AGENDA

MILWAUKIE PLANNING COMMISSION
Tuesday August 10, 2010, 6:30 PM

MILWAUKIE CITY HALL CONFERENCE ROOM
10722 SE MAIN STREET

A light dinner will be provided for the Commissioners.

1.0 Call to Order - Procedural Matters

2.0 Planning Commission Minutes – Motion Needed

2.1 June 8, 2010

3.0 Information Items

4.0 Audience Participation – This is an opportunity for the public to comment on any item not on the agenda

5.0 Public Hearings – Public hearings will follow the procedure listed on reverse

6.0 Worksession Items

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

7.0 Planning Department Other Business/Updates

8.0 Planning Commission Discussion Items – This is an opportunity for comment or discussion for items not on the agenda.

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

Milwaukie Planning Commission Statement

The Planning Commission serves as an advisory body to, and a resource for, the City Council in land use matters. In this capacity, the mission of the Planning Commission is to articulate the Community's values and commitment to socially and environmentally responsible uses of its resources as reflected in the Comprehensive Plan

1. **PROCEDURAL MATTERS.** If you wish to speak at this meeting, please fill out a yellow card and give to planning staff. Please turn off all personal communication devices during meeting. For background information on agenda items, call the Planning Department at 503-786-7600 or email planning@ci.milwaukie.or.us. Thank You.

2. **PLANNING COMMISSION MINUTES.** Approved PC Minutes can be found on the City website at www.cityofmilwaukie.org

3. **CITY COUNCIL MINUTES** City Council Minutes can be found on the City website at www.cityofmilwaukie.org

4. **FORECAST FOR FUTURE MEETING.** These items are tentatively scheduled, but may be rescheduled prior to the meeting date. Please contact staff with any questions you may have.

5. **TME LIMIT POLICY.** The Commission intends to end each meeting by 10:00pm. The Planning Commission will pause discussion of agenda items at 9:45pm to discuss whether to continue the agenda item to a future date or finish the agenda item.

Public Hearing Procedure

Those who wish to testify should come to the front podium, state his or her name and address for the record, and remain at the podium until the Chairperson has asked if there are any questions from the Commissioners.

1. **STAFF REPORT.** Each hearing starts with a brief review of the staff report by staff. The report lists the criteria for the land use action being considered, as well as a recommended decision with reasons for that recommendation.

2. **CORRESPONDENCE.** Staff will report any verbal or written correspondence that has been received since the Commission was presented with its meeting packet.

3. **APPLICANT'S PRESENTATION.**

4. **PUBLIC TESTIMONY IN SUPPORT.** Testimony from those in favor of the application.

5. **NEUTRAL PUBLIC TESTIMONY.** Comments or questions from interested persons who are neither in favor of nor opposed to the application.

6. **PUBLIC TESTIMONY IN OPPOSITION.** Testimony from those in opposition to the application.

7. **QUESTIONS FROM COMMISSIONERS.** The commission will have the opportunity to ask for clarification from staff, the applicant, or those who have already testified.

8. **REBUTTAL TESTIMONY FROM APPLICANT.** After all public testimony, the commission will take rebuttal testimony from the applicant.

9. **CLOSING OF PUBLIC HEARING.** The Chairperson will close the public portion of the hearing. The Commission will then enter into deliberation. From this point in the hearing the Commission will not receive any additional testimony from the audience, but may ask questions of anyone who has testified.

10. **COMMISSION DISCUSSION AND ACTION.** It is the Commission's intention to make a decision this evening on each issue on the agenda. Planning Commission decisions may be appealed to the City Council. If you wish to appeal a decision, please contact the Planning Department for information on the procedures and fees involved.

11. **MEETING CONTINUANCE.** Prior to the close of the first public hearing, *any person* may request an opportunity to present additional information at another time. If there is such a request, the Planning Commission will either continue the public hearing to a date certain, or leave the record open for at least seven days for additional written evidence, argument, or testimony. The Planning Commission may ask the applicant to consider granting an extension of the 120-day time period for making a decision if a delay in making a decision could impact the ability of the City to take final action on the application, including resolution of all local appeals.

The City of Milwaukie will make reasonable accommodation for people with disabilities. Please notify us no less than five (5) business days prior to the meeting.

Milwaukie Planning Commission:

Jeff Klein, Chair
Nick Harris, Vice Chair
Lisa Batey
Teresa Bresaw
Scott Churchill
Chris Wilson
Mark Gamba

Planning Department Staff:

Katie Mangle, Planning Director
Susan Shanks, Senior Planner
Brett Kelver, Associate Planner
Ryan Marquardt, Associate Planner
Li Alligood, Assistant Planner
Alicia Stoutenburg, Administrative Specialist II
Paula Pinyerd, Hearings Reporter

CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Public Safety Building: Community Room
3200 SE Harrison Street
TUESDAY, June 8, 2010
6:30 PM

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

STAFF PRESENT
Katie Mangle, Planning Director
Brett Kelver, Associate Planner

COMMISSIONERS ABSENT
Teresa Bresaw

Natural Resources Overlay Advisory Group/Other Attendees:
Brad Smith
Christopher Burkett
Don Jost
Teri Melnichuk
Jason Smith on behalf of Blount
Dave Green

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.

Katie Mangle, Planning Director, announced that Mark Gamba was appointed to the Commission by City Council last week.

Commissioner Gamba said he had been in Milwaukie 8 years and lives in the Historic Milwaukie district. He is a commercial photographer with a small gallery. He was interested in sustainability and moving planning in that direction.

Chair Klein welcomed Commissioner Gamba.

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: Joint Session with Natural Resources Overlay Advisory Group
Staff Person: Brett Kelver

Brett Kelver, Associate Planner, explained that this was an opportunity for the Planning Commission and the Natural Resources Advisory Group (Advisory Group) to informally discuss the proposed Code and maps. The Natural Resources Overlay project did not require inventing everything from scratch because some rules were already in place in the zoning Code. The Water Quality Resource (WQR) regulations that covered riparian areas were already in the Code, but the Habitat Conservation Areas (HCAs) were new. The purpose of the project was to meld these items together. He believed everyone was on the same page about wanting to find ways for the Code to encourage, not restrict, restoration and enhancement efforts, while also balancing property owner rights with protections and clarifying that such work is not mandated. The process needed to be manageable in terms of administration, fees, etc. Along with HCA rules proposed and modeled by Metro, objective and clear standards are needed so that every development situation did not necessarily have to come to the Commission for consideration. The new Code should encourage restoration work and enhancement of areas while ensuring that work was being done according to standards.

The Commission, Advisory Group, and staff reviewed the overall goals of the project and discussed the following key issues, also listed on 6.1 Page 2 of the packet, with these key discussion points:

<u>Natural Resource Management Plans</u>: No permits are required in the current Code for standard landscaping maintenance, planting of native plants, and removal of noxious vegetation or invasive non-native plants. These plans applied to those with more long-term ideas that might involve removing trees. Pathways or footbridges were examples of improvements that cause a disturbance beyond what is generally allowed outright. How should the Code be structured so people can do such things? What criteria should be considered?

- The group briefly discussed the construction management plan, subsequent disturbance, and mitigation involved with the Oak Grove Water Reclamation Facility upgrade project which involved the adjacent Rivervilla Park. Key comments included:
  - There were 2 trees proposed for removal and 5 trees protected. Mitigation included planting 47 trees and 1,333 shrubs with associated ground cover. The mitigation was too dense and would result in the same issues that occurred at Reed College. Mitigation would occur outside the actual impact zone.
  - The project was under County authority and the County has different HCA requirements than the City. The planting plan for restoration of Rivervilla Park was developed before the HCA application went through, so the County did not apply their mitigation table, but based requirements on the applicant's planting plans.
- The issue regarded having reasonable mitigation levels.
  - In a development context, the same results at the facility would not be achieved using the mitigation table in the draft Code.
- Managing natural resources onsite should not be connected to any one particular table. The property owner should be allowed to propose a tree removal and mitigation plan for their property. This would eliminate using an arbitrary figure from a table or a one-size fits all restoration for the community.
- Putting Natural Resource Management Plans in a different category with separate criteria and processes applying to development was an approach unique to Milwaukie.
  - If mitigation led to an untenable outcome, a discretionary review option provided that approved mitigation could vary in the number and size of trees and shrubs.
- Most cities use the same Metro source document. The mitigation requirements seemed high.
- The mitigation table did not apply to the maintenance process, so thinning of vegetation in an HCA would not require mitigation.
- The Natural Resource Management Plans did not address ongoing maintenance. If a plan is submitted, the City should want to see how that plan will be managed over time.
- Residential applications:
  - A subdivision is 4 or more lots, and must go to the Commission for approval. Page 18 of 32 in the draft Code pushed to put HCA or WQR areas in its own tract. The Centex Maplewood subdivision south of Lake Rd had 2 wetland areas that were separated into 2 unbuildable lots and designated as natural resource areas. It would be different if a stream went through the property and touched each lot.

- The mitigation table was a starting point, but the developer could propose another formula since the project would go to the Commission.
- HCAs in backyards tend to be mowed lawns or gardens. Setting aside the HCA as a separate tract owned by the Home Owners Association (HOA) generally meant it would be disturbed less.
- An alternative was to establish setbacks from the edge of the resource as is typical in partitions rather than subdivisions, which have enough room to adjust lots and density.
- In subdivision development, much of the review is done at the time of lot creation, so when lots were later sold, the house footprint was already designed with tracts set aside for HCAs and to allow for restoration.
    - Under MCC Subsection 19.322.4, the first exempted item was a building site in a phased development because the applicant had previously met the building permit requirements for that building site. The developer will have created the lots, built roads, set up a mitigation plan, and completed restoration, so the individual lots could be sold and building permits obtained for individual homes on the designated building envelope, as long as they did not further disturb the WQR or HCA. The lots were shovel-ready because the developer had completed the preliminary work and the building envelopes were on the plat map.
    - The subdivision process was a larger disturbance, so it was assumed that tree removal was needed with mitigation addressed during lot creation. When the sites were sold, they had prior approval to remove trees, with mitigation already completed during the subdivision process.

- Milwaukie has many big lots that were dividable. If an owner partitioned a lot but did no physical development, the lot creation was just on paper and did not trigger mitigation requirements. However, the buyer of that lot would have to complete mitigation and restoration requirements when they begin development.
    - Any required frontage improvements at the time of partition often would not involve an HCA or removal of trees. If trees had to be removed to build a house, some mitigation would be needed.
- Milwaukie had many vacant lots that could be subdivided. A number of pockets could be subdivided into 3 or 4 lots, but most would be just simple partitions.
- HCA issues could be addressed during partition and subdivision processes so that each individual lot did not have to go through the process again. It was easier to deal with

mitigation when dealing with the larger original lot than with each individual residential lot.

- The Code addressed cluster development and variances requested on lot size in an effort to minimize the impact. If the Code restricted development, taking away rights and making it harder for owners to deal with their property, something had to be given back.
  - The model Code dealt with cluster development and allowed for onsite and offsite transfer of development rights. Offsite transfers would not be included in the subject Code because Milwaukie was not set up to handle it; only the onsite transfer of development rights would be included.
- During the subdivision process, the owner could be encouraged to configure the lots around the HCA, allowing more flexibility than normally given a property owner. The total density would not change, but the unbuildable HCA tract was designated and the developer could have flexibility in lot width, depth, and size.
  - The draft Code allowed for up to 30% reduction in lot size, width, and depth. If in a zone that allowed 7,000 sq ft lots, a 30% reduction to 4,900 sq ft lots would still comply. Otherwise, a lot would be lost and the community would not benefit from protection of a natural resource area. The lot size reduction provided flexibility to allow some clustering in order to preserve some open space. The community benefited from preservation of high quality natural resources without landowners losing development potential.
- Policy decisions regarded:
  - How much flexibility is acceptable in a single-family zone without increasing density.
  - What housing types should be allowed on small lots while protecting open space and natural resources.
  - What was the right reduction percentage to allow a balance between how small of a lot was acceptable when considering the single-family zones and other development types.
  - The best lot size reduction percentage had to be determined to allow a balance between more flexibility to preserve resources and acceptable housing types to neighbors.
  - Milwaukie gave the neighborhoods a lot of power through Land Use Committees (LUCs). If lot sizes were reduced and multi-family housing developed, how would it move through the neighborhood process?

- The group briefly discussed how a parcel owned by the Wetland Conservancy was developed through certain negotiations and allowed for smaller lots within the HCA.
- In a subdivision with an HCA, owners had smaller lots but benefited from the developed greenway. Private natural areas could be held by the HOA with a restrictive covenant and conservation easement.
    - Options could be discussed and something added to give the Commission the right to consider other appropriate maintenance arrangements as proposed by the applicant.

- Steps discussed in protecting natural resources:
    - Keep development out of a natural resource area, which failed long term because often people see it as private property, which it is, to do with as they wished. This tended to degrade the habitat value. It might be appropriate in some situations, but this was the least desirable of the protection steps.
    - Establish an open area tract; a good option but ownership could be a problem.
        - Deeding the open space to an HOA to be held in common meant having several different owners, practically guaranteeing that the property would not be managed and maintained, especially for its natural resource value.
            - An HOA might work if held by a legal corporation. However, homeowners typically have no idea what to do, so the natural resource degrades. Organizations such as the Johnson Creek Watershed Council could work with HOAs to develop a natural resource management plan. It was a positive idea, but very difficult.
        - Deeding to a land trust, such as the Three Rivers Land Conservancy, put the open space in the hands of professional land management, which would provide resource protection long term.
        - The best option is to let the developer continue to own the open space and dispose of it as they see fit. That decision could be made privately as a commercial transfer to the government or as a donation and done fairly simply.
            - It is more difficult to recapture and manage the property with multiple owners when in an HOA or held in common.

- How should the City encourage owners to set aside and protect HCAs? Incentives are needed so HCAs stayed as they are.
    - An owner had a stack of bureaucracy to go through to ensure he was compensated for developing a property while maintaining the existing ecosystem. The idea was to

recognize larger natural resources, and although a donation could not be forced, a greater density in a subdivision might allow the owner to get more out of it than expected, causing him to donate the HCA tract.

- It might be a good policy to discourage or not accept land subdivisions to be held in common by an HOA and encourage one owner. If the land is not donated, it was still possible to sell it to Metro, the City, or another organization for conservation purposes.
    - There was still value to the original owner/developer who could negotiate a fair market value with an organization wanting to acquire and manage the natural resource. Governmental organizations hire professional appraisers to determine a fair market price.

- Ownership of separate natural resource tracts should be identified to distinguish it from lots intended for sale. A natural resource tract is defined as a private natural area held by the owner or HOA by a restrictive covenant and/or conservation easement. The lot had to be called out separately.
    - After the lot is registered as an easement with the County, the HCA tract is unbuildable. It is shown on the plat map as a separate tract with an easement and held by the owner or HOA. Ownership could transfer, but the property would not become buildable. It could be held by an HOA, but not by the owners in common, which should be made clear.
    - Although undevelopable, an HCA lot adds valuable open space to surrounding properties.
- The advantage of having one owner keep the property is that the owner is usually motivated to maintain it.
    - When a property is conservancy-owned, such as Elk Rock Island, it can result in not being maintained. Once land is transferred into a conglomerate, it can become a weed pile depending on how it is managed.
        - It is difficult for conservation organizations to have small lots scattered throughout the city that are not part of a larger system. Owners like to dedicate property for small pocket parks, but they were hard to maintain unless attached to a larger tract. Groups are now looking at areas such as Milwaukie as a whole and seeking park areas adjacent to other park areas that can be combined.
- Isolated open areas have value, even if in disrepair, as habitat for migrating birds, butterflies, and animals, and as an interface between grasslands and wetlands.
    - A property could have adequate management and proper stewardship by a homeowner with a vested interest.

- One point of contact was preferred to ownership in common.

- Staff has received complaints from homeowners in HOAs, asking who is supposed to take care of a common area that was falling into disrepair. Some people liked overgrown areas with blackberry bushes for safety reasons because they prevented people from climbing a fence, for example.
- Commercial application. What could be done differently?
  - Mitigation is still required whether a subdivision was commercial or residential. An easement may not necessarily be required to protect the mitigation area, but it could be included in the Code as a standard.
  - If a new industrial building on a site required restoration to mitigate impact, the mitigation would take place on the site. Long-term protection was not currently included as a Code standard.
  - The Panattoni site was discussed as a development that required a lot of mitigation in the WQR area. Conditions on the project included a 3-year requirement to maintain the plants.
  - There is not much difference between residential and commercial mitigation improvements when a footprint impacts HCAs. The draft Code has some flexibility to allow reduced setbacks or other adjustments to avoid the HCA area or to reduce the impact by using the mitigation table. These options for flexibility are provided through clear and objective standards or by going to the Commission for a Variance Request. Each property in the HCA, except for WQR areas, was allowed some area of disturbance. WQR areas were stricter.
  - Issues regarding Harmony Road Mini-Storage were discussed. The original proposal put the water treatment along Harmony Rd, which then required fill in the back because the project encroached into the creek banks.
    - There should be flexibility to keep the development close to Harmony Rd and place water treatment in the riparian area at the back of the site.
    - There was also interesting habitat, including oak trees and an uncommon wildflower called dogbane. The first thing the developer did was cut down the large oaks and sequoias. No natural resources management plan existed at the time. It did not appear that the developer was working in good faith with the resource value of the site. It was proactive development without any review.

<u>Tree Removal</u>

- Trees not in WQR areas could be cut down. The City restricted tree removal in WQR areas approximately 50 ft from a stream and in the right-of-way. No other type of tree protection exists in the City for private property. The proposed Code would add tree removal protection to HCAs.
- The original HCA maps were completed by taking pictures from planes. While it seemed that anything green and bushy was designated an HCA, more analysis had been done.
    - HCAs did include areas of blackberry bushes and other invasive species, as well as the street in front of the Waldorf School. Communities should use common sense to determine which HCAs were supposed to be on the map.
    - The current Code included a table of water features and distances in terms of protected buffers. HCAs are based more on inventory, but did consider proximities to streams or water features. The resource decreased in value moving away from the water feature.
- Efforts were being made to correct the original GIS maps. A methodology was outlined in the draft that provided a process for map correction if a designation was made in error.
- Most map correction processes were an attempt by private owners to minimize the HCA boundary on a property. Metro was unable to answer or address why more areas of Dave Green's property and the school district property did not have a broader HCA area mapped south of Willow St.
- WQR regarded only slope and distance from the stream or wetland and had nothing to do with vegetation. HCAs mostly involve low structure vegetation and the distance from a protected water feature even on developed land.
- The HCA process did not appear to be a land grab by Metro, and Metro was not trying to purchase the HCAs. Riparian, habitat, and other natural resource protections are called out in State Planning Goal 5 under the Oregon Administrative Rules (OARs) this process is something all local Oregon governments go through. Metro is doing this on behalf of the region.
    - The HCA program has a regulatory aspect, which the draft Code addresses, as well as a property acquisition program and public education. This project is really about how Milwaukie can save the salmon, and talk to developers about being softer on the land. There was a regulatory aspect, especially with the timeline Metro is requiring of the City, but staff is focusing on natural resource management in a meaningful, responsive way that does not make the City the bad guy.
- The tree canopy in Milwaukie is thinning. No City tree ordinance regulated tree cutting on private property unless the tree is in a WQR area or right-of-way. The Advisory Committee

had discussed the role that shade, woody debris, streams, and the flood plain play in natural resource quality, and noted that in WQR areas it extended to tree removal as well. They discussed size of trees, safety concerns about a tree that might fall, and identifying how a downed tree in a resource area could be removed without causing earth disturbances.

- In WQR areas, even invasive trees had to be reviewed by the City before removal. The Advisory Group discussed what size limits of invasive trees could be removed.

- Ongoing Issues 6.1 Page 4, Item 8 discussed the removal of vegetation to preserve view corridors. The current Code had a potential for conflict between WQRs areas and Willamette Greenway(WG) areas, in which views to and from the river were a consideration.
  - Should the WG and its consideration of view corridors trump major pruning or removal of trees in WQR or HCA areas?
  - Currently, the Code is set up so that WG protections or maintenance trumps WQR area rules, so a tree could be removed in a WQR area to maintain a view corridor. This seemed backwards because a WQR area should perhaps weigh more than a right or requirement to provide a view on the WG. The WG and downtown were the only areas with view corridor protection.
    - View corridors to the river were important in the development of the Kellogg Wastewater Treatment Plant. The river was a natural, calming resource and nice to see. It would not be good to have regulations change to forbid trimming bushes that obscure the river.
    - At Riverfront Park, the desire was to preserve some area as more of a natural habitat to provide a direct link between water and upland habitat, including tall trees for birds to nest in.
  - Some view shed should be allowed, but an entire area of trees should not be cut.
- A Type I Review required an arborist's confirmation. The City does not have an arborist on staff, but has a list of arborists on call.
  - Occasionally, the City expects a homeowner requesting a tree removal permit in the right-of-way to hire an arborist to demonstrate that the criteria have been met. Removing trees in the right-of-way required information provided by an arborist about the tree's health and whether it presents a hazard. City staff could hire an arborist to confirm findings by the homeowner's arborist.
  - Perhaps a fee could be structured for the application to cover the City's cost to hire an arborist. Arborists carry liability insurance in case a tree falls over for various reasons after inspection. The City is aware of the liability issue and also carries insurance.

- Anyone living in an area with a view of the river would not want to clear cut their lot and would maintain the health of the trees.
- No conflicts exist regarding landscape planning and ongoing maintenance in WQR areas.
- Currently, trees in the WQR area could be pruned or cut to maintain the view corridor. Should that be different? The issue was about developers being able to prune or cut existing trees in a WQR that affect the view corridor. What degree of pruning should be allowed? Light pruning was different than removing a substantial amount of canopy.
- The conflict regarded new development. New view corridors could be created in the WG but other sections of the Code protected trees within the WQR.
    - When one buys a lot screened from the river that is what they get.
- An ongoing concern for one homeowner was that old trees could not be removed without planting others or it would mess up the landscape design. Regulations said that landscape maintenance was exempt, but that was a big topic. Most of the trees were non-native, so if an Oregon Ash fell down, was it treated differently than a magnolia tree?
    - If a tree is not on the plant list as an invasive, nuisance, or prohibited plant, then removing it even if non-native would require some review. If the tree had fallen and could be removed without disturbing the earth, then it was exempt.
    - Currently, significant tree pruning in the right-of-way was defined as more than 20% of the tree canopy or more than 10% of its root area. The draft Code's definition should be similar to the current definition.
    - Ongoing maintenance should not require significant pruning because no more than 20% of the canopy should be removed, so it would continue to be exempt.
    - Current WQR area rules said that if a tree was not an immediate danger to life and safety or a prohibited or nuisance tree, then it needed some degree of review before being removed from a designated area. The City wanted an arborist to determine if a tree was at the end of its practical life.
    - An ongoing maintenance plan should be crafted to identify trees that should be removed, which could be done with a minimal level of review.
- Exempt trees should also include trees removed or thinned as part of the Natural Resource Management Plan. Staff clarified that a general exemption exists for all activities that occur under a Natural Resource Management Plan.
    - The description of invasive nuisance trees was too limiting. A better term was any non-native tree. It was more important to conserve native communities, which are assemblages of trees and shrubs that tend to be very unique associations. Non-native

trees disrupt the native communities tremendously. A non-native tree inappropriate to a site should not be protected by institutional language that is contrary to good stewardship. Anything non-native should be able to be removed at any time, particularly if conservation is the focus.

- The phrase "limit of 3 or fewer" did not identify tree size or size of property. A percentage of canopy cover was a better. If there were 3 trees that created significant cover for the creek, it would affect water temperature if all 3 were suddenly removed.
  - Most Codes set a 6- to 8-inch minimum caliper to identify trees.
- Any non-native tree, even if not invasive, impacts the ecological canopy. All vegetation and trees provide stormwater, water retention, and shade benefits. Cutting down a 30-in Sequoia removes a lot of tree cover. The regulations were originally about water quality, not about blending in habitat. The question was whether to be stricter in protecting native trees. There were some nuances to consider, but the intent was to have a more flexible process.
- One goal is to identify what can be done quickly and easily when a property owner calls staff, so that staff can just look at the Code to decide what action to take. More nuances added complexity, requiring a review, site visit, etc., to evaluate coverage and canopy. If it met certain criteria, it was exempt, but beyond that more time and resources were required to evaluate the situation.
- If new trees were planted to replace a sick tree and the sick tree is removed, no additional mitigation is required. The Advisory Group discussed requiring 1:1 replacement or a ratio of inches diameter for mitigation, unless the owner justified why it should not be done, such as a tree being planted before removal of the sick tree.
  - This does not exist in the current Code for trees in the right-of-way. Every time a tree removal permit is approved, staff could not require the planting of a new tree.
- Was it possible to create a procedure that allowed for a painless tree removal process for the conscientious homeowner, with the government being a helpful entity while still drawing a hard line to stop the person wanting to clear cut their land?
  - That spirit had motivated the Natural Resource Management Plan.
  - It was difficult to know which person was requesting the tree removal permit. If the initial process did not require a lot of time or cost and was done well, staff should be able to establish which type of person they were working with.
  - Another key was whether staff could use common sense when the property owner requests a permit, or have to defer to a rigid law. Common sense and knowledge during the review process from the beginning would be very critical.

- In writing code, legal limits also exist regarding how much "common sense" staff can use. Staff was trying to craft review processes while working within the confines of legal abilities to be discretionary. If it was non-discretionary so that the same rules applied to everyone, then the process could be cheap and easy with checklists. But highly discretionary items come to the Commission for a decision. Staff spent a lot of time trying to figure out how to get more done with the Type I and Type II Reviews. Developing clear and objective criteria for simple things like tree permits and using more "common sense" would be very useful and supported by staff. However, State law requires public notice be made with regard to discretionary decisions to allow for public comments.

- Draft 2 included a placeholder for feedback about language still needed for tree removal permits within HCAs and WQR areas before preparing the hearing draft.
  - A landowner with an approved Natural Resource Management Plan in place could do a number of things, including removing or replacing trees because that plan's actions are exempt.
- Should the Type I application be expanded or was it a good starting place for the hearing draft?
  - A Type I application was a one-page application with a 7- to 10-day turnaround. Staff could make a decision in the office if an applicant provided good information with clear photos and an arborist's report. If staff disagreed with what is presented, they go to the site.
- If not expensive, it would benefit the City and landowners to require that all properties along stream corridors have a Natural Resource Management Plan in place. It would be nice to have the Watershed Council working with a group of property owners along a stream corridor to consider the resource as a whole.
- It was important to know how the City did outreach to get the best management practices to property owners along HCAs and WQR areas. That communication pushes the landowners where desired without having to drop the hammer.
- The City is very supportive and appreciative of the new North Clackamas Urban Watershed Council, but more support would have more impact.
- Under the "Exempt" section was the suggestion to allow removal of downed trees if it could be done without further disturbing the earth. If a tree that went down into a creek, removing the tree would be allowed as an exempt activity as long as there was no excavation, stump grinding, or backhoe work to get it out.

Ms. Mangle concluded by saying that staff was still working to incorporate feedback into the draft Code. She invited everyone to email any specific feedback to Mr. Kelver. Worksession would be held with the Commission in August to which the Advisory Group would be invited. Hopefully public hearings would be held in late fall.

- An open house is planned for the larger community, but not just about the Code. Staff hoped to expand the event to include broader management and stewardship practices.
- A firm date has not been set for the final draft. Draft 3 should be ready by the end of July. Draft 4 would be the hearing draft presented in August/September.

7.0 Planning Department Other Business/Updates – None

8.0 Planning Commission Discussion Items – None

9.0 Forecast for Future Meetings:

June 22, 2010	1. Public Hearing: WG-10-01 19th Ave Replat & Duplex
July 13, 2010	1. Public Hearing: WQR-10-02, CSU-10-06 Pond House Deck *tentative*
	2. Worksession: Review Procedures Code Project briefing part 2

Ms. Mangle reviewed the future meetings. Staff wanted to ensure a quorum for the June 22nd meeting; Commissioner Batey would not participate and Vice Chair Harris would be out of town.

- The July 13th public hearing regarding the replacement of the Pond House deck was now certain and no longer tentative.
- She confirmed that the rezoned property on Lake Rd had submitted their land partition and were talking with the City Engineering Department about whether they could save the tree by designing the street around it. The applicant was willing to do so, but was determining if it was technically feasible because the tree's health was important. The project was moving forward.

Vice Chair Harris offered to adjust his vacation time to accommodate attending the June 22nd meeting if needed.

Meeting adjourned at 8:58 p.m.

Respectfully submitted,

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

_____

Jeff Klein, Chair

MILWAUKIE
Dogwood City of the West

To: **Planning Commission**

From: **Katie Mangle, Planning Director** KM

Bill Monahan, City Attorney

Date: **July 30, 2010, for August 10, 2010, Worksession**

Subject: **Planning Commission Effectiveness**

ACTION REQUESTED

None. This is for discussion only.

BACKGROUND INFORMATION

Ongoing training is important to bring new members up to speed and allow experienced members to reflect on how hearings have been conducted. At this meeting, we will do both – first, a more organized "training" from Bill Monahan, City Attorney, on what each Commissioner needs to know about making land use decisions during a public hearing. Then, we will take time to discuss how these lessons have worked during past decisions, and generally discuss how the Commission can be most effective.

During the discussion of making land use decisions, Mr. Monahan will provide an overview of the basics of holding a land use hearing:

- Due Process in quasi-judicial land use hearings
- Evidence, rebuttal, and the record
- The Commission as impartial tribunal - declarations of conflict of interest or bias, ex parte contacts
- Raise it or waive it – the importance of the script
- Hearing conduct and roles of participants
- Reaching a decision - the basis of a decision is the approval criteria
- Hearing continuation and options for keeping the record open
- The decision - findings, how findings must address the criteria, and appeal rights
- Conditions of approval

- The 120 day rule
- Exactions – why we need them, and how we are limited in requiring them

This overview will lead into a conversation amongst the members on how individual commissioners can be most effective in your role, and how we as a team can make the Commission most effective. In preparing for the meeting, please review the attached material and think about:

- Why do you volunteer your time for the Milwaukie Planning Commission? How do you represent the City? The community?
- What is the perception you want members of the public to have about the Commission?
- What is the image the Planning Commission should project about the City?
- Are there aspects of hearings held over the past year that made you uncomfortable? Why?
- How could/ should we measure the success or effectiveness of the Commission?
- How could staff better support the Commission in your role as a key decision-maker for the City?
- What resources or support would like to have to be more effective?

ATTACHMENTS

Attachments are provided only to the Planning Commission unless noted as being attached. All material is available for viewing upon request.

1. Planning Commission Land Use Hearing Substance and Procedure Training - Prepared by Bill Monahan
2. Milwaukie Planning Commissioner Tips and Reminders – Prepared by Katie Mangle, drawing on excerpts from Adrianne Brockman's Oregon APA Planning Commissioner Training Series, 2007
3. How to be a Highly Effective Commissioner – Unknown source, likely prepared by the American Planning Association for general distribution.
4. Bias in Land Use Decisions – Prepared by the Stayton, OR Planning Department for its Planning Commission

PLANNING COMMISSION OR CITY COUNCIL LAND USE HEARING SUBSTANCE AND PROCEDURE TRAINING

Presented by:

Bill Monahan

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PLANNING COMMISSION or CITY COUNCIL LAND USE HEARING SUBSTANCE AND PROCEDURE

I. HEARING PROCEDURES

A. General Background.

The source of most procedural requirements for land use hearings in Oregon is the 1972 case Fasano v. Board of Commissioners of Washington County, a case involving a request for a zone change to accommodate a trailer park. The case is significant because in it the Supreme Court first stated the principle that parties to a quasi-judicial proceeding[1] are entitled to have the hearing conducted in conformance with Constitutional procedural due process, and that in order to achieve due process, the hearing tribunal must adhere to certain standards for the conduct of the hearing, reaching its decision, and reduce that decision to writing. Although the Fasano decision has been refined over the years, it remains good law and is the beginning of any discussion of Oregon land use hearing procedures. The elements of procedural due process are: the opportunity to present and rebut evidence, the right to a decision based on the record and supported by adequate findings, and the right to an impartial tribunal.

B. The Elements of Due Process.

1. The Opportunity to Present and Rebut Evidence.

Every party to a quasi-judicial hearing has the right to present evidence and to rebut all the evidence presented by the other parties. These rights generate several significant procedural requirements for the conduct of hearings. What constitutes "evidence" will be discussed below.

The opportunity to present evidence may be preserved by the hearing body even though limits may be set on the manner of presentation. Such limits might include time limits on oral presentations, requiring submittal of certain materials in writing before the hearing, or setting a minimum time before the hearing in which written evidence must be submitted.

The opportunity to rebut evidence creates more complicated procedural requirements. If a party is to rebut evidence, it follows that that party must (a) know what the evidence is and (b) have an opportunity to speak or to submit written materials after the evidence is introduced.

[1] Quasi-judicial proceedings are generally defined as involving either only a few parties or affecting relatively small tracts of land. Contrast this with legislative matters, which are broad in scope, affecting large tracts of land or a large number of people. Examples of quasi-judicial proceedings are conditional use permits and subdivisions; examples of legislative proceedings are text amendments and major general plan amendments.

a. Knowing What the Evidence Is.

The parties will, if they are present at the hearing, know what oral testimony is introduced and what written exhibits are received. But there are ways in which evidence from outside the hearing room may enter into the decision-maker's deliberations, and unless the parties know what this evidence is and are given a chance to refute or rebut it, the decision may be overturned as procedurally flawed.

The two basic means by which so-called "external" evidence may enter into a decision are by means of ex parte contacts and site visits. For purposes of procedural due process, it is important to remember that this external evidence is not necessarily bad; it simply must be placed on the record, out in the open, to allow every interested person to know of its existence and to attempt to refute it.

b. Opportunity to Rebut.

The evidence is now out in the open. The tribunal must now ensure that those adversely affected by the evidence have a chance to refute it. This means they must be given a chance to speak or submit written rebuttal after the evidence is introduced. If the applicant, for example, presents its case, and opponents of the proposal present new information, the applicant must then be given a chance to rebut that information. Two areas for caution: first, this back-and-forth introduction of new evidence/rebuttal between the sides need not go on indefinitely; the hearing tribunal may set limits on the introduction of new material. Second, once the public hearing is closed, no new material must be introduced or accepted, or it will necessitate re-opening the hearing. The tribunal must refrain from asking questions after the close of the hearing to prevent potential re-opening of the hearing for rebuttal purposes. Questions of staff which do not generate new evidence are permitted even after the hearing is closed. ORS 197.763 requires that any new evidence presented at the hearing in support of an application gives an automatic right to continuance to anyone who requests it. The tribunal may limit the continued hearing to consider only those new issues.

2. The Record.

The parties have now introduced everything they wish to introduce and the hearing is closed. What is the "record" of the hearing on which the decision must be based? The record is significant in that it is the document which may be reviewed on appeal should an appeal occur.

The record includes all the evidence "placed before" the tribunal during the hearing, including maps, photographs and all written items submitted. The record also includes the oral testimony. Generally, the minutes suffice to preserve the oral testimony but in cases where the accuracy of the minutes is disputed or they are not sufficiently complete, a full transcript may be prepared. Again, ORS 197.763 contains changes in procedures relating to the record. Before the hearing is closed, any party can request that the record remain open for seven days. This delays the final decision.

3. "Evidence" in Land Use Cases.

Somewhere in this "record" is the evidence which must be the basis of the tribunal's decision. "Evidence" in land use cases is not necessarily "evidence" which would be acceptable in a court of law, since the rules are much more relaxed in land use settings. For example, witnesses may or may not be sworn in to testify in land use cases, and even hearsay evidence can be accepted.

The rule of thumb to determine whether the evidence in the record is adequate to support the decision reached is the standard used in administrative law: is it the kind of evidence on which reasonable persons rely in the conduct of their own affairs? The test is basic reliability or trustworthiness of the evidence. This obviously allows a great deal of discretion on the part of the hearing body to determine whether the evidence should be accepted.

a. "Substantial" Evidence.

The decision must not only be based on reliable evidence in the record, but the quantity of that evidence must be substantial. The evidence need not be uncontroverted or even voluminous. There may be some inconsistencies in the evidence presented. The key issue is whether the evidence in support of the decision, when viewed in light of any contrary evidence, was still sufficient that a reasonable person could rely on it. The reviewing body on appeal will not disturb a decision based on substantial evidence even if there is conflicting evidence in the record, as long as the findings are sufficient as to why certain evidence was believed sufficient.

b. Procedures of Admitting Evidence.

If doubts as to whether evidence is reliable or relevant arise during the hearing (i.e., lots of hearsay, signed petitions introduced that night), the best procedure is to admit the evidence. If another party objects, the evidence may still be accepted and a decision on whether to admit it into the record can be made at the time the order is written (the hearing body will have to give direction on this issue before adoption of an order). There may be evidence which for some reason is not advisable to admit. The attorney will offer direction in such event.

4. ORS 197.763 - "Raise It or Waive It"

The provisions of ORS 197.763 require local governments to give detailed notice and follow certain procedural requirements at quasi-judicial land use hearings. In exchange for compliance with these notice and procedure requirements, the local government receives the benefit of a demand placed on participants that calls for all issues to be raised during the local proceedings. Any issues not raised at the local proceedings are waived if the matter is taken up on appeal to LUBA. The benefit to the City from this "raise it or waive it" provision is that fewer LUBA appeals are remanded back to the local level to address new issues raised for the first time at LUBA.

a. **Notice of hearing**: The notice of hearing must explain the nature of the application and the proposed use or uses which could be authorized, and it must list the criteria that apply to the application. The notice must also include a warning that failure to raise an issue with sufficient specificity to give the local decision maker an opportunity to respond to that issue precludes LUBA appeal based on that issue. Furthermore, the notice of hearing must contain a general explanation of procedure for the conduct of the hearing and presentation of evidence, including an explanation of the right to request a continuance if new evidence in support of an application is submitted.

b. **Distribution of notice**: ORS 197.763 requires notice to property owners within 100 feet and to a recognized neighborhood organization whose boundaries include the site.

c. **Staff report**: Any staff report used at the hearing shall be available at least seven days prior to the hearing.

d. **Statement by chair at commencement of hearing:** At the beginning of the hearing, a statement must be made that enumerates the applicable criteria, directs participants to address their testimony and evidence to applicable criteria, and states that "failure to raise an issue with sufficient specificity to afford the decision maker and the parties an adequate opportunity to respond to the issues precludes appeal to LUBA based on that issue."

e. **Continuances:** As described in the notice of hearing, any party can request a continuance if additional evidence in support of an application is received after the notice of hearing is given. In most instances, a continuance will not be warranted if the applicant limits its presentation at the hearing to a discussion of the evidence previously submitted and rebuttal of evidence presented by opponents.

f. **Leaving the record open**: Unless a continuance has been granted, any participant may request that the record remain open for at least seven days after the hearing. If new issues are raised when additional evidence is submitted during this period, the record may need to be reopened to allow rebuttal.

g. **Compliance with procedures:** Failure to comply with the notice and procedure requirements of ORS 197.763 constitutes procedural error, which will result in reversal or remand if the error caused **prejudice** to the petitioner's substantial rights. However, if the petitioner had the opportunity to object to the procedural error before the local governing body but failed to do so, then the error cannot be assigned as grounds for reversal or remand.

An additional consequence of failure to comply with the notice and procedure requirements of ORS 197.763 is that such failure invalidates the "raise it or waive it" concept. That is, if the local body fails to comply with the notice and

procedure requirements, a petitioner will be allowed to raise issues on appeal before LUBA that were not raised before the local governing body.

h. **Conclusion:** Local governments must pay careful attention to the notice and procedure requirements of ORS 197.763 to make sure that cases on appeal to LUBA are not reversed or remanded and that the beneficial limiting effects of the "raise it or waive it" provisions are not lost.

5. Impartial Tribunal.

The parties to a quasi-judicial land use proceeding have a right to what is known as an "impartial tribunal." The hearing body acts as judge or arbitrator and must therefore be free of personal interest or bias. In the course of a particular proceeding, certain situations may arise that challenge the ability of the hearings body to make a decision in an impartial and uninterested manner. These situations include ex parte contacts, site visits, conflicts of interest, and bias. The following sections identify when these situations arise and examine the procedural requirements that should be followed to avoid having a decision reversed or remanded on appeal.

a. Ex parte Contacts

i. What are they?

Ex parte contacts are those contacts by a party on a fact in issue under circumstances which do not involve all parties to the proceeding. Note the three essential elements; unless all three are present, you have not been involved in an ex parte contact. Ex parte contacts can be made orally when the other side is not present, or they can be in the form of written information that the other side does not receive.

Although it is important for public officials to communicate with their constituents, ex-parte communications should be discouraged in favor of the public hearing process. If ex parte contacts do occur, they do not necessarily invalidate the impartial hearings procedure. The procedure outlined below is designed to ensure that a record is made to establish that the hearing process and the members of the hearing body were not biased.

ii. What should you do?

The most important thing to remember is this: If an ex parte contact occurs, put it on the record at the very next hearing on the matter, before any testimony is received and before any other proceedings on the matter take place. Describe the substance of the contact and announce the right of the interested person to rebut the substance of the communication. This must be done as early as possible during the proceedings, at the first hearing after the contact occurs. The court of appeals has held that failure to make such disclosures are not simply procedural errors, but can result in remand of the case to the City.

b. Site Visits

At the beginning of each quasi-judicial hearing, the Chairman asks if any Commissioner/Councilor has visited the site of the proposal. Why?

Closely associated with ex parte contacts, the issue of site visits is important because a Commissioner/Councilor may have had an opportunity to gain information outside of the public hearing which may or may not otherwise be part of the record. Since the decision must be based on the evidence in the record, it becomes important that the visit, and any information gained which does not appear in the record, must be put on the record if the decision is to be valid. The key to solving the problem created by a site visit is to MAKE A DISCLOSURE. As always, the disclosure should be made as early in the process as possible so as to afford the applicant or other interested parties a chance to rebut the evidence is necessary.

c. Conflicts of Interest

Generally, conflicts of interest are defined as situations in which you, as a public official deliberating in a quasi-judicial proceeding, have an actual or potential financial interest in the matter before you. The legislature defines actual and potential conflicts of interest in ORS Chapter 244, the Ethics Rules.

i. Actual and Potential Conflicts:

An **actual** conflict of interest is defined as any action or any decision or recommendation by a person acting in a capacity as a public official. The effect of which **"would"** be to the private pecuniary benefit or detriment of the person or the person's relative[2] or any business with which the person or a relative of the person is associated. (ORS 244.020(1) A **potential conflict of interest** is one that **"could"** be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated. (ORS 244.020(11)

ii. What should you do?

The statute describes rules for public officials who have actual or potential conflicts of interest. Commissioners/Councilors must PUBLICLY ANNOUNCE **potential** and **actual** conflicts of interest, and

[2] A **"relative"** is defined to include the spouse of the public official, the domestic partner of the public official, and any children, siblings, spouses of siblings, or parents of the public official or of the public official's spouse, any individual for whom the public official has a legal support obligation, or any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment. (ORS 244.020(14)

in the case of an ACTUAL CONFLICT, MUST REFRAIN FROM PARTICIPATING IN DEBATE ON THE ISSUE OR FROM VOTING ON THE ISSUE. An announcement of the nature of a conflict of interest needs to be made on each occasion the conflict of interest is met; that is, one time during a meeting. If the matter giving rise to the conflict of interest is raised at another meeting, the disclosure must be made again at that meeting.

Note: ORS 244.135 specifies how Planning Commission members must handle conflicts. The rules are somewhat different from the general requirements noted above. A member of a planning commission shall not participate in any commission proceeding or action in which any of the following has a direct or substantial financial interest:

a. the member or the spouse, brother, sister, child, parent, father-in-law, mother-in-law of the member;
b. any business in which the member is then serving or has served within the previous two years;
c. any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.

These specific rules that apply to planning commission members take precedent over the general requirements described in this document. ORS 244.135 (2) also requires that a planning commission member disclose any actual or potential interest at the meeting of the commission where the action is being taken.

There is an exception to the voting restriction if a public official's vote is necessary to meet a requirement of a minimum number of votes to take official action. In this situation, the official is eligible to vote, but still may not participate in any discussion or debate on the issue. We do not recommend utilizing this exception because it creates an appearance of impropriety when a Commissioner/Councilor votes on an issue that would provide a financial benefit to the Commissioner/Councilor or a relative of the Commissioner/Councilor.

To recapitulate the conflict of interest definitions and requirements: A situation that **could** provide private pecuniary benefit is a **potential** conflict of interest. The public official must only **publicly announce** the potential conflict prior to participating in debate and voting on the issue. In contrast, a situation that **would** provide private pecuniary benefit is an **actual** conflict of interest. The public official must **publicly announce** the actual conflict, **refrain from debate and not vote** on the issue.

It is important to remember that even the appearance of an actual or potential conflict of interest is what counts. You need not actually believe you are in a conflict of interest situation to give rise to your duty to disclose it as discussed above. IF THERE IS ANY DOUBT IN YOUR MIND, MAKE THE DISCLOSURE. Again, the reason this is important is that we are required to

provide an impartial tribunal for deciding the quasi-judicial matters, which come before us.

d. Personal Bias

Personal bias exists when a Commissioner/Councilor is prevented from rendering a fair judgment in a matter because of an acquaintance or relationship with someone or something involved in the case. Personal bias differs from conflicts of interest because there is no potential for financial gain, but only the existence of a relationship.

In situations where there is even the appearance of potential bias, you must DISCLOSE the nature of the bias and state whether or not in your opinion it requires disqualification. There is no requirement of disqualification in situations involving simple bias, but Commissioners/Councilors should disqualify themselves if the bias prevents them from being fair and impartial in the matter.

6 Burden of Proof.

The proponent of change has the burden of proving that all elements necessary to grant the proposed change are met. The greater the change proposed, the greater will be the burden of proof. The applicant's job is to submit substantial evidence, which shows that the proposal complies with each of the applicable criteria.

II. FINDINGS

Another requirement which originates with the Fasano decision and which has been expanded and refined considerably since then is the requirement that the decision made is supported by findings which in turn are based on the record. There are three essential requirements for findings: that they are based on the record, be facts and not conclusions, and be relevant to and address all relevant criteria for the decision. Findings are significant in that often they are the means by which an appeal is either avoided or won.

A. Findings Must be Based on the Record.

It is not possible to generate findings from thin air. Although this seems to go without saying, it is important to remember that somewhere in the transcript of the proceeding or in written materials submitted, all the evidence necessary to draw findings must be recorded. Surprisingly, failure to meet this test is one of the most common bases for overturning a decision on appeal. Generally, the applicant bears the burden of introducing the majority of evidence, but in cases where staff or the hearing body disagrees with the applicant, evidence supporting denial must appear in the record. Staff generally supplies the necessary data and, at times, opponents of the request may also produce evidence. The hearing body's role is to both ensure that the decision made is supported by the evidence heard, and to get into the record items of personal knowledge which are relevant and form all or a part of the basis for a decision (i.e., ex parte contacts or site visits).

B. Findings are Facts, not Conclusions.

Proper findings constitute an outline of the evidence in the record. They are not conclusions or opinions; these are drawn from the facts in order to arrive at a decision. In other words, the facts are stated and conclusions are drawn as to how the facts in the record relate to the criteria for the decision. It is necessary to state what the relevant criteria are and then to apply the facts proven in the hearing to those criteria. Again, the hearing body's role is really one of understanding how the evidence produced at the hearing relates to the criteria for the decision, and making certain that the record supports the decision made. It is up to the preparer of the order to ensure that the findings are legally sufficient once a sound decision is made.

C. Findings Address All Relevant Criteria.

In case of approval of an application, all criteria outlined in the General Plan or Zoning Ordinance are relevant. That means each and every one of them must be addressed in the hearing body's decision and in the findings adopted by the hearing body. In the case of a denial of an application, findings are still required, but a failure of the proposal to meet any criterion will suffice to support the denial. Therefore, findings are only required as to the criterion not met. The hearing body should make clear on a vote to deny an application which criterion (or criteria) is not met by the evidence and why so that appropriate findings can be prepared.

III. THE 120-DAY RULE

ORS 227.179 requires cities to take final action on most quasi-judicial land use applications within 120 days of the date the application was deemed complete. An application is deemed complete on the date it is filed if the application is complete when filed or if staff does not advise the applicant that it was incomplete within 30 days of filing. If staff does advise the applicant that additional materials must be submitted, and the applicant does provide the additional materials, the application is deemed complete when the additional materials are filed. If the City advises the applicant that the application is not complete but the applicant refuses to provide the additional materials, the application is deemed complete 31 days after the application was first filed.

Note: a recent case confirmed that ORS 227.178(4) means what it says, on the 181st day after first being submitted an application is void under certain circumstances. The statute provides that on the 181st day after first being submitted an application is void if the applicant has been notified of the missing information as required under ORS 227.178(2) and has not submitted either: a) all of the missing information, b) some of the missing information and written notice that no other information will be provided, or c) written notice that none of the missing information will be provided. A city cannot continue processing the application after the 181st day.

If the City does not act on the application within 120 days, the applicant may apply to circuit court for a writ of mandamus. ORS 227.179. If the applicant does so, the City loses jurisdiction to make a decision on the application. The court will have sole jurisdiction until it makes its decision. The court may order that the City approve the application. Courts generally are not concerned with land use details, so orders from courts to grant an application normally do not contain detailed conditions of approval.

If the 120-day deadline passes and the applicant does not file a mandamus action in circuit court, the City retains jurisdiction to make a decision. If the City realizes it has missed the deadline, it should still proceed to a decision following normal procedures unless the mandamus proceeding is filed. However, the City may want to speed up the process, to the extent consistent with applicable rules, if it is aware that the 120 deadline is approaching or has passed.

The 120-day rule has a second effect that is often ignored. If the local government does not reach a final decision within 120 days, the applicant is entitled to a partial fee refund (all unexpended fees or deposits of 50 percent of the total of all fees and deposits, whichever is greater). ORS 227.178(8). If the City does not provide a refund within 120 days of the refund request, it may have to pay the applicant's attorney fees. ORS 227.178(9)(c).

IV. CONDITIONS OF APPROVAL

Conditions of approval may be granted under three circumstances:

A. The code expressly allows a condition of approval to be imposed;

B. The application could be denied if the condition of approval is not imposed;

C. The condition of approval assures that applicable criteria or standards will be complied with.

These criteria for granting an approval often overlap. A condition may also be imposed if consented to by the applicant, but the City should normally only seek to impose conditions if they meet at least one of the criteria.

Even if the local ordinance does not expressly authorize conditions of approval, conditions of approval may be imposed if the decision would have to be denied without the condition of approval. For example, if a wall is shown on the application as being 8 feet in height and the code imposes a 6-foot maximum, the application may be approved with a condition that the wall not exceed 6 feet.

Conditions of approval may be imposed to assure compliance with applicable standards or criteria. While applicable criteria and standards will not always require separate conditions of approval, in some cases it will be appropriate to impose conditions to assure compliance with applicable standards. For example, parking requirements may be adjusted if significant trees are preserved. If the City allows the adjusted parking, it may impose a condition of approval requiring that the significant tree be preserved.

ORS 197.522 provides:

> "A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an applicable plan that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval."

This statute was added by the 1999 legislature and has not been extensively interpreted by LUBA or the courts. As written, if appears to require an approval without conditions if consistent with applicable regulations and an approval with conditions if an application cannot be approved without conditions but can be approved with conditions. Finally, it appears to impose an obligation to impose conditions of approval rather than denying an application if the application can be made consistent with applicable standards and criteria through the imposition of the conditions.

V. EXACTIONS: THE *NOLLAN/DOLAN* STANDARD - Approvals, Denials, and Conditions of Approval

A. Introduction

Since *Dolan v. City of Tigard*, 512 US 374 (1994) was decided, local governments have had to deal with the issues raised by *Dolan* and apply *Dolan* to land use applications. Lower court and state court decisions have resulted in substantial clarification of the *Dolan* decision, but the one Supreme Court case that discussed *Dolan* directly has apparently limited the scope of *Dolan*'s applicability. The knowledge gained through the evaluation of the post-*Dolan* court cases and the practical experience gained through the processing of applications in which *Dolan* issues are present allows us to reassess *Dolan* at this time.

Dolan requires that every exaction imposed as a condition of a land approval be related to and roughly proportional to the impact of the development.[3] The government must demonstrate rough

[3] The most common exactions are requirements to dedicate land for rights-of-way and

proportionality based on an individual assessment in each case. All provisions of the code must be interpreted in light of the *Dolan* standard.

The City may, however, deny applications based on a failure to meet established criteria, as long as the criteria do not require an exaction. The City can deny an application if required public services or improvements are not available but cannot deny an application because the applicant failed to provide the required public improvements when the burden of the exaction would significantly exceed the impact of the development.

B. Analysis

1. Every Exaction Must Be Justified by a Rough Proportionality Analysis

A requirement to dedicate right-of-way is an exaction. A requirement to construct public improvements is probably an exaction. A denial of an application is not an exaction. There must be an "essential nexus" between any exaction imposed as a condition of development and the impact of the development, *Nollan v. California Coastal Comm'n*, 483 US 825 (1987).[4] The exaction must be "roughly proportional" to the impact of the development. *Dolan v. City of Tigard*, 512 US 374 (1994). *Dolan* requires "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

Under *Dolan*, every exaction must be justified under the rough proportionality test, with the burden of proof being on the City. LUBA has taken the position that requiring additional right-of-way on a street bordering a development cannot be justified as a matter of course, but must meet the rough proportionality standard. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995). Therefore, even a condition requiring that an applicant dedicate right-of-way for an adjoining street must meet the rough proportionality standard and be based on an individualized evaluation of the traffic impact created by the development.

2. Local Governments May Deny an Application Based on Uniform Standards and Criteria that Do Not Require an Exaction

As recognized by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 US 825 (1987), a local government may deny a request for a land use approval if objective standards regarding the property or the level of services available justify a denial. However, the holding in *Dolan* precludes a denial based on the failure to meet a code requirement if the code requirement requires an exaction and the exaction is disproportionate to the impact of the development. In other words, if the City could not require an exaction as a condition of approval under *Dolan*, it cannot deny the

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requirements to provide on-site or off-site public improvements.

[4] The "essential nexus" requires a relationship between the type of impact and the type of exaction. This test is met if the impact is on the road transportation system and the exaction is a street dedication or improvement. The test is not met if the impact is on the sewer system but the exaction is a street dedication or improvement unrelated to any sewer line.

application on the basis that the applicant did not provide the exaction. However, if the code requires that certain public improvements or services be in place and meet certain standards, *Dolan* does not prevent a denial based on the lack of existing public improvements.

In the case of rights-of-way and street improvements, a requirement that all developments must have direct access to a street that meets City standards would survive a *Dolan* challenge; a requirement that the applicant dedicate right-of-way and improve all adjacent streets so that they meet City standards would not satisfy *Dolan* unless the City could demonstrate that the dedication and improvement are roughly proportional to the traffic impact of the development.

The *Dolan* standard applies in all situations involving exactions. It applies to local streets, to developments with more than one street frontage, to single family residences, and to redevelopment. In the case of redevelopment, the impacts that can be compensated for by an exaction are limited to the increase resulting from the redevelopment.

C. Summary

In deciding land use applications in which dedications or improvements may be an issue, the City should apply the city code in light of the *Dolan* requirements that all exactions must be related to and roughly proportional to the impact of the development and that the rough proportionality evaluation must be based on an individualized assessment. Failure to apply existing code provisions in light of *Dolan* could result in takings claims.

ATTACHMENT 2

Milwaukie Planning Commissioner Tips and Reminders

Preparing for a Hearing

- Read the staff report and ask questions of the staff before the meeting or at the beginning of the meeting. The statutes provide that a communication between a Commissioner and staff is not an ex parte communication.
- Reading the staff report early will alert a Commissioner to a bias or conflict of interest.
- Let staff know if you can not attend a meeting. Staff and applicants spend many hours preparing for a hearing, and time is wasted if it turns out the Commission will not achieve quorum.
    - Additionally, there are consequences for failure to comply with the "120 Day Rule". Staff works very hard, often overtime, to avoid any delays that put the community at risk.

During a Hearing

- **Take Notes on the Pro and Con Evidence**
  It is a good idea to take notes as the testimony is given. The Commission will be required to make a decision based on the facts as applied to the criteria. A Commissioner will be required to make a motion, and it will be helpful if facts can be identified which support the motion. Discussion should follow, and it should be a discussion based on the relevant facts and criteria.

- **Take Notes Regarding Possible Conditions of Approval**
  It is a good idea to note the issues and concerns raised by those in opposition. Often, conditions of approval can be added to make the proposal satisfactory to the residents. Applying conditions helps in making the opponents feel they were heard.

- **Avoid deliberating during testimony.**
  Ask a lot of questions, but avoid sharing your opinions or stating conclusions until the public hearing has been closed. When Commissioners start drawing conclusions based on individual testimony, audience members could draw the conclusion that Commissioners' minds have been made up before all evidence has been heard.

Making Decisions

- **Base your decision on the approval criteria.**
  Each Commissioner is expected to determine the facts; and each member could see the facts differently. The statutes require the decision to be in compliance with the approval criteria in order for it to be approved. The Commissioners do not apply their own opinions and values.

- **Making the Motion**
  "Based on the evidence in the record, I find that the criteria are/ are not satisfied and move the decision be denied / approved / approved with conditions."

Some of the above tips are excerpts from "Quasi-judicial Land Use Decision Making: Parts 1 and 2" by Adrianne Brockman, presented by the Oregon APA Planning Commissioner Training Series, 2007

How to be a Highly Effective Commissioner

Prepare Yourself

- Be regular in your attendance at Commission meetings.
- Be prompt.
- Conduct yourselves in keeping with the extreme importance your decision has to the parties
- If you or one of your family members has a financial interest in the outcome of a case, you must declare that conflict on the record and not participate in the case.
- Information on a case gained outside of the public hearing must be disclosed on the record to provide the opportunity repudiation. This is called "ex-parte contact." Refer questions and phone calls to city staff to avoid ex-parte contacts.
- Drive by the property if you feel it would assist you but be cautious about ex-parte contact with the applicant, neighbors or other parties to the case. ***You are the decision-maker, and your neutrality must be beyond question.***
- Be familiar with the decision criteria for the case. If there is a written staff report, match the facts in the staff report to the decision criteria. Note which criteria need more facts. During the hearing, you may need to solicit testimony from the parties to provide the missing facts.

Be Fair and Respectful

- Listen; ask questions that honor the concerns being shared; do no lead or argue with those testifying. ***You can disagree without being disagreeable.*** Withhold your judgment until all testimony has been given and the record is closed.

Do Your Job as Best You Can

- Be satisfied with all the decision criteria have been addressed before the record is closed.
- When the Chair closes the record, no more public testimony is taken.
- Don't be afraid to make decisions. Putting off a hard decision doesn't make it easier to make.
- Remember which phase of the hearing you're in: keep the deliberation phase separate from the testimony phase.
- Note errors or inconsistencies within the testimony phase and raise those issues in deliberations, not during the testimony.
- The burden of proof to present the case is on the applicant – not the opponents and not on you.

- The record must contain your reasons for choosing a particular outcome. Avoid reaching conclusions for which the parties and staff must guess at what was in your mind.
- In advance of the vote, if you state ***why*** you favor or oppose an application, you can help generate a discussion that is useful, especially for difficult decisions.
- It takes courage to go first in making the motion or speaking out. Remember that and be courteous with each other, *especially* if you disagree.

Support the Process

- Suggest changes if you see the need.
- Criticize each other and staff, I you must, but constructively, not as a personal attack.
- Remember that "opponents" are invited to attend your public hearings. Avoid treating them with hostility.

"P" Stands for Public

- As planners, strive to serve the public interest. This may require that you take an unpopular position.
- Listen to all people, not just to those who fit into the stereotype of "desirable citizens." Worst traits may come out at a public hearing. Angry noisy, rude people aren't necessarily wrong.
- Those who don't speak English well or who are untidy or poorly dressed are not necessarily wrong.
- Give polite attention to everyone and you may hear something useful for the decision.
- You do not need to like everyone in order to give them a fair hearing.
- Keep a sense of perspective.
- Half of the parties in any controversy will disagree with any given position.
- All of the parties want you to ***fair-minded*** and ***objective*** and to guard you ***neutrality***.

Planning Commissioner Training
City of Stayton
March 2, 2010

BIAS

An inherent role of a Planning Commissioner is to vote on motions resulting in decisions by the Planning Commission. In the process of making decisions the possibility of a public official having bias arises.

"Personal bias" is different from "conflict of interest." Conflict of interest relates to financial benefit or avoiding financial detriment.

Personal bias is related to a person being prejudiced for or against a party or an issue to the extent that they cannot make a fair decision on the merits of the case.

For example, as a Planning Commissioner you're sitting as a member of an impartial tribunal regarding a conditional use application and you feel very very strongly about the applicant or the use at that location. You may be so biased in favor or in opposition to the applicant or application that you are not capable of making a fair, impartial judgment. Commissioners who have a bias that stands in the way of a fair and impartial judgment should not participate in the decision.

"Actual bias" means prejudice or prejudgment of the facts to such a degree that a Planning Commissioner is incapable of rendering an objective decision on the merits of the case. If you have an actual bias, you should step down and not participate as a Commissioner. You may participate as a citizen and sit in the audience and testify and submit factual information.

You need not recuse yourself merely because you have knowledge of the facts or know one or more of the applicants or opponents, or even if you have a leaning to one side or the other. It is understood that everyone has biases. A Planning Commissioner is not bound by the same squeaky-clean standards as a Judge in a court of law, but a Commissioner should step down if the Commissioner believes they cannot make a fair decision based on the merits of the application.

As with any land use issue, one of the parties may have a different opinion as to whether a Commissioner is too biased to make a fair decision. If a party that is on the losing side of a decision believes a Commissioner is too biased, that party may appeal the decision to the appeal authority (generally the City Council for Planning Commission decisions). Once all local appeals have been exhausted a party may appeal to the Oregon Land Use Board of Appeals based on bias.

Bias and its infinite gradations are not easy to nail down. As an example, the following is a link to the Land Use Board of Appeals (LUBA) website and a bias case involving City Councilors. http://www.oregon.gov/LUBA/2007Opinions.shtml. Scroll to the month of May in 2007 and see case number 2006-055, 056 and 057, *Woodward v. City of Cottage Grove*.

OREGON REVISED STATUTE (ORS) 227

ORS 227.180(3) explains how to resolve bias from ex-parte contacts (see bolded italics below):

227.180 Review of action on permit application; fees.

(1) Not shown.

(2) Not shown.

(3) No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or <u>bias resulting from ex parte contact</u> with a member of the decision-making body, if the member of the decision-making body receiving the contact: (emphasis added)

(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and

(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

(4) A communication between city staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section.

(5) Subsection (3) of this section does not apply to ex parte contact with a hearings officer.