CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Milwaukie City Hall
10722 SE Main Street
TUESDAY, November 9, 2010
6:30 PM

COMMISSIONERS PRESENT
Jeff Klein, Chair
Nick Harris, Vice Chair
Lisa Batey
Chris Wilson
Mark Gamba

STAFF PRESENT
Katie Mangle, Planning Director
Susan Shanks, Senior Planner
Ryan Marquardt, Associate Planner
Zach Weigel, Civil Engineer
Damien Hall, City Attorney

COMMISSIONERS ABSENT
Scott Churchill

1.0 Call to Order – Procedural Matters
Chair Klein called the meeting to order at 6:33 p.m. and read the conduct of meeting format into the record.

2.0 Planning Commission Minutes – None

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: Water Master Plan
Staff Person: Ryan Marquardt

Ryan Marquardt, Associate Planner, reviewed the purpose for having the Water Master Plan (Plan) and the process for adopting the Plan as a legislative amendment to the Comprehensive Plan. The Plan would come before the Planning Commission for public hearing sometime in 2011. The Citizen Utility Advisory Board (CUAB), established by City Code and advises the Council about utility rates and capital improvement projects, had already looked at some of the work for the Plan and would continue to be involved. Council had already looked at the scope and request for proposals and would make the final decision on the Plan's adoption.

Zach Weigel, City Engineer, presented the Plan, which included an overview of the City's water system and an explanation about why the City was doing a new Plan, rather than an update of the existing plan. He also discussed the work being done by the consultants.

Staff responded to comments and questions from the Commission as follows:
- Daily usage figures were not available at this meeting but would be provided at a later date.

- The City had actually seen a 1-2% overall decrease in water usage over the last 15 years, compared with a population increase of about 1% per year. The City did not have water usage broken out by commercial versus residential.
- About 11% of the water the City produced was unaccounted for according to usage records. The difference was due to leaks, fires, for which water was not metered, and other anomalies. This information was based on only the last 2 years of data; the meter at Well 5 was installed wrong which negated generating accurate information from data collected in prior years.
- Staff was basing the projected increase in water needs strictly on land use data, not population growth. The consultants were asked to include data for both buildable and underutilized lands to determine future water demands.
    - The current zoning was used to determine water demand, not possible future zoning changes. Underutilized lands included parcels which were zoned for higher density, but currently developed at a lower density.
- The Urban Growth Management Area (UGMA), a theoretical planning area, was currently served by Clackamas River Water. The City had an agreement with the County to coordinate on development and providing services there when needed.
- Water use from other providers through interties only occurred during emergency situations and was rare. All 7 wells were currently operational and had been for the past 2 years. All the wells were on the Troutdale aquifer.
- The consultants would not be testing for leaks; that was already being done by City maintenance staff.
- The existing system was a conglomeration of about 4 different systems that the City had acquired over time. It was quite old with a lot of cast iron, steel pipes, and lead joint pipes. Areas with lead joint pipes would be put into the database to determine whether they would be replaced.
- The Troutdale aquifer was 300 sq miles, covering most of Multnomah and Clark counties. The only other user was the City of Portland for their emergency back-up wells.
    - The water quality person in the City's Operations Department had reported that they do keep data on the stability of the aquifer's level, and it had been stable.
- The consultants were looking at above-ground issues, existing systems, and projecting what improvements would be needed for the City to provide water service in the future. They were also building a hydraulic model, which was where most of the $200,000 in consulting fees had been spent.
    - West Yost Associates had been chosen from among four consulting proposals received as a result of a Request for Qualifications. Proposals were ranked based on a scoring system by the Water and Engineering Departments and West Yost received the top score. All the proposals had been similarly priced.
- With regard to stormwater management, which was not part of this Plan:
    - Removing or replacing drywells or drainage wells within a certain distance of the City's water wells was an ongoing project. The drywells needed to be replaced with a pipe system, which was very expensive. Stormwater could not be put into an underground injection control (UIC) device. A drywell was a UIC, and they were all old. The City was slowly coming into EPA compliance. All the UICs were mapped. Drywell replacements were not part of the Plan.
    - Bioswale systems were an option for piping stormwater. There was no clear definition of a UIC versus a swale. Stormwater could be treated and then put into a pipe system through a swale in any area within a 2-year travel time from the surface to the

groundwater table in the zone of a well. A swale could be a problem if the water entering it was not already clean. The 2-year travel time defined the geography.
    - Portland, which was situated over the aquifer, was installing bioswale systems. Milwaukie had adopted Portland's stormwater manual and was following those policies, although Portland was not on a well system.
    - The 2-year issue regarded stormwater close to actual well points. Maps showed where the 2-year time of travel applied. The City could do infiltration treatment swales in those areas, but it would have to be approved by DEQ.
    - It was significantly cheaper to do swales rather than piping for stormwater.
- The Plan was intended to establish a baseline, understand how the water system worked, and project future needs. Micro-generators, which would generate electricity at the point of outflow from the treatment plants, could be addressed in a separate report. The Plan would not preclude the City from doing that.
- The consultants had preliminary numbers indicating peak hours and seasons of demand. That chapter was being completely rewritten. The highest usage was in August due to irrigation.
- The Plan would not include information on plans for grey water systems or rain water collection systems that the City could require of City buildings, as well as industrial and residential properties that would alleviate the peak usage. Those items could be addressed separately if staff was so directed.
    - Those issues applied to more than just stormwater. If fresh water currently used for irrigation could be replaced with reclaimed stormwater, future fresh water needs could be greatly reduced.
- As part of the City's Comprehensive Plan, this Plan should include discussion about conservation as a policy goal as well as the more efficient use of water.
- Fresh water usage had decreased in the last 20 years, and projections were being based on maximum build-out, which may or may not occur in the next 20 years.
- The Plan was not just a report, but a plan for maintaining the current water system. The scope was not just to draw conclusions and data, but to provide recommendations and management tools to help City staff continue the modeling and continue to address development review.
- Staff sought questions and feedback from the Commission about the Plan to help determine what could still be incorporated into the Plan itself, what might need to be in the Comprehensive Plan policies, and what might be entirely different projects or programs at some point in the future. Comments about water conservation, etc., were valuable.
    - The purpose of the worksession was to start the discussion and get ideas on the table so staff could figure out how to address them before returning to the Commission for a recommendation.
- The Wastewater Master Plan would be another active Master Plan to come before the Commission in a few months. Stormwater management was not being addressed at this point.
- Conservation and redirection of wastewater needed to be addressed in the big picture. The 1% reduction in consumption was likely due to conservation, which should be taken into account in the Plan.
- The Plan should address billing. Water usage was currently a small percentage of the water bill compared to user fees and sewer charges. Billing was not necessarily based on consumption. City sewer bills were based only on winter usage, because summer usage involved so much lawn watering. A billing policy change by the City to financially encourage conservation would go a long way toward accomplishing results.

    - Tankless heaters, low-flow showers and toilets would continue to increase if incentives exist for citizens and developers to add them.
- Staff would consider where conservation goals and sustainability incentives could be best addressed, whether in the Plan or Comprehensive Plan where the utilities section would be updated.
    - The City should likely be setting policy for sustainability and conservation in other areas, such as building practices, and review information and incentives so that the City is doing more in different areas.
- **Ms. Mangle** noted the email she sent inviting the Commissioners on a ride-along with Don Simenson for an interesting tour of the City's water system. He really knows the system and could probably answer a lot of their questions.
- The consultants' contract was originally scheduled to end in November, but was extended to February 2011. A lot more work had to be done on the hydraulic model than anticipated.
- Regarding Item 6.2.3 Abandon Obsolete Water Mains and Transfer Services on 6.1 Page 8 of the packet, new water mains had been installed 10 to 20 years ago but the services were not transferred. There had been political uncertainty whether the City wanted to be the main service provider for many different services, and this was part of that issue. The City was now in the process of switching over to the new mains. The redundancies would be abandoned; most were old, 4-in water mains in poor condition.
- Staff would return when they had actual figures to share, as well as information on the age of the system, where lead joint degradation was most prevalent, and numbers on water volume so they could quantify the 11% loss.
- The Commission also wanted to see work on revising billing practices to place more emphasis on lowering consumption to incentivize users to conserve. The City was not currently promoting conservation.
    - While conservation would affect the needed supply, it would not impact the size of the City's water mains or storage needed, which was based on fire flow.
    - The City's past problems with billing were still being sorted out, but a lot of progress had been made. Commercial accounts were complete and residential accounts were being addressed. Citizens would receive personal contacts regarding corrections.

6.2 Summary: Land Use and Development Review Process Tune-up (Briefing #6): Review Conditional Uses, Variances, Nonconforming Situations, Amendments, Development Review, and Procedures draft chapters
Staff Person: Susan Shanks

Susan Shanks, Senior Planner, distributed the PowerPoint handout "Land Use and Development Review Tune-up" dated November 9, 2010, highlighting the key policy changes made to Title 19. She briefly noted the reorganization of several chapters, noting the bulk of the changes included new Milwaukie Municipal Code (MMC) Chapters 19.800, 19.900, and 19.1000.

- Staff sought feedback from the Commission about four primary policy topics, which were discussed in detail with the subcommittee, Commissioners Batey and Gamba, last week. Asterisks within the PowerPoint denoted the policy items for discussion by the Commission.
- She noted the Code project was a team effort, and introduced consultant Sarah Breakstone of the Angelo Planning Group, whose work was founded by the TGM Grant, and Ryan Marquardt, Associate City Planner.

Ms. Shanks reviewed the key policy changes to the following Code chapters with discussion

and additional comments from the Commission and staff as noted:

MMC Chapter 19.800 Nonconforming Uses and Development

- Rights to Rebuild. Staff proposed retaining the current provision regarding a citizen's rights to rebuild a nonconforming structure in the case of fire or other destruction out of their control. This decision was based on the advice of the City Attorney and consultants.
  - If the Commission disagreed, both the Commission's and staff's recommendations could be forwarded to City Council for a decision.
  - Alternatively, staff could put the item on the Code fix list if the Commission felt strongly that that was the direction the City needed to go, and it could become part of another project.
  - **Damien Hall, City Attorney,** explained the issues involved in changing a citizen's right to rebuild nonconforming structures with these comments:
    - This type of policy change would require a lot of public outreach. Citizens have had this right and understood that they could rebuild their structures if destroyed. They also may have made investments accordingly.
    - Insurance policies could rely on the right to rebuild, and changing that right would potentially void those policies.
    - The loss of a home or business to fire or other damage was not the best time to get rid of nonconforming structures, when the owner was under distress.
  - Other tools were available to address the problem. Denying rebuilding seemed like a borderline taking situation and warranted exploring other options. Perhaps the City should consider buying a structure if it was that offensive.
  - Encroachments into the right-of-way were a different legal scenario than not meeting a setback standard on private property. The City could tell a citizen at any time not to encroach; they did not have the same rights to maintain or retain that if the structure changed.
    - This policy allowed citizens to retain a zero lot line, if they so desired. A City sidewalk could be built up against the home and the gutters would run right onto the sidewalk. If that house burned down, it could be rebuilt in the same spot rather than being moved 20 ft back from the sidewalk.
  - Rebuilding nonconforming structures due to loss was a rare occurrence in the City. More often, citizens voluntarily want to alter or demolish nonconforming structures, in which case, the City would require conformance. The right to rebuild was limited to destruction by an accident, so the policy would not result in the magnitude of change envisioned.
  - One major concern was that nonconforming structures often have more than one nonconforming issue. Structures with zero setbacks could have limited lot space that would not allow normal setbacks or other policies. Imposing this policy could potentially make something unbuildable.
  - The policy could be changed so nonconforming structures could not be rebuilt and then owners of destroyed nonconforming structures could request a variance from the Commission. Perhaps the associated fees for that process could be waived.
  - Not allowing the identical structure to be rebuilt could still be constituted as a taking, even if the owner could come before the Commission to request authorization to rebuild.
  - The City had no idea where all of the nonconforming structures were. Every time the Code is changed, nonconformity was created. This policy change would not address a set problem and would be very aggressive without a certain and specific target. The City could end up facing a lot of unintended consequences and risks.
    - Reviewing each destroyed structure on a case-by-case basis was proposed, rather

than accepting flaws in the old policy. The entire scenario could be reviewed to determine what options were available to bring the nonconforming structure into conformity.
    - The best practice was to move nonconforming structures into conformity whenever possible.
  - Adding another layer of process, such as having citizens come before the Commission, would involve the analysis of various competing issues like Willamette Greenway (WG) or Water Quality Resource (WQR) area requirements. This would cost citizens time and money even if the process was free. The City would not be able to take on all that analysis. The City needed to be smart about where that process was added and to which properties. The entire scope of the problem was not understood.
  - The City needed to be careful moving forward with regard to unforeseen limitations on homes or businesses. Owners might be left with a less valuable structure.
- The insurance company aspect was important. Insurance companies tend to be very strict about building exactly what was there before.
  - The fact that insurance companies and appraisers called to ask if structures can be rebuilt if destroyed implied that other cities' codes may restrict building some structures.
  - Some cities have a more nuanced approach with some parameters, but usually allowed for rebuilding that usually defaulted to at least the footprint. Portland allowed the rebuilding of the same footprint, but the rebuild had to conform to the current height limitations, for example, if the structure was previously nonconforming as far as height.
  - A policy that allowed a case-by-case consideration and instructed future Commissioners and staff to be "wisely lenient" might work.
    - The Commission would then have to determine the criteria to lay the groundwork for such decisions. The Code would have to be very well written.
    - It should also be worth the cost and level of analysis required from the property owner. Coming before the Commission with an obvious case of approval or denial would be a waste of time and money.
  - The City needed to be sensitive to the fact that these owners would be caught in a moment of distress.
    - Staff confirmed that the few cases where this Code had applied really were accidental losses. It did not apply to property owners wanting to replace or repair failing structures. It had been primarily applied in cases of loss in fires.
    - Staff did not know whether the 1996 flooding had resulted in the application of this Code.
  - Staff was not opposed to looking at changing the policy, but it would require more careful thought in terms of how to craft it and what other good models were available. They did not feel it was wise to include it in this Code Tune-up Project. It had not been on their radar as a problem that needed to be fixed. Staff understood the Commission felt strongly that they look at it.
  - Since insurance agents did call the City and ask about the rebuilding policy, there may be options the City could consider that would satisfy the Commission's desire to address bad building decisions of the past. Options being employed by other cities should be explored.
    - The City would never have a voice in whether or not insurance companies had to pay property owners for rebuilding, because it involved a private contract between the business and consumer.
  - The urgency of this Tune-up Project was based on the timing of the funding for the consultants work on this Code project and the Residential Design Standards project,

which would end in June 2011. The consultants' scope included the final draft of the Code. The deadline did not apply to actual adoption of the changes.
    - The intent was to move these Code amendments forward, even while the Residential Design Standards project was still going because that project would require many of the tools being created in this project. The community was more interested in the Residential Design Standards, but the tune up was the foundation for that.
    - The City would not necessarily need to wait 2 years to return to this policy issue, but some things could not be addressed right now and continue moving at the pace required. There were more controversial issues that staff had not foreseen tackling.
- Amortization of Nonconforming Uses. This proposal would create a process whereby the City could discontinue a use in the future. Some land uses were not compatible and some were actually detrimental to the community. Staff hoped to adopt the amortization of nonconforming uses tool so the City could prevent certain uses from continuing if necessary.
    - Staff was working with the City Attorney to differentiate between high and low impact uses. Studying uses now would give the City the opportunity to evaluate whether some uses were in the right location for the long term, and amortizing could help create the desired vision for various neighborhoods.
        - This policy change would create the framework for the future; not identify specific properties the City would want to discontinue at this time. Several sites in the city were noted where amortizing nonconforming uses could be a beneficial tool.
    - Guidelines and controls would need to be written into the amortization tool beyond just high or low impact to protect against overly aggressive application of the policy.
        - Current draft language distinguished between high and low impact. The tool would not apply to uses not negatively impacting surrounding properties, such as a floral shop in a neighborhood.
        - Once high impact nonconforming uses were identified, Council would consider a list of criteria when determining an amortization schedule. The idea was to provide some sort of fairness for the property owner. The value of the property and improvements and how long it had been nonconforming would be considered to see if a property owner had an opportunity to recoup their investment. Negative impacts on surrounding properties and the fact that it was nonconforming would also be considered. Council would then develop an amortization schedule accordingly, such that the use in question would terminate on a certain date.
        - As written, Council would direct the Planning Director to evaluate and identify high and low impact uses. There would be both staff and then Commission level review. If property owners were not satisfied, they would also be able to take the matter before Council. With three levels of decision makers, including the elected Council, abuse was highly unlikely.
    - This action was not considered an imminent domain issue and did not require compensation to be made because the City Zoning Code authorized the action.
        - Once the amortization schedule ended, a legal nonconforming use would become to a violation of the Zoning Code.
        - Theoretically the owner could leave the property vacant to spite the City, but that was not expected nor was that the policy's intent, although it was the owner's prerogative.
    - Council was unlikely to invoke this power unless there was a huge neighborhood outcry. As elected officials, Council would be held responsible for whatever decision they made on this. Amortization also had to be initiated by Council.

- As written, the policy did not set a minimum or maximum amortization schedule, but it would probably start with approximately a 5-year period. This timeframe would extend into the following Council election, so the new Council would be addressing the issue.
  - It was unlikely that a property owner would wait until the end of a schedule to choose an alternative use.
- This tool is being used elsewhere in the country.
- This tool would be used in extreme situations where there really was a public outcry and was just another parameter that could be set on certain uses not considered appropriate. This was a big hammer and hopefully would be used sparingly, if at all.
  - It would be effective as a threat; something that could be used in an egregious high-impact situation. The City might not actually have to use it, but it could prompt conversation to work out problems.

MMC Chapter 19.900 Land Use Applications.

- 19.904 Community Service Uses (CSU) and 19.907 Downtown Design Review were being moved, but not revised, as well as all the sub-applications under 19.910 Residential Dwellings. Director's Determination 19.903 was being expanded to enable a formal determination for other citizens' requests, such as whether a use was similar to those allowed outright.
- **Chair Klein** questioned why the City even had a CSU since it essentially put nonconforming uses in an area where they should not necessarily exist otherwise. The City looked at nonconforming uses as being parks and churches and schools, etc. They should either be allowed or not allowed in an area. A CSU had put a church in the City's industrial area.
  - Staff would be considering eliminating the CSU designation and making them a type of conditional use since essentially CSUs are a type of conditional use. This would allow things to be specifically identified in the Code. It was unusual to have a Community Service section in the Code; most other cities had this type of use as a conditional use.
- Conditional use loss of rights. Staff had proposed not continuing conditional uses into perpetuity; if the use changed or was discontinued for 3 years, those conditional use rights would be lost. Staff was now proposing a modification to exempt loss of rights for conditional uses that were residential in nature.
  - A possible unanticipated consequence of broadly applying loss of use rights would be the negative impact to uses where the structure and use were very much intertwined. Specifically, residential uses that are designed to be houses or duplexes that could not easily become something else. If one side of a duplex that was a conditional use in a residential zone remained unoccupied for 3 years, the owner would not lose his rights to the duplex
  - In contrast, a commercial building could have a conditional use one day and an outright allowed use another day. It was a much easier transition.
- Type II variance allowances. Staff was proposing another Type II variance procedure that limits what one could do as a Type II variance and would allow smaller types of variances to be approved at the staff level.

MMC Chapter 19.1000 Review Procedures

- Land Use Approval expiration dates. Staff sought feedback about the new language.
- Updates to referral/notice procedures. Newspaper notices were no longer the best way to communicate with the public in every case, and staff wanted the flexibility to use different tools. Newspaper notices might still be used at times, but would no longer be required. The proposal required different sign notifications and using more current technology to get the

word out. Currently, sign postings were not required for Type II applications, so neighbors would be noticed by mail, but someone walking by who lived just outside the notice range would never know about the application.

The Commission and staff discussed the four primary policy topics of concern with these key comments:

MMC Chapter 19.1000 Type II Variance Allowances; Variances to front yard setbacks

- The subcommittee reviewed staff's proposal for a 25% Type II variance with a minimum front yard setback of 15 ft. Properties that already had a minimum setback of 15 ft, like in the R2 Zone, would not be eligible for a Type II variance, only those zoned R10, R7, R5, and R3 Zones that would potentially have a 20 ft setback. That was to address the issue of keeping a setback that would reduce some of the opposition the City received on sidewalk projects, while still allowing someone to build a set of stairs if it was routed out to Code.
  - The Commission consented to the proposed changes.

MMC Chapter 19.1000 Review Procedures; Land Use Approval expiration dates

- The subcommittee and staff reviewed the new language and approach to having approvals expire. Most approvals involve building permits so the proposed approach was as follows:
  - Approvals involving building permits must be obtained and paid for within 2 years, along with System Development Charges (SDCs), etc. Final certification of occupancy must be obtained within 4 years. A process would provide for a 2-year extension; however, a project that required no building permit, could apply for a 4-year extension. Multiple extensions would be available.
    - Partitions and historical use exceptions were projects that do not require a building permit.
    - If no extension was approved, the approval would expire and the developer would have to start over.
    - Staff hoped this approach would be clear and objective, rather than trying to determine substantial completion.
- The objective was not to force someone to abandon a project that was half built, but to ensure that a project was built under the conditions of its review, and that the project did not outlive its permit.
- Within the first 2 to 4 years, applicants would not have to prove nothing had changed, but when applying for an extension, the City could require additional information if conditions had changed, such as traffic or environmental protections.
  - Staff clarified for Mr. Whistler in the audience that if an applicant was working furiously and approaching the 4-year certificate of occupancy deadline, hopefully they would be managing their project well enough to have asked for an extension in advance of that time period.
  - Unlimited extensions were available, provided the applicant was showing progress toward completion of the project.
  - If an applicant neglected to apply for an extension and let the land use permit expire, technically, he would have to start over. The City wanted to promote good project management and reduce the staff time required to remind citizens to take care of their applications. With this as a policy applying across the board, it would become part of the routine and be consistent.
  - The extension process would be fairly straightforward, but applicants still needed to go through it and show that the conditions were still relevant.
  - The limits would all be defined in the approval documents. The proposed timeframes

were not particularly stringent compared to other jurisdictions.

- The City tended not to deal with professional builders, but with citizens doing their own applications, which was why they did not want to be overly stringent. They wanted to work with people toward getting their projects done.

MMC Chapter 19.900 Land Use Application; Conditional Use Loss of Rights:

- With residential now out of the picture, 3 years seemed like a long time for an existing conditional use to sit unused or abandoned.
  - Staff was open to adjusting the time frame. Ranges of 1 to 3 years were used in other cities.
- In some instances, the City had approved a conditional use related to the changing circumstances in a neighborhood, but it was never intended to be a long-term use and was not a good fit for the neighborhood once the changes were complete. Having the conditional use lapse after 1 year made sense in that regard.
- The neighborhood surrounding a property with a 20- to 30-year-old conditional use might have changed in that time, resulting in a conditional use that was no longer appropriate.
  - One year seemed aggressive, almost like waiting in prey.
- If a business closed and was seeking financing to reopen, would it be considered unused? Maybe a definition needed to be created for what "out of business" meant.
  - A business license or mail receipt could indicate a business was not abandoned.
- A conditional use was attached to the property not the ownership.
- If a conditional use expired, business owners could always come before the Commission to request a new conditional use allowance.
  - If a business were seeking financing to reopen and did not know whether they would be granted a new conditional use, it might impact their ability to obtain financing.
- What determined the expiration of a conditional use? A definition should be established and written into the policy.
  - It was not just someone closing their doors due to a family tragedy. Someone would have to actually give up a lease, move out of the premises or stop doing business.
  - A Director's Determination might come into play in such situations to evaluate the facts of a specific case.
- The Commission agreed 2 years abandonment should be an adequate timeframe for a conditional use to expire. That timeframe could be re-evaluated if needed.

MMC Chapter 19.800 Nonconforming Uses & Development; Amortization of nonconforming uses:

- It was possible that this policy would never come into play, but it would be good to have a "hammer." Council members had been hesitant to enforce even smaller issues.

The Commission and staff addressed additional questions regarding the proposed Tune-up Project as follows:

MMC Chapter 19.905.5 Conditions of Approval; Limiting Conditional Uses. The list of limitations was good as a default, but the subcommittee believed having the flexibility to limit the duration and transferability in selected cases should be considered. Classic Memories and Sweet Pea Daycare were cited as examples. The Commission should have the option; it would not necessarily be used with any regularity (6.2 Page 7). Discussion was as follows:

- The policy related to businesses in permanent structures. They would be asking someone to come in and operate a specific kind of business for a limited time. What if the business became very successful supplying products or services in the community, and then the 5

years ended? That business would have helped develop the neighborhood, would they now be kicked out?

- If the archery business went away, the City would not want that space vacant. Until South Downtown was developed, the City would want something operating in that space. The City would approve a business coming in, but maybe only for 5 years, because then the City would be building something else.
  - Nothing said a business could not come back, or that the City could not consider some type of extension application. The limitations would provide a useful tool in selected transitional situations. For example, using some open lots for sports fields for a couple of years could work with the understanding that the site would be developed eventually.
- If limitations on duration and transferability were applied to conditional uses, they should also be applied to use exceptions, CSUs, and to the provision of nonconforming structures that could only house a nonconforming use. If legally acceptable, the limitations needed to be consistent across the board and should not be applied only to conditional uses.
- **Mr. Hall** stated that legally, things could be designated as temporary uses; most Codes did this. It was not typical to see temporary uses associated with a conditional use. A conditional use allowed uses the City wanted to have, but enable the City to have some control over their numbers or location.
  - He advised separating the idea of "temporary use" from the concept of "conditional use", and discussing what they wanted to have as temporary versus conditional uses.
  - Policy-wise, it put people in a really tough spot, because a conditional use was a completely discretionary decision on behalf of the City. They would be allowing people to run a business in a location for x amount of time, but then discontinue it at the end of that time.
- There were times the Commission wanted to impose a limited time conditional use as opposed to imposing a bunch of additional conditions in terms of what was built, etc. It was sort of a trade off: the Commission would not require that the business do some things, but they would also sunset the use at some point.
  - Something similar was done with the Sweet Pea Daycare with regard to transferability, not necessarily a time limit on the use; it went with the ownership. If the business were sold, the conditional use would no longer be allowed.
  - The transferability was a related limit because it would give the City the freedom to intervene when a business was no longer profitable.
  - The point was that the policy would be impacting profitable businesses that employed people, perhaps bringing people into downtown, and then tossing them to the side due to an imposed time limit on the use.
- **Mr. Hall** clarified that the proposal would apply to new businesses being established. As a policy item, a better way to guide what went in might be limiting the permitted uses, not creating some sort of a transitional zone.
- The City had many transitional areas where a vision existed for something different, but did not want to stop people from having going concerns until the City got closer to that vision.
  - A conditional use was not an outright allowed use; it was sort of a matter of grace.
- **Mr. Hall** noted that once the policy was approved, it would probably be on the same footing as a permitted use in most places. Applicants would have to modify it, return and revisit their assumptions, but it was presumed that as long as they were modifying within certain bounds it would be permitted.
  - The conditional use was not usually something unwanted in the community. If the City wanted to limit what was coming in, they might want to limit the use on the front end versus allowing a bunch of uses not consistent with the City's vision, and then basically

keep those people in limbo for the time period.

- Ideally, the City would rezone and make some current conditional uses outright permitted uses, but so many Code projects were in the queue that revisiting the lists of conditional uses could be five years from now. Something needed to be put in place in the interim, while all the transition was going on around light rail and everything.
  - Someone could apply right now for a new business on property the City did not want to leave vacant and unused, but the City would not want to commit to having something that could stay for 20 years.
- If someone came in and bought those blocks now and built something that was permitable now, what could be done in the future?
  - That was a different scenario. If someone wanted to rent the archery shop and put in something else, instead of having it sit vacant for the next 5 years, the City wanted them to know up front that 5 years from now that would not be there anymore.
  - That meant that the renter would be dictating the end use of an area. The market would drive what the value of a given property would be as well as who the inevitable occupants of that area would be, regardless of who was in that structure currently.
    - The City would have a hard time telling someone they wanted their business and wanted them to work there for 5 years, even though they really did not like the cut of their jib, but after 5 years the City had bigger and grander plans. It was not going to work.
    - At the end of 5 years, if the City was not prepared to move on that site and do something different with it, were there legal ramifications if the renter had to move out and wanted assurances that the new development would go in?
  - These were all arguments that might come up in a specific context. The discussion regarded having a tool that might be used on limited occasions, not for something that was a routine part of every conditional use.
- **Mr. Hall** inquired how such limitations would be structured. It would require populating some kind of list of temporary uses, separate from conditional uses. It engendered arbitrary decisions. Creating any objective criteria would be difficult if the City just said they could limit any conditional use to 5 years if they believed they did not want the business around.
  - A list of temporary uses would be a written out transition policy. Certain uses would be allowed, but only for 5 years; other uses consistent with the City's future vision would be allowed on a conditional and permitted basis. Another category of uses could be created, but it would be difficult to determine how to go about applying them.
- On 6.2 Page 7, 19.905.5 Conditions of Approval listed limiting the height, hours, days, place, and manner of operation. Why not add "K. limiting the duration of the use"?
  - **Mr. Hall** explained that an option existed to limit the duration of the use; it was a discretionary approval.
  - If the City approved the use, they should not have to approve it forever. Perhaps the City did not have to, but that ought to be enumerated so applicants know and it was on the record.
- Not having amortization of nonconforming uses would create more concern about conditional use matters that came in.
  - That was the whole point of having the policy; if the City was skeptical of a use, perhaps it should not necessarily be brought into the picture anyway.
- This provision would not be used that way, but when the City had a vision. The City had planners and hired expensive consultants for a reason, to develop a vision and provide direction for the City. By the same token, they did not want spaces sitting empty for 6 months, 6 years, or 12 years, while that vision came to fruition.

- This policy would provide the City a tool on conditional uses. For instance, the downtown had odd restrictions; some of it was office and some commercial. The City might want to allow office use in commercial zones and commercial uses in office zones.
- **Ms. Mangle** noted the language stated, "not limited to." If this were an important issue on a specific application, the Commission was not limited from pursuing the time limitation if everyone agreed the conditional use would not be approved without that kind of limitation, which was what had happened with Sweet Pea Daycare.
  - Having these limitations might be a bad idea. If there was that much concern for the use, the Commission probably should not be approving it. If the City ever had to follow through on one of these, it would be very difficult to enforce.
- The Classic Memories downtown location was a use exception, which was a similar concept in some ways. Classic Memories had billed it as a transitional use, claiming they did not expect to be there long-term and intended to retire soon. The Commission had stopped short of incorporating that as a condition, but it did weigh into the decision. They did move out and had another location in the City.
- **Chair Klein** added another consideration was that 20 years from now a different Commission might apply this policy to every application and kick people out after 12 months.
  - He did not think this was a good policy. He understood it and the intent was great, but it was scary. The Commission was already working to get rid of holes written in the Code 30 years ago.
- Excluding this policy would not preclude the Commission from creating some transitional uses; approval criteria would be needed however.
- **Ms. Mangle** believed the issue being raised was important, but including such language in this Code section would only address conditional uses; it was a broader issue to consider. This was something to put on the list of Code fixes to keep discussing.
  - Conditional use, CSU, use exception; it was all the same question and it should be an available tool for all of them.
  - All those tools were not available to everybody now. The use exception criteria would not help something be a transitional use. Limiting it did not help, if a building was an office use, it had to be used as office and could not as a bowling alley.
- The struggle with downtown was how the City could allow for temporary uses that the City did not necessarily want to see long term and empower decision makers with the right tools to make a decision without being completely arbitrary or anticipating something that will never happen.
  - The issue was when that temporary use became successful, when it became the thing that drew people into downtown, would the City have to shut it down? Would the business have to do another land use process for something that was wildly successful?
- The occupant of that building or business would be at the whim of the Commission on a decision that was made 5 years prior and possibly by a previous Commission. That was not good policy.
  - That occupant could then move 2 blocks elsewhere, leaving that spot vacant.
- The suggested policy involved a 5- or 7-year window, not 6 months like more traditional temporary uses. There were businesses who would apply for that. It depended on the cost of real estate, their business plan, etc.
- Having a different Commission would be an issue for the business occupying the building under a time limit. When applying to have their permit continued for another 5 years, those on the Commission who were open to the idea and approved the first permit might have changed. The new Commission might be totally against it. This could mean that the conditions had changed, but it also might mean that the decision makers' personalities had

changed too.

- This issue regarded economic development and redevelopment, and how the City could both control and foster that growth, which was something the City needed to be thinking about.
  - Graham's Building, for example, had trouble keeping full occupancy. There were probably some uses that could have been good transitional uses the City might not want to see when South Downtown was redone.
- This policy might make it harder to fill a vacant building. A tenant looking for a place to rent would probably not want to sign a lease that gave the landlord all the power after a certain number of years, and where the option to extend the lease was unclear. If it was sitting vacant but that power was in the Commission's hands, it was the same type of deal.
  - The market would drive the market. The fact was that if a business was not successful, it would go away.
- Throwing a discretionary criterion into the conditional use mix might not be legal to impose. What would happen in 5 years? There were reasons laws created nonconforming uses, which the City could probably get around.
- **Ms. Mangle** noted that no conditional uses existed downtown, just limited uses, permitted uses, or prohibited uses. The issue was appropriate for downtown, but the conditional use would not be a tool used to address it, because there was a use exception, or continuation of a nonconforming use. Limited use was allowed outright.
- The Commission consented to not include the limitations policy.

Purpose Statement.
Mr. Hall explained that purpose statements at the beginning of each Code section were not approval criteria unless the Code actually stated an application had to comply with the purpose statements. Milwaukie's Code did not say that, so purpose statements would not be a determining factor in approval or denial. The idea was that each of the criteria was consistent with that purpose statement, and then in the instance where it was not clear how the criterion applied to a particular application; the purpose statement would give the Commission direction in interpreting the criteria. If a couple outcomes were possible and it was not clear how they fell, the Commission would go toward the one supported by the purpose statement.

- Upon appeal, the Land Use Board of Appeals (LUBA) would review the consistency with purpose statements if someone challenged the City's interpretation of its own Code. The City could get remanded if they interpreted it in a way not consistent with a purpose statement.
- The purpose statement was not an approval criterion where the Commission would say a whole application was inconsistent with the purpose. The actual numbered criterion was still needed.

Commissioner Batey noted the purpose statement for the Variance Chapter was very permissive and read, "Variances may be granted for the purpose of fostering reinvestment in existing buildings, allowing for creative infill development solutions, avoiding environmental impact, and/or precluding an economic taking of property." An applicant might believe they had a creative infill development solution, but the Commission denies the variance because the criteria are not met. In cases where the City had very subjective criteria and a very permissive purpose statement, how might a lawyer use that purpose statement to challenge a Commission decision? The City was going from a very restrictive variance in the existing Code to very permissive variance criteria, and even a very permissive purpose statement. She was concerned about this particular purpose statement

- **Mr. Hall** responded that subjective criteria enabled the Commission to use its discretion.

When a City decision was appealed, there would be a presumption that the City's interpretation of its own Code was correct, unless it was clearly irrational. In the case of subjective approval criteria of the variance process, the City would be given a wide latitude. Yes, an attorney could argue that the purpose was to provide creative infill and spend a lot of time trying to prove that a proposal was creative infill, but that would not get them to the concept that the City's interpretation was completely inconsistent with the Code.

Staff reviewed the next steps for the Code Tune-up Project as indicated in the PowerPoint handout with these additional comments:

- Ms. Mangle's presentation to City Council on November 16 would discuss this project in the context of other Code changes, including the Residential Design Standards Project, Natural Resource Overlay Project, the Parking Chapter Amendments, and the multi-year Code overhaul project staff was entertaining and the direction they wanted to go.
- Any other input, comments, or questions should be sent to staff prior to December 10, when staff would submit the third and final draft to DLCD. The City was required to notify DLCD and provide the draft amendments 45 days in advance of any hearings on the Code Tune-up Project. December 10 was the deadline for submission to get a January 25, 2011 Commission hearing. In the interim, staff would describe the actual proposed amendments in more detail to Council, providing a deeper overview of the key policy changes to get them familiar with what they would eventually review at a public hearing.
- Staff recommended that the Commissioners watch or attend that Council meeting. The Commission had worked hard on the Code Tune-up Project, and staff would be asking for representatives to speak to Council at the hearing stage, likely in March. Having the Commission represented would also show that this was not just a staff project, but did involve the Commission in a real way.

7.0 Planning Department Other Business/Updates

Ms. Mangle reported that staff had done the land use and development retraining. It was well attended with 13 to 14 people, including someone from every Neighborhood Development Association (NDA), and two who were not associated with NDAs. Staff had received some good feedback and she hoped to do some training once a year. She would email the links to the website where all the training materials were posted to all who attended as well as to the NDA Chairs, Land Use Committees (LUCs) and the Commissioners. They had also talked about the Code Tune-up Project at the training and all the draft chapters were now available online.

- She found that videotaping Commission meetings, particularly hearings, was looking more feasible than she thought. The City's contract with Willamette Falls Television, who did the Council meetings, had some capacity to add some Commission meetings. She had thought it was going to be a bigger budget concern.
    - The video would be posted to the website but not broadcast on television. Videotaping would improve the audio recording and address the issues they had been having. It had not been determined whether Ms. Pinyerd would still attend meetings. With a permanent video record, typed meeting minutes may not be needed. LUBA did not require minutes, only a record of decisions. Other cities and Milwaukie's Council still needed written minutes even though they had recordings. How all the pieces would fit was open for discussion.
- In doing more worksessions and having meetings run late, she sought feedback from the Commission about how to make the most of their time. One way to address the issue would be to move the meetings up. The Commission could change the current meeting format by starting the meetings earlier to hold worksessions first and then the regular meeting at 7:00 p.m. for example. It depended how the Commission wanted to do their work. She was open

to making adjustments if the group was interested, and she welcomed any suggestions.

Discussion points from the Commission included:
- Commissioners' work schedules did not allow for an earlier start time on a regular basis.
- As enticing as it was to move the time frame earlier, there was the potential to just fill that time and still continue until 10:00 p.m. Until changes were made in how the Commissioners deliberated and made decisions, the meetings would continue to be lengthy.
- Chair Klein stated he was agreeable to videotaping the meetings.

8.0 Planning Commission Discussion Items

Chair Klein reported that a decision had been made on the '76 Station's LED sign in municipal court. The Applicant was found guilty and sentencing was to occur on May 4, 2011.

Ms. Mangle added that the business owner was also following up on the Commission's recommendation and invitation to return with proposed Code language to address that situation.
- The citation was due to the fact that the owner had not addressed any of the issues by the deadline. It was a separate issue from what the Commission heard, and unfortunately had turned out to be a messy way to handle it.

Mr. Marquardt explained that the sentencing in May was with the understanding that the owner and City were still pursuing options as far as Code changes. The judge had not wanted to step into the middle of that and had not looked at the letter prior to the case because he did not want to bias himself. The letter really had nothing to do with guilt or innocence, but was more informational.

Ms. Mangle confirmed that Clearwire had a Type II application and a tentative notice of decision for approval had been mailed out the previous week. It would not come before the Commission unless it was appealed.
- She reported that the Jackson Street Improvement Project was delayed one month. The shelters had been delayed because the company selected to provide them went out of business. The Design and Landmarks Committee selected another shelter last week, but it would not be installed by the time Jackson St opened on December 5, 2010. Installation would be probably in January or February 2011. Jackson St was still an active construction area as landscaping was still being installed. Bus service would begin on December 5th but the street could open to all traffic sooner than that.

Chair Klein noted that it would be interesting to see what the numbers were on bus layovers and times and what existed before versus what would be there when this opened. Jackson St was being sold as a place where there would be less bus layovers and more parking spaces, etc.

Ms. Mangle confirmed there would still be two buses laying over on 21st Ave.

Commissioner Batey noted that Commissioner Gamba had been quoted in the newspaper about the Lake Oswego bridge. She had not known that the railroad had said no to a pedestrian crossing over the railroad bridge.

Chair Klein responded to the visiting student that light rail would be coming to Milwaukie in 2015. There would be a park & ride at Tacoma St in addition to the one currently at Park Ave.

9.0 Forecast for Future Meetings:

November 23, 2010 1. Tentatively Cancelled

December 14, 2010 1. Worksession: Wastewater Master Plan

Meeting adjourned at 9:27 p.m.

Respectfully submitted,

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

Jeff Klein, Chair