 s.f. to meet both the R-1 and LDR maximums.

**“We’ve always done it.”**

Staff states:

*“Secondary dwellings (previously called accessory dwellings prior to the 2001 land use code update) have long been permitted within the City of Eugene’s R-1 zone as a means to promote opportunities for small scale infill, to make efficient use of land, and to fulfill the Metro Plan’s overall goals and policies to increase overall residential density. The City of Eugene typically approves building permits for an average of 9 secondary dwellings per year. Historically, these dwellings have not counted toward residential density provisions.*

...

*The city has had a long practice of not counting secondary dwelling units (whether attached or detached) in the density “dwelling per net acre” calculation.” (Findings at page 7.)*

The fact that a jurisdiction has followed an unlawful land use practice is not a *justification* for that practice. Instead, as the following statute makes clear, such practices can be the basis for an enforcement order from the State Land Conservation and Development Commission (LCDC):

**ORS 197.320(6)** *A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation.*

**“Lots of other cities do it.”**

Staff states:

*“This approach is consistent with how many communities across the state treat secondary dwellings (including City of Springfield) and is supported by Department of Land Conservation and Development (DLCD) staff.*

...

*The City of Springfield, which also does not count secondary dwellings towards density requirements, calculates density the same way and therefore interprets the Metro Plan density language in the same way the City of Eugene has historically interpreted it.” (Findings at page 7.)*

Eugene staff misrepresent the LCDC staff position. DLCD staff did not, and would not, say that DLCD supports land use practices that are not consistent with the local comprehensive plan.

Gordon Howard, LCDC Urban Planning Specialist, stated in an e-mail on November 5, 2013:

*“I am not aware of, and have not found any, specific Oregon judicial decisions regarding accessory dwelling units and how they are counted toward residential density ....”*

Thus, there is no applicable legal precedent in other jurisdiction’s practices, as staff suggests.

Mr. Howard went on to advise the City, as follows:

*“I would recommend to the city that it clear up any potential inconsistencies between its density provisions and allowance of accessory dwelling units.”*

There is absolutely no merit to staff’s suggestion that the proposed code has a legal foundation in either prior decisions or a legal opinion from LCDC.

To the contrary, LCDC's advice is sound: Whatever the City Council wishes to do with respect to SDU density should be done consistently and transparently.

Staff even admits: "[T] the historical practice alone is not enough to justify the city's policy not to count secondary dwelling units ...." (underline added)

**"Finesse the Metro Plan."**

In addition to the "trump card," discussed above, staff also states:

*"[Metro Plan] policy [A.9] provides a density range that depends on "dwelling units" for its density calculation. However, it does not dictate how that calculation is done and what dwelling units are counted in that calculation.*

...

*This approach [of not counting SDUs] is further supported by other text and policies in the Metro Plan, including text that calls for an overall average of about six units per gross acres for new construction (page II-G-3), and policy A.13 that calls for increasing overall residential density by creating more opportunities for effectively designed infill (see full text of policy below)." (Findings at page 7.)*

While the *Metro Plan* expresses a goal of "about" 6 dwelling units per gross acre, this in no way alters the LDR designation's maximum of 10 dwelling units per gross acre. Nor does this goal imply any authority for a jurisdiction to not comply with the density maximum on land that is designated LDR. Instead, as the context makes clear, this goal is to be achieved by adopting code that implements the LDR and other designations consistently with their definitions and designating the appropriate amounts of land with the different designations so as to achieve the desired goal.

Likewise, Policy A.13 in no way negates the density limits in Policy A.9, nor is it necessary to allow a lot size as small as 2,250 square feet per dwelling, instead of 3,050 square feet per dwelling, in order to further Policy A.13 by "creating more opportunities for effectively designed in-fill".

Both of the above arguments are clearly attempts to use a gross misreading of the *Metro Plan* to circumvent the clear density limit defined by Policy A.9.

**"The code has been 'acknowledged'."**

Staff states:

*"This approach was found to be consistent with the applicable Metro Plan policies and Statewide Planning Goals, and was acknowledged by the state." (Findings at page 8.)*

As the City Attorney knows full well, the Oregon Supreme Court in *Baker v. City of Milwaukie* (21 OR 500 (1975)) rejected the City of Milwaukie's identical argument regarding their residential zone density standards:

*"Likewise, the City of Milwaukie, upon adopting a comprehensive plan, had a duty to implement that plan through the enactment of zoning ordinances in accordance therewith.*

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*In summary, we conclude that a comprehensive plan is the controlling land use planning instrument for a city. Upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. We further hold that the zoning decisions of a city must be in accord with that plan and a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail.”*

Staff’s repeated attempts to use the fact that the Eugene Code has been acknowledged as justification for code provisions that do not conform to the *Metro Plan* provisions is a highly unprofessional attempt to mislead City officials and the public.

## **SUMMARY**

The findings presented by staff don’t provide a bit of legitimate, legal justification for allowing alley access lots and SDUs to exceed the R-1 and LDR density maximums.

Were Council to adopt the proposed standards, not only would the code amendments be rejected by LUBA, the community’s trust in transparent, straightforward dealings by Council would be diminished.

The appropriate course of action is, as advised by the LCDC staff member, to simply clear up any potential inconsistencies between density provisions and allowances for alley access lots and SDUs. That can be accomplished easily by requiring at least 3,050 square feet for a new alley access lot and at least 6,100 square feet for a lot with an SDU. The existing PUD and Cluster Subdivision standards already provide additional flexibility.

Alternately, Council could amend the *Metro Plan* to revise the LDR density limit and/or the way that density is calculated.<sup>3</sup>

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<sup>3</sup> Portland has taken the approach of adopting both plan policies and zoning standards that consistently allow for different ways to calculate density in different situations.