

**CITY OF MILWAUKIE  
PLANNING COMMISSION  
MINUTES  
Milwaukie City Hall  
10722 SE Main Street  
TUESDAY, August 10, 2010  
6:30 PM**

**COMMISSIONERS PRESENT**

Jeff Klein, Chair  
Nick Harris, Vice Chair  
Teresa Bresaw  
Chris Wilson  
Mark Gamba

**STAFF PRESENT**

Katie Mangle, Planning Director  
Bill Monahan, City Attorney

**COMMISSIONERS ABSENT**

Scott Churchill  
Lisa Batey

**1.0 Call to Order – Procedural Matters**

Chair Klein called the meeting to order at 6:36 p.m. and read the conduct of meeting format into the record.

**2.0 Planning Commission Minutes**

2.1 June 8, 2010

**Commissioner Gamba moved to approve the June 8, 2010, Planning Commission meeting minutes as presented. Vice Chair Harris seconded the motion, which passed 4 to 1 with Commissioner Bresaw abstaining.**

2.2 May 25, 2010

**Vice Chair Harris moved to continue the May 25, 2010 Planning Commission meeting minutes to August 24, 2010. Commissioner Wilson seconded the motion, which passed unanimously.**

**3.0 Information Items – None.**

**4.0 Audience Participation** –This is an opportunity for the public to comment on any item not on the agenda. There was none.

**5.0 Public Hearings – None.**

**6.0 Worksession Items**

6.1 Summary: Training and discussion on holding effective public hearings  
Staff Person: Bill Monahan and Katie Mangle

**Katie Mangle, Planning Director**, said the worksession was a good opportunity to discuss how the process might be made as effective/efficient as possible, to build teamwork amongst the Commissioners, and for the Commissioners to raise any concerns or questions they might have. She noted the questions listed on 6.1 Page 2 of the packet were for discussion as the Commissioners considered their roles on the Commission. She asked each Commissioner to

state why they serve on the Commission, and encouraged each Commissioner to then consider their responses when Mr. Monahan continued with the land use hearing training.

Responses to the questions listed on 6.1 Page 2 were as follows:

**Commissioner Gamba** volunteered his time as a Commissioner because he believes the Commission as a body had the opportunity to make changes for the better. When people do not volunteer to work and make changes, it results in the status quo.

**Commissioner Bresaw** stated the perception she wants members of the public to have about the Commission is to know that the Commission is listening to everybody's comments, and that the Commission cannot reject something just because the public does not want it. There had to be a valid reason why the Commission would reject a project/application. Sometimes the Commission can create conditions to make it a better plan or project, and the neighbors would be happier. Likewise, the Commission should project an image of being fair to all parties, including developers, builders, neighbors, property owners, etcetera. She volunteers on the Commission because she tries to represent the average person, and listen to different points of view.

**Vice Chair Harris** said he volunteered for similar reasons, and tries to represent the average person and make a difference in the community. He has learned a vast amount in his 6 months on the Commission and is starting to feel like he is getting a grip on it, but he is enjoying it too. When the Commission makes a decision, he finds himself analyzing the decision until late into the evening, not necessarily right or wrong, just how the Commission came to the decision. With his son now in college, he believed being on the Commission was an opportunity to participate in the community and better himself at the same time.

**Commissioner Wilson** said he also volunteers to be part of the community and donate his time and expertise in environmental and geotechnical backgrounds.

**Chair Klein** agreed that there is a need in Milwaukie for people to step forward and do things. He believed there was apathy throughout the community, which makes it difficult, but if you want something done, you do it yourself. He had always considered that the Commission exists not for the applicant, but to protect the interests of the people living near or being impacted by the application. He takes a lot of pride in that work.

- He noted one situation in particular that made him uncomfortable this past year, adding it was important to stay focused on what the Commission is here to do.

**Bill Monahan, City Attorney**, noted that City staff is open to criticism because they have a role to play, which might not always be clearly defined. Through the worksession, he hoped staff would be better able to define their roles, and learn what role the Commission wants staff to have in serving the Commission so it can be more effective.

**Chair Klein** stated it was important that no questions were left unanswered at the end of the meeting. Others likely have the same questions, and asking what seems to be a basic question often leads to great conversation amongst the group and progresses to bigger issues and a better process.

**Mr. Monahan** discussed the basic elements of holding a land use hearing, as noted in Attachment 1, responding to questions and comments from the Commission as follows:

- Quasi-judicial decisions in Milwaukie are made by a citizen body. The City could choose to have an outside hearings officer, but he believed the community preferred having citizens make those decisions, because members of that citizen body would have to live with those decisions. No outside person was coming in and ruling on process. People do not want just process; they want feeling added to the process.
- Due Process. The primary item in any quasi-judicial decision is the process of due process. Quasi-judicial decisions which are made are specific to one or a few properties, and those properties that would be impacted by the development activity can be identified. Legislative changes affect a multitude of properties, such as those done over the last couple years: TSP changes, Code amendments, Comprehensive Map changes, etc.
  - A quasi-judicial hearing is much like a court proceeding with strict standards that must be followed to make sure all participants have fair dealings. The Commission's obligation is to be a tribunal that follows important procedures that shows the public that the Commission has clearly heard what has been presented in the arguments for and against, has applied the proper criteria to the decision, and makes a decision that is transparent.
  - A due process proceeding requires that the Commission can only make its decision based on the evidence in the record, which includes: any analysis by staff of the original submittal from the applicant; the information submitted by staff in the staff report; any and all oral and written comments the Commission receives before the close of the hearing; and any questions offered to the applicant and their representatives at the hearing, as well as their comments and responses.
  - The applicant is entitled to a decision made by the Commission that is based on that record and supported by findings that illustrate the Commission's thinking when the decision was made.
    - For example, if there were to be a quasi-judicial application for a zone change, the Commission cannot approve it because they like it. The Commission must identify what evidence was presented to cause the Commission to make the linkage between the application, evidence, and the decision. In the case of an approval, the Commission must be sure to address each criterion and show that all the criteria are met for a decision to be supported and approved. If even one criterion cannot be met, the Commission would need to either deny the application and give reasons why the one criterion was not met, or fashion a condition of approval that allows the applicant to make adjustments to their application to meet that criterion.
- He clarified that Commissioners who have done a site visit are asked to identify what they have seen or heard and who they have spoken with, and identify anything different from what is included in the application.
  - Typically, reading 2-month old news articles are not noted because those articles are not always tracked by legal counsel.
  - Commissioners are obligated to disclose on the record that they saw or heard a presentation or information at a public meeting, on television, in an article, in talking with someone, etc., once they become aware that an application is a possibility. For example, they should be concerned about gaining information specific to that application when staff mentions a preapplication meeting, or the agenda notes an upcoming application item.
    - The purpose of such disclosure is to make sure that those at the meeting have the opportunity to observe and understand the Commission's decision-making process, and also to rebut and refute any and all evidence that is in the record, because the applicant is going to say one thing, staff will interpret it a certain way, and different points of view will be heard throughout the hearing.

- The Commission's obligation is to make a decision based on balancing the evidence, but does not have to reject any evidence. If two experts give testimony about the impact a project will have on traffic generation, for instance, choose which makes the most sense to the Commission as a body, and explain why, which would go into the findings. The Commission does not have to discredit the other expert's argument.
- The need to allow people to challenge and rebut evidence gets to the issues of the ex parte contacts and the site visit. People can only refute information that the Commission is taking into consideration, so they have to hear a Commissioner say, "I talked to someone and they told me the following..." so it is on the record, and now they can try to correct that if they feel it is necessary.
- The objective is that when the decision is made, participants involved in the process should leave the room with the understanding that a fair decision was made, any and all information was heard and taken into consideration, and a record and a decision exists that stands up to challenge. Mr. Monahan's job is to guide the Commission to help fill in the gaps, so it is defensible.
  - In his 3 years of working with the Commission, Milwaukie has not had one Land Use Board of Appeals (LUBA) appeal, which shows the quality of the staff and the decisions made. He briefly explained how the LUBA process works, and how conditioning an application without giving the applicant an opportunity for discussion or rebuttal can lead directly to a challenge at circuit court on just that condition. The threat of going to circuit court would lead City staff and legal counsel to advise City Council to negotiate with the applicant because not only will the condition be thrown out, the City could also have to pay the applicant's attorney fees.
  - He clarified that the issues with Ed Parecki's property at Main and Monroe involved an appeal of a Code interpretation. Southgate Park & Ride was a LUBA appeal by the neighbors, not the applicant.
  - **Commissioner Bresaw** was surprised that the sidewalk conditioned for the Immoveable Foundation Church was never appealed. Ms. Mangle noted the sidewalk was built.
  - **Ms. Mangle** distributed a table of all Commission decisions made over the last 2 years created by Alicia Stoutenburg to prompt recollection of prior decisions and possibly further discussion.
- With regard to the need to have a transparent process and impartial decision-maker, each Commissioner has an obligation to declare at the start of the hearing whether an actual or potential conflict of interest exists (ORS 244). The Commission needs to be careful with the State Government Ethics rules, because the process of having to go before the Government Ethics Commission because of a complaint can be quite messy, technical, expensive, and embarrassing.
  - ORS 244.135 specifies the distinction between the two types of conflict of interest. A declaration needs to be made at a meeting, along with the facts involved. If Mr. Monahan believes something declared as a potential conflict could be an actual conflict, he may ask some more questions to help the Commissioner clarify the conflict because of the implications.
  - An actual conflict of interest is when the decision *will* have any financial impact, positive or negative, on the Commissioner. If so, then the Commissioner cannot participate in the proceedings, but must make a declaration at that meeting, identify that they cannot participate due to an actual conflict of interest and step down.
  - Potential conflict of interest is when the decision *may* have an impact financially on the Commissioner.

- The State made the determination that they would like people to participate on volunteer bodies, but not as public officials if they will benefit. ORS 244.135 specifies that Commissioners must handle conflicts of interest in a certain manner, which he reviewed. (6.1 Page 10)
  - He did not believe Commissioner Batey's recusing herself from the Carolyn Tomei application was an actual conflict, because there has to be some certainty that her property would be affected; that she could benefit when selling her property. It was definitely a biased situation, and he believed she was right to be cautious and recuse herself.
- Conflict of interest declarations must be made at the very first hearing of the matter being considered. If the hearing is continued, a Commissioner needs to make the same declaration at the next meeting, because statute requires the declaration to be made when there is potential for the decision to be made. The declaration needs to get in the record for the Commissioner's protection. If the declaration is not in the minutes, the Commissioner should correct the record.
  - All audio recordings of the meetings are on file with the City and can be very effective in addressing any challenges.
- If an actual or potential conflict of interest is realized during the hearing, such as realizing a project is adjacent to a family member's property, the Commissioner would need to make the declaration as soon as possible, and state whether the conflict is actual or potential, or a bias.
- Once the declaration is made, the Chair must ask if any member of the audience challenges any Commission member.
  - The Commission should discuss how elaborate that process will be if a Commissioner is challenged. Mr. Monahan stated that he prefers to ask the member being challenged to make their own determination to either answer the challenge or recuse themselves if it does not impact the quorum and the ability of the body to make a decision. If the member feels strongly that no conflict exists and intends to participate, then the body usually determines whether the member should participate. The Commission needs to determine its process preference, to leave that decision with the member, or make the determination as a body about whether the challenged member should participate.
    - **Commissioner Wilson** noted that one's persistence/insistence creates an air of bias that they will not be able to be fair. If there is a quorum, it seems that they should need to be out.
    - **Mr. Monahan** agreed that was the most reasonable approach, He typically recommended that the Commission make the ultimate decision about whether a challenged member participates.
- The bias question regarded whether one could make a fair decision.
  - First, Commissioners should not predetermine what the decision will be prior to the hearing. The Commission must be open and give weight to everything coming into and presented during the process.
    - A Commissioner serving on the Waldorf School Board, for instance, who is vested in a concept being reviewed by the Commission, would not want to give the challengers of that decision an opportunity to cast dispersion on the Commission or on the school with the appearance that the deck was stacked in the school's favor with a board member on the Commission. No case law exists where decisions were overturned because of bias; however, bias damages the Commission's integrity. He recommended that Commissioners recuse themselves with regard to bias.

- **Chair Klein** stated that in reading through an application, one will find the holes they want to find and key in on them. When does having an inquisitive mind and saying the Commission needs to look at a broader picture become a bias? In reading some applications, he has thought, "There is no way this will pass." He felt as though he was creating a bias for himself when reading the application because he did not believe the application had a fair shot.
- **Mr. Monahan** advised thinking, "There's no way the application will be approved unless the applicant can adequately address the questions about certain criteria. What information would be needed in order to change my mind?" Rather than thinking, "It cannot be approved" think, "I cannot vote for the application unless I'm convinced." He recommended writing down all the issues and what needed to be seen before coming into the meeting.
  - If seeking outside counsel, for example, having a Commissioner's friend who is an expert in a specific area review the information to see if they agreed with an error in the application, that person must come to the meeting as an expert so they can be cross-examined.
  - If a Commissioner disagrees with the data, they should give the applicant an opportunity to check their information, which may require a continuance if the applicant did not bring their expert.
  - If an authoritative statement on the matter is found on the Internet, print and provide it to staff. Staff can then distribute it to the Commission and applicant, and the applicant can decide how to address it. Applicants' lawyers do not always make the presentation in Milwaukie, which results in much more open dialogue and conclusions are reached without feeling threatened. Lawyers can play the process game and ask for a continuance and for the information obtained.
- **Chair Klein** stated that reviewing the packet and getting questions to staff early allows time for staff and the applicant to return with answers. Bringing questions to the meeting can often result in a continuance, and if done too often, the application ends up getting approved because it ran up against the 120-day land use clock.
- The Declaration of Bias question needs to be reinserted into the Chair's initial hearing comments.
- The provision allowing for additional time to be requested is on the agenda. At the first evidentiary hearing, the Commission must grant a request by anyone for additional time. This can be done by continuing the hearing to take more testimony at the second hearing or holding the record open for at least 7 days for anyone to submit information about anything pertaining to the application. After that 7-day period, the Commission must deliberate based on the new and all other information submitted.
  - If it is not the first evidentiary hearing and the applicant requests more time, it is at the Commission's discretion whether or not to grant a continuance. If new evidence is presented at the hearing that supports the application, a continuance must be granted to allow people to refute the new information. However, if no one challenges the new evidence, the Commission would procedurally be fine if the hearing is not continued. However, with new information, it is always best to continue because the Commission must understand whether or not it adequately addresses the criteria.
  - **Mr. Monahan** believed, for example, the binder of the meetings brought in by North Clackamas Parks and Recreation District to support the public output that they had was technically new evidence. He asked if it addressed the criteria.
  - **Ms. Mangle** said it was a Comprehensive Plan amendment application, and one criterion is public involvement and the binder demonstrated the applicant addressed

- that criterion. It was more supportive information, but no one had time to review it. The applicant did not intend to put the Commission in that position.
- Applicants could say they have done research on lighting, for example, and present material supporting their proposal. The Commission could dismiss the evidence and focus on the actual application, or request to see the other research, which would be new information and reason to continue.
  - The Commission can reject evidence if believed not to be pertinent; however, staff recommends bringing the evidence in for the Commission to consider. New information supporting an application does not have to come from the applicant; it could come in from anywhere. Someone opposing the application might bring in new evidence that turns out to be contrary to their position and supports the application, and still qualifies for the need to continue.
    - New comments submitted by mail or email do not count, unless new evidence is presented. If an issue is raised that has not been discussed, it could go toward a criterion and would be new evidence.
  - Raise it or waive it. Staff identifies all the criteria that apply to an application when notice is sent. The City has the benefit of that criteria being all that the application is judged on unless someone during the hearing says that the identified criteria is not all that needs to be considered, noting that criteria were missed, for instance. Do not assume that if someone quotes a policy in the Comprehensive Plan, that it needs to be addressed. The Comprehensive Plan is first, and the Milwaukie Municipal Code (MMC) implements the Comprehensive Plan; they need to be connected. If all the criteria are addressed, the Commission is also addressing the Comprehensive Plan. The Commission must take new criterion raised at a hearing into consideration, if in fact it does apply.
    - The burden of addressing that new criterion is on the applicant. But if not addressed even by the Commission and the decision to approve the application goes up on appeal and LUBA is convinced that new criterion did apply, it could get remanded per the findings based on that criterion. If someone has not raised new criterion, they have waived their opportunity to challenge the decision to LUBA. The City makes that statement as part of the Chair's initial comments.
  - 120-Day Rule. Statutes state that an applicant's application must be reviewed locally, including having the ability for a local appeal within 120 days after the application is deemed complete. The statute allows up to 30 days for an application to be deemed complete. If it is not complete, staff is obligated to tell the applicant what items need to be submitted in order for staff to recommend approval. The applicant can decide to submit the new information and has up to 180 days to do so; or at the end of the 30 days, the applicant can inform staff that they are not going to give staff anything further, and are confident the application is complete and approvable. When this occurs, staff generally has a bias, but do not have to declare it, so the application will go to the Commission without a positive recommendation because it does not address all the criteria. Some applicants will tell staff to deem their application complete, and have their experts work to get the application through because of their own tight timeframe. Once the application is deemed complete, whether it is day 1 or day 30, then the final decision must be made within 120 days, which is tight given all that must be done with notices, hearings, issuing findings, and making decisions.
    - **Ms. Mangle** added that staff organizes their work for the Commission around the 30 days. Staff first works with applicants to help assure an approvable application. After staff has a complete application, they manage everything to get that application to the Commission within 45 days, which includes having 2 potential hearings.
    - If running up against the 120-day clock and a continuance is needed, the Commission cannot extend the 120-day clock without the applicant's approval. The applicant is often

asked to voluntarily state for the record that they would like a continuance. If the final decision is not rendered within those 120 days, the applicant can proceed to circuit court. If the judge believes the application is approvable based on the information, the judge will approve the application, but will probably not apply any conditions of approval that the Commission would have liked. The applicant can also qualify to receive back part of their application fees.

- **Ms. Mangle** brought up a similar issue with the Waldorf School application, which was very controversial. It took a few Commission meetings to deal with all the issues. By the time it did get appealed to City Council, there was little time left on the clock that the Council only had one meeting in which to make their decision.
- **Chair Klein** noted when it seemed the 120-day clock might be an issue and more than one or two Commissioners had questions, the applicant will often waive the clock because of the threat of a possible denial.
- **Ms. Mangle** noted how not having a quorum for a few meetings could compromise the 120-day clock, allowing approval without any Commission discussion.
- It is very important the Commission gather information, and not deliberate during the course of the hearing. Clarifying questions may be asked, but conclusions should not be drawn one way or another. Commissioners can indicate their opinion at the deliberation point, even without enough information for approval. The straw poll can help the applicant to decide if they need more time. If staff senses the applicant is nervous and the Commission is close to denying the application, staff will often request a recess to talk with the applicant about the options of either extending the 120 days by 2 weeks or appealing to Council with the current record.
- During deliberations, it is important that the Commission connect the evidence to the criteria, and for the public to hear that they have been heard. Having a Commissioner note and then reiterate what was heard at a meeting makes the public feel that they were heard and understood. Even though they may not have gotten the decision they wanted, people leave the hearing believing the Commission heard and understood their concerns; or they will consider an appeal.
  - When deliberating toward a decision, the Commission can decide if they need more time, or to approve or deny the application. The Commission should craft a condition of approval if that will make the application approvable. The statute has been written to say if at all possible reasonable conditions of approval can be fashioned, they need to be fashioned. The legislature is very much influenced by the development community; it is, after all, the Land Conservation and *Development* Commission (LCDC).
- Conditions of approval need to be reasonable. The Commission cannot ask for more from an applicant in terms of exactions than is justified by a rough proportionality test. The Engineering staff is doing a better job of justifying why their conditions are required for the record.
- **Chair Klein** asked if it was up to the Commissioner(s) in opposition of an application to explain where the criteria are not being met, rather than just not liking a project.
  - **Mr. Monahan** replied it depended on the dynamics of the group and what they are trying to get to as an end result. Some commissions want consensus, so perhaps the opposing person should be obligated to state what would change their vote. Other bodies are fine with a 4 to 3 vote. Sometimes people can never be satisfied with a decision, so they will not help craft a condition.
  - **Ms. Mangle** said that would be where the Commission works together to make a decision. At times, she is conscientious of the fact that while a Commissioner may know their position may not be supported by the Code, it is important that they take a stand that may not occur if they were the deciding vote. She believed this was fine. It helps

staff to understand the Commission's decisions and reasoning, because staff is trying to reflect the Commission's guidance when talking to applicants earlier in the development process. The more the Commission can craft conditions to address the issues or at least get everyone to express their issues, the more it will help staff with the bigger picture.

- **Mr. Monahan** agreed it would help staff for the next application, because they are trying to reflect what the Commission needs to make proper decisions. The same with findings, which must be based on the evidence that shows why something is approved. Even if the Commission goes against staff's recommendation, staff will still help the Commission craft the finding if provided with an explanation of the issue.
  - The Commission briefly discussed a minor land partition Type II decision lot where the Commission reversed the Planning Director's decision and whether the findings of that application were supportable.
- The Commission and staff discussed how this Commission is unique in that they do a lot of deliberating, unlike many commissions. Key discussion points were as follows:
  - Staff preferred more deliberation/discussion. Other planning commissions and city councils take all the information and a couple commissioners may not participate at all in questioning. Then when it is time for deliberation, someone moves for approval, no discussion occurs, it is approved, and no one can understand why the decision was made.
  - **Chair Klein** did not believe the Commission deliberated enough. He wanted their deliberation to be more of an open discussion. Currently, each Commissioner offered their thoughts and then voted, going around the dais. Deliberations should be expanded for the Commissioners to explain their concerns and challenge each other's positions, which can be done civilly, before actually stating their position. The straw poll is good because it provides an overall gauge of how the Commissioners feel, and then the details can be worked out in deliberation, which is where some real processing occurs.
  - **Vice Chair Harris** agreed. He preferred true deliberation versus an expression of opinion and then a decision. The Commission moves directly to a vote.
  - Such deliberation would enable the Commission to counter one another to clarify certain points and help each other in the decision-making process.
  - Changing how deliberations are done might give a person the opportunity to have the time to see where they want to make their stand and move forward. It was difficult to disagree with the majority.
- **Mr. Monahan** described his role in the process as looking at the process points and helping the Commission understand the interpretations of the criteria. He tries not to jump in and drive the Commission. The community does not want to see a lawyer running the process; they want to see the process at work. If he thinks the Commission might get itself or the organization into a problem due to a statement that may lead to an appeal or litigation, for instance, he will jump in. He is willing to step in and do more, but it's more effective for the Chair to run the process.
  - **Chair Klein** said that he has been trying to bring Mr. Monahan into the conversation more. Mr. Monahan is very respectful of the Commission and what he says will help the Commission with the legal findings and show where the Commission is being supported on an issue or not.
  - **Mr. Monahan** noted staff knows the Code and the subject site better, so he will deflect certain questions to them. When not very vocal at hearings, he may not have anything to contribute, or he is concerned that his comment would be contrary to how business is done in Milwaukie, so he refrains. In serving 7 different cities, he tries to be careful not to mix up codes and procedures.

- **Chair Klein** liked the idea of acknowledging public comment. In the future, he would review the list of comments and make sure the issues were addressed.
- The Commission and staff discussed Community Service Uses (CSU) with these comments:
  - Some jurisdictions do not have CSUs, so why does Milwaukie? The broad scope of CSUs always seems to get the Commission in trouble.
  - CSUs were the majority of applications reviewed by the Commission and are unique. All schools, religious institutions, government institutions, public utilities, daycares, etcetera, are allowed in any zone, but to go in any zone, it needs to go under special review. Milwaukie's approach is unique. Essentially a CSU is a special conditional use, which every city has, but Milwaukie has a special conditional use for the list of uses. Some cities zone properties as public properties, and then go through development review. The CSU should get more benefit than a typical commercial conditional use would, because it has public benefits. The applicant would get the benefit of the doubt on some things, and be held to a higher standard.
  - A CSU is like a conditional use for a use that draws from further than the neighborhood. It has more of a community impact, they're either government or nonprofit as opposed to commercial. It was an effort to have a pretty uniform list of criteria that apply to CSUs. Conditional uses typically would have a defined set of conditions that apply to just that unique use, but Milwaukie has batched them together, saying that each use has a potential impact on a surrounding neighborhood. It would not typically fit into this neighborhood unless it is analyzed with a full view and consideration of the surrounding area.
  - It seems some uses should be allowed and others not allowed; for example, schools and parks should be allowed downtown and in neighborhoods. Many projects in 2009 were CSUs, and because they have such a broad perspective, it's difficult for staff because knowing where the Commission will be coming from and on what points is uncertain.
  - The Code update project is in process, and one key tool being added to the Code is the ability to do development review just on development. Without that tool, many things that the City does differently are inefficient.
  - Certain uses should be allowed in residential areas without an application. However, with an outright permitted use, there would be no way to look at all the impacts on the community.
  - Other communities use a conditional use rather than having a CSU. They go to the effort of having a general set of conditional use criteria that they apply to all conditional uses, or have some specifics that they know historically had been a concern regarding that type of use, like transportation, height, proximity to residential neighborhoods, etcetera.

The Commission took a short break and reconvened at 8:14 p.m.

Discussion continued about the questions listed on 6.1 Page 2 as follows:

- What perception should members of the public have about the Commission?
  - At a Design and Landmarks Committee (DLC) training worksession about a year ago, Chair Becky Ives stated that the DLC wants to be perceived as being a group that is tough but fair, and where everyone knows that they will get a fair shake.
  - The public should feel like the Commission makes wise decisions, whether they come agreeing or disagreeing, and those members of the public should leave understanding the decisions that were made.

- One problem is when the Commission is not allowed to make the right decision because of a bad rule that is in place.
  - When there is a bad rule, the criteria in existence at the time the application was filed have to be applied. Then the Commission can work with staff to modify the criteria for future applications.
  - Applicants can come in and request a Code change, and sometimes that is a better option, because the Commission can change the Code. Whereas the Commission may not have legal standing to grant the applicant the variance.
    - Such applications force/allow staff to address the 'bad Code' right then, and sometimes the Commission can do a quicker Code change than a Code update project. Code should not be written for one property, but for the whole city.
- Asking good questions and coming to good sound decisions is very important for the Commission to do. When people leave they may be upset, but at least they will understand how the Commission came to its decision.
- When the hearing starts to feel like a trial rather than a hearing is most uncomfortable when considering the perception of people in the audience. While the questions might be good ones, how they are phrased and the tone used can be negative.
  - **Mr. Monahan** suggested eliciting information and clarification of what is said. For example, "Mr. Applicant, you have the burden of proof and must show the Commission that you have addressed each and every one of the criteria. Based on what I've seen and what staff provided, I'm not seeing it. Can you go into greater detail and is there other information in the record that can help me to agree that you have addressed the criteria." That style of asking questions would be what the Commission should strive for.
- Once the answer is given, asking the question again or changing the question just a little to get a different answer is not beneficial for anyone. The answer the applicant provides is the answer, and the Commission needs to take it or leave it.
  - Attachment 3 "How to be a Highly Effective Commissioner" included good points to remember when dealing with the public. The Commission should treat everyone, no matter the education level, dress, background, etc. with respect.
  - Speaking before the Commission or Council can be intimidating. Commissioners should put themselves in the speaker's shoes, whether the applicant, applicant's consultants/representatives, citizens, etc. Most people testifying are opposed because they do not want a project to go through and can be upset. It is important to understand what they are trying to do.
- Sometimes people think they are opposed to an application, but they do not really understand the application. They may question what makes an application approvable, but it really is not the Commission's responsibility to address. It is better for the record and the audience for the Commission to say that it is a good question, and the applicant should address that on rebuttal. If not, Mr. Monahan will ask the applicant to address the issue.
  - Showing frustration with those with questions will keep them from ever returning before the Commission. Making the applicant's argument indicates which direction a Commissioner is leaning.
  - Keep in mind most people never come to City Hall. Testifying before the Commission could be their only contact with City government outside of paying a utility bill. The Commission and staff act as good hosts and represent the institution of the City of Milwaukie as well as the community.
- The person speaking may not have all the information. It takes a lot of time to go through all the papers and maps, or people learn of the hearing last minute.

- If treated disrespectfully, a person may leave the meeting with complete distrust of the City.
- Were there any aspects of hearings held over the past year that made any Commissioner uncomfortable?
  - The Milwaukie High School lighting. The Commission did not have the experience, and it took a lot of convincing by the applicant because it was technical. However, nothing could have really been done differently. The convincing factor was that other schools were doing the same thing, and it was working. It was a good outcome, but time-consuming.
  - Some issues that have come before the Commission were too complex for the Commission to really analyze. Traffic analysis is hard to understand. There are times when they will not be able to have a true understanding, and must trust the expert or staff to know that it will work. At times, the Commission, either as an individual or a group, will need to accept the expertise of staff or the City's consultants.
  - Some Commissioners have a very good understanding of the environmental aspects of such sections as .Water Quality Resource (WQR), Willamette Greenway (WG), etc. and have points to use. But in many instances, the Commission had to decide if it fits, and if so, make the subtle changes necessary and move on. The Commission often trusts the experts that have come up with the decision and address the minutia off to the side.
- The new duplex on 19<sup>th</sup> Ave in Island Station. Either the WG or WQR rule basically stated no development could take place on that property, and yet the project was approved.
  - **Ms. Mangle** explained it was a variance to the density standard. Code variances help the City avoid situations where so many regulations are imposed on the property that no use is left. That rule does not apply for all applications. Because underlying lots existed, they did not actually have to do the replat and could have built a bunch of skinny houses. The density standard is only triggered on certain types of applications. One variance approval criterion is unique circumstances on the property that are outside of one's control; so the environmental regulations were outside of that control. The applicant could have designed his house to avoid the tree, but could not have moved his property away from the Willamette River.
  - **Mr. Monahan** noted the City has a lot of overlapping obligations. The City is required to meet Metro's housing rule for density, so the overall opportunity to develop undeveloped properties within the community when the City prepared the Comprehensive Plan 30+ years ago had to assign densities to allow that 10 units per acre throughout the community.
    - There is an obligation to allow some reasonable development of property. If so many regulations are made that a developer is able show a judge he cannot make any reasonable economic use of the property, then the City is basically buying that property. Oregonians in Action have been very successful in lobbying efforts. With all the different overlays, this particular property was ripe for that application.
  - Contrary rules exist with one body requiring 10 units per acre, and another body stating nothing can be developed on a WQR.
  - The applicant must apply for a variance, and then the application has to be the minimum impact and intrusion to the property. The Commission would always try to help a developer get the minimum as opposed to having to argue for denial.
    - **Ms. Mangle** stated staff relies on the Commission for wisdom. The Commission can identify problems without being an expert or reading everything, and ask

smart questions that help everyone understand. Staff tries to identify the key issues in the staff report and suggest what the important discretionary decisions are.

- The whole discussion was focused on a 3-ft difference in setback, when the rule stated a house could not be built there. This point was raised a couple times, but being new, this Commissioner thought he was just missing something. What is the hierarchy?
  - **Ms. Mangle** replied staff presented their take on the situation, but there are often different ways to interpret items that are discretionary. Asking questions is important, and she believed the Commission had asked very observant questions.
  - **Mr. Monahan** noted future discussions would address variances and what criteria the Commission wants in order to approve a variance. Staff needs to do a better job of explaining the variance criteria, which is difficult.
  - Local governments tend to craft some criteria to at least make a reasonable evaluation to say they are protecting the community by allowing something in with the least impact. But the Commission has to explain to the community how these decisions were made and how the Code applies.
    - Staff held about 10 hours of staff meetings about this issue to determine a finding. Though staff has worked diligently for a decision, the Commission still needs to ask probing questions to make sure they understand the application. A Commissioner may still disagree with staff's recommendation. Some items are difficult for staff to fit into in the context of the hearing. A lot of time is spent figuring out how to communicate and boil key items down into something manageable for the Commission and hearing.
- **Ms. Mangle** clarified WQR analysis entailed 'avoid, minimize, mitigate' and did not prohibit building. With the entire property covered, it could not be avoided. Zero density only applies when subdividing land.
- **Chair Klein** explained his conclusion to give up the zero density, but standing firm on the setback was simple. The applicant did not have a lot of options, other than the variance for the zero density. Through almost any process, the applicant could have taken litigation and accomplished what they wanted to do. If they wanted to build the house, then there would have been 5 houses on the site rather than 2.
  - The applicant had a very limited number of options, and the approved option had the least impact. Part of the variance is that there are no other feasible options, but the Commissioners all knew other feasible options were available. The applicant stated he had not looked at any other options, and was intent on proceeding with their initial plan. If the applicant would have presented another drawing or tried something else, he might understand that the proposed option fit best. The applicant did not prove that the proposed option was the best or only option available.
- **Commissioner Bresaw** believed it was more of a communication gap. The applicant believed what he proposed was approvable.
- **Commissioner Gamba** agreed. The applicant invested time and money creating a proposal based on information he was initially told from staff, and then the information changed.
- **Chair Klein** responded that from staff's perspective, the applicant first came in and asked if their sketched plan was okay, staff said yes, but showed them things they need to be concerned about. The applicant took that limited information and had a consultant work on their plan for 9 months without knowing all the rules. They

- returned with completed drawings and staff provided feedback about the areas not being met, having been able to review the plan during the typical 30-day period.
- **Ms. Mangle** noted the Commission had more power to make changes than staff. Drawings can be changed; built structures are permanent.
    - An applicant has to do a lot of design and engineering to demonstrate that they meet all the criteria, so they have done a lot of work by the time the project comes before the Commission. Discomfort can result if the applicant must make changes because of the expense involved. However, the burden is on the applicant to meet the criteria. Having complete plans is no reason for the Commission to not make changes to meet the criteria.
    - Staff does what they can to give applicants good information throughout the process, but they also warn applicants that their project may not pass.
  - The Harmony Mini-Storage involved voting on a variance that was outside of Code, which stated a maximum of 2 or 3 extensions on time for construction. Commissioner Batey stated that the Code did not provide for the variance that the Commission was giving the developer; it was a time for construction.
    - **Ms. Mangle** clarified the Harmony Mini-Storage application regarded a variance to the time limit. Several Commissioners disagreed with staff. The Commission knew the applicant could not afford to build, but that is not a factor in meeting the variance criteria.
  - The first Pond House application was an uncomfortable situation. The Friends of Ledding Library seemed to feel very unappreciated for all the hard work they did, and then were put on the hot seat, like they were doing something bad.
    - This was an example of where questions could be asked and something could be denied if needed, but there was no reason for people to walk out feeling insulted. Volunteers still have to meet the criteria.
    - One question raised was whether or not the library was going to stay and if it was a good investment of City resources, which is not a criterion.
      - But is it? As a CSU, one of the questions asked is does it serve the community and so should the City be utilizing this money for the project. The City continues to dump money into the Pond House; so many aspects add costs and burden to the City.
      - The impacts are to be considered from a land use point of view, not from a financial point of view.
      - It is a great community facility that people enjoy.
  - How could staff better support the Commission?
    - Have illustrations that show how the proposed project would look; a virtual picture to indicate height, mass, etc.
      - Staff cannot provide such illustrations, but can request them from the applicant.
      - Staff had to be careful about measuring and creating illustrations themselves because miscalculations could lead to big problems. Staff does a lot of work facilitating the process to get the Commission good information, but they do not create information.
    - Staff should require the information, but if an applicant submits images with height poles, etc., staff should determine if the images/measurements are accurate. Height poles placed during the review process could be different than the actual project.
      - Appropriate and accurate reference points are also a factor, and will provide different perspectives.
    - Staff does request information from the applicant and could require something.

- If there is not enough information to know whether the criteria are being met, the Commission could request that the applicant return with more view or mapping information, etc.
  - Applicants can push back with staff about the costs of extra information etc. But if requested at a hearing, the applicant must decide to take a chance on the vote or invest the time and money to get an approval.
- **Commissioner Gamba** stated that for future reference, staff can warn applicants that if there are questions about views, he wanted illustrations showing the height poles. It was a simple thing to do.
- **Commissioner Wilson** noted photo simulations were another option and were not that expensive.
  - Photo simulations were harder to prove height.
- **Mr. Monahan** advised that if the Commission was going to ask for more information, narrow the focus down so everything is on the record.

**Chair Klein** stated that everyone needs to be at the meetings. There have been a lot of absences and the Commission makes the best decisions as a group, and as the group grows better decisions are being made. Ideas are bounced off of each other even when there are opposing views. The commitment needs to be made to Commission.

- There were three decisions that he felt were wrong:
  - Panattoni because of the exit. The Commission should have requested more restrictions on that intersection.
  - The Gramor Development. DKS & Associates had advised not putting the second driveway so close to Hwy 224, but the Commission proceeded. It created a dangerous situation. It was believed that the applicant agreed to take out the access if it did not work.
  - The Hamilton project/remodel. The Commission did that NDA a disservice by not requiring the Hamiltons to pay the full fees in lieu of construction (FILOC). Later on, the interpretation of what could be done with the FILOC was spread out over an NDA rather than retaining the monies for just in front of the property.
- He drives by these sites frequently and always thinks about these issues. He agreed with the developments, but believed these issues should have been better addressed.
- As a Commissioner, he wants to get decisions as correct as possible, because the Commissioners, as citizens of Milwaukie, will live with the best decisions as well as the mistakes that have been made. The Commission's work is very important.

The Commission and Ms. Mangle discussed the Commission's role:

- To represent/protect nearby neighbors from being negatively impacted by poor projects.
- To facilitate a good process for the applicant, who invests time and money to have an approvable application.
  - The City subsidizes the expense of the hearing, so everyone pays for land use review.

**Chair Klein** said it is important to remember that staff does a lot of work on the application to get it approvable, or close to being approvable before it comes before the Commission. It's the Commission's responsibility, as the community's conscience, to consider the application, and tweak an application if necessary, to fit the community in the best way possible.

**Ms. Mangle** noted the display boards showing the history of the Planning Department and Commission applications.

- She indicated the rapid staff turnover over a period of 10 to 15 years. Now there was a period of stability, enabling staff to do the bigger Code projects, and have more confidence in making recommendations.
- The boards would be available at future meetings.

**7.0 Planning Department Other Business/Updates - None.**

**8.0 Planning Commission Discussion Items**

**Chair Klein** announced Jim Macy would be featured tomorrow as part of the Concert in the Park series, which was held every Wednesday. Approximately 250 people attended last week, and it was a fantastic concert.

**9.0 Forecast for Future Meetings:**

- August 24, 2010
1. Worksession: Review Procedures Code Project briefing #3 – Variances, Nonconforming uses, and a new Development Review process
  2. Worksession: CPA-10-02 Wastewater Master Plan *tentative*
- September 14, 2010
1. Public Hearing: CPA-10-02 Wastewater Master Plan *tentative*
  2. Worksession: Milwaukie's Comprehensive Plan – how to start thinking about (and planning for) the future

**Ms. Mangle** reviewed the Forecast with these additional comments:

- Three worksessions would be held on August 24<sup>th</sup> including an update on the Natural Resources Overlay Project. All three projects were on timelines and need discussion with the Commission.
- Hopefully, a hearing would be held on the Wastewater Mater Plan in September.
- The September 14<sup>th</sup> worksession would include training and group discussion about updating the Comprehensive Plan, which is sorely outdated.
- Staff was meeting with the applicants of North Clackamas Park in the beginning of September, and then a worksession would be setup before the hearing is set.

**Chair Klein** encouraged the Commission to foresee getting multiple applications done in one night. He reminded everyone to fill out their Statement of Economic Interest.

Meeting adjourned at 9:14 p.m.

Respectfully submitted,

Paula Pinyerd, ABC Transcription Services, Inc. for  
Alicia Stoutenburg, Administrative Specialist II



Jeff Klein, Chair