



## **AGENDA**

### **MILWAUKIE PLANNING COMMISSION Tuesday February 23, 2010, 6:30 PM**

**MILWAUKIE CITY HALL  
10722 SE MAIN STREET**

- 1.0 Call to Order - Procedural Matters**
- 2.0 Planning Commission Minutes** – Motion Needed
  - 2.1 January 12, 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
  - 5.1 Summary: Harmony Mini-Storage Substantial Construction Variance  
Applicant/Owner: Hans Thygeson/HT Investment Properties, LLC  
Address: 5945 & 5965 SE Harmony Rd  
File: VR-10-01  
Staff Person: Susan Shanks
- 6.0 Worksession Items**
- 7.0 Planning Department Other Business/Updates**
  - 7.1 Summary: Officer Elections
- 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:**
  - March 9, 2010 Joint Session with DLC
    - 1. Light Rail briefing
    - 2. City Hall Sculpture Garden
  - March 23, 2010
    - 1. Public Hearing: ZA-10-01 Parking Code Amendments

### 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](mailto: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](http://www.cityofmilwaukie.org)
3. **CITY COUNCIL MINUTES** City Council Minutes can be found on the City website at [www.cityofmilwaukie.org](http://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  
Dick Newman, Vice Chair  
Lisa Batey  
Teresa Bresaw  
Scott Churchill  
Chris Wilson  
Nick Harris

### Planning Department Staff:

Katie Mangle, Planning Director  
Susan Shanks, Senior Planner  
Brett Kelter, 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  
Milwaukie City Hall  
10722 SE Main Street  
TUESDAY, January 12, 2010  
6:30 PM**

**COMMISSIONERS PRESENT**

Jeff Klein, Chair  
 Lisa Batey  
 Teresa Bresaw  
 Chris Wilson  
 Scott Churchill (arrived during CSU-09-11)

**STAFF PRESENT**

Katie Mangle, Planning Director  
 Brett Kelter, Associate Planner  
 Li Alligood, Assistant Planner  
 Brad Albert, Civil Engineer  
 Bill Monahan, City Attorney

**COMMISSIONERS ABSENT**

Dick Newman, Vice Chair  
 Paulette Qutub

**1.0 Call to Order – Procedural Matters**

Chair Klein called the meeting to order at 6:35 p.m. and read the conduct of meeting format into the record.

**2.0 Planning Commission Minutes**

2.1 November 11, 2009

**Commissioner Batey** noted that the agenda should note the November 10, 2009 minutes.

**Commissioner Batey** moved to approve the minutes for November 10, 2009 as written.

**Commissioner Wilson** seconded the motion, which passed 3 to 0 to 1 with Commissioner Bresaw abstaining.

**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**

5.1 Summary: CSU major modification of NCSD administrative offices.

Hearing will be continued to February 9, 2010.

Applicant/Owner: Garry Kryszak/North Clackamas School District

43 Address: 4444 SE Lake Rd

44 File: CSU-09-11 *continued from 11/24/09*

45 Staff Person: Ryan Marquardt

46

47 **Chair Klein** called the public hearing for CSU-09-11 to order at 6:39 p.m.

48

49 Commissioner Churchill arrived at this time.

50

51 **Katie Mangle, Planning Director**, stated that the School District requested the hearing be  
52 continued to February 9, 2010, to allow time to address some of the issues raised by the  
53 Commission and the neighborhood. The Applicant had submitted preliminary revised plans and  
54 an additional waiver to extend the 120-day clock. Staff supported the request for additional time.

55

56 **Commissioner Bresaw moved to continue CSU-09-11 to February 9, 2010. Commissioner**  
57 **Churchill seconded the motion, which passed unanimously.**

58

59 5.2 Summary: Zone change from R10 to R7

60 Applicant/Owner: Tim Riley/Clunas Funding Group, Inc.

61 Address: SE Brae & SE Bowman

62 File: ZC-09-01 *continued from 11/24/09*

63 Staff Person: Li Alligood

64

65 **Chair Klein** reopened the public hearing for ZC-09-01 to order and read the conduct of major  
66 quasi-judicial hearing format into the record.

67

68 **Li Alligood, Assistant Planner**, cited the applicable approval criteria of the Milwaukie  
69 Municipal Code as found on 5.2 Page 4 of the packet, which was entered into the record.  
70 Copies of the report were made available at the sign-in table.

71

72 **Chair Klein** asked if any Commissioners had a conflict of interest or any ex parte contacts to  
73 declare.

74

All Commissioners had visited the site, but no Commissioner declared a conflict of interest, bias, or conclusion from a site visit. No Commissioner's participation was challenged by any member of the audience, nor was the jurisdiction of the Planning Commission to hear the application.

**Mr. Monahan** suggested that this was the appropriate time for Commissioner Wilson to address how he had prepared for the hearing since he did not attend the prior meeting, where the vote was tied 2 to 2. In order to participate, it was important for all parties to hear that Commissioner Wilson had availed himself of the opportunity to become familiar with the application materials, staff report, and public input received to date.

**Commissioner Wilson** stated that he had familiarized himself with the issue utilizing the meeting packet and rough draft of the meeting minutes, as well as visiting the site, listening to the audio recording of the hearing, and speaking with a member of the Planning staff.

**Chair Klein** asked if Commissioner Wilson had questions for the Applicant regarding the materials he had studied so far.

**Commissioner Wilson** responded "No, not at this time." He noted that when visiting the site, he did not notice any inconsistencies with the materials he had reviewed.

**Debbie Zecic, 13076 SE Pennywood Ct**, asked about procedure, stating that many of the neighbors were not present tonight because they were told that no further testimony would be accepted. There would simply be a straight vote. She asked if more information was going to be provided.

**Mr. Monahan** responded that the direction at the end of the prior meeting was that the application was continued to the current meeting for deliberations. However, if new information had been submitted, it could be discussed and the Commission could determine if there was reason to continue the meeting to allow further opportunity for public comments.

**Commissioner Batey** recalled that at the prior meeting, it was stated that there was potential for new information, and if so, the Applicant would be able to speak and public comment would be allowed.

- **Ms. Mangle** said it was the Commission's decision.

109

110 **Chair Klein** clarified that if the application was reopened to public testimony, only new  
111 information brought forward would be discussed.

112

113 **Ms. Zecic** understood that if anything new were brought forward this evening, the hearing would  
114 be a continued to some future date.

115

116 **Chair Klein** answered "No," a decision would most likely be reached this evening.

117

118 **Ms. Zecic** said she did not object to a decision tonight, but did object because both she and the  
119 person with her had both understood the same thing; that it was specifically stated that there  
120 would be a straight vote and no new information.

121

122 **Chair Klein** replied unless new information was brought forward, and if so, the Commission had  
123 to allow that new information to come before the Applicant.

124

125 **Commissioner Churchill** recalled the discussion had indicated that public testimony would be  
126 closed with deliberation allowed only among the Commissioners. However, new information was  
127 presented, which might warrant more public input.

128

129 **Mr. Monahan** clarified that if new evidence was presented that required the opportunity for  
130 public review and a continuance was requested, then the Commission was bound by statute to  
131 allow that continuance.

132

133 **Ms. Alligood** reviewed the staff report via PowerPoint, with the following additional comments:

- 134 • The Applicant submitted a supplemental narrative that provided visual and value  
135 comparisons that clarified some concerns presented by the Commission and residents  
136 about the type of development that would be seen on an R7 versus R10 lot. However, not all  
137 the concerns raised in the November 24, 2009, hearing were addressed.
- 138 • Additional background information about the site was distributed to the Commission before  
139 the hearing. Commissioner Wilson had requested additional information about the Lake  
140 Road Neighborhood District Association (NDA) exploring the option of a park on the site  
141 years ago. The yellow, 5-page handout described the meeting where the City discussed the  
142 possibility of a park with the Oak Lodge Water District.

- The supplemental material did not change the staff analysis as the proposal continued to meet criteria for the zone change. Staff recommended that the Planning Commission recommend approval of the zone change application to City Council.
- She was not certain the supplemental narrative or yellow handout would be considered new information. The Applicant's narrative clarified information already included in the application and staff report. The new information about the Oak Lodge Water District meeting was from 2002, but was not previously included in the record. The supplemental narrative was included in the staff report published online, but the Water District information was not.

**Chair Klein** asked if the additional information would justify opening up the public testimony portion of the hearing.

**Commissioner Bresaw** did not believe the information warranted opening the hearing for additional public testimony.

**Commissioner Churchill** stated he was not clear where the supplemental information came from when he received the packet, so he appreciated learning that it came from the Applicant. He believed the supplemental information was somewhat deceptive and did not really address the issues.

- He cited the image on 5.2S Page 7 that said, "Most likely Construction with R10 Zoning" versus an R7 Zone shown on 5.2S Page 6. The photographs did not represent the conditions, even massed at that site. The information was new, but did not answer questions regarding the scale and mass of the properties.
- Citing Item D on 5.2 Page 3 of the packet, he agreed that an additional home on the subject site would impact properties to the south, but the entire neighborhood would be impacted as well. The mass and scale proposed on the lots had to be considered.
- Noting staff's comment under Item D stating, "the visual impact of an additional home on the subject site would be insignificant," he said he disagreed with that statement.

**Chair Klein** interjected and asked if the new information was important enough to open to public testimony, knowing that only the new photographs and Oak Lodge Water District notes could be addressed. The information was worthy for discussion, but the Commission had to determine if the discussion should be opened to the public.

**Commissioner Churchill** said the new information presented a massing that was appropriate to understand the site. Clarification would be something else, and he believed the public should have the opportunity to comment.

**Commissioner Batey** stated that Item D addressed one of the issues being debated at the last meeting. She did not believe the supplemental information from the Applicant was useful. The information regarding Oak Lodge Water District had more influence on her, and she considered it to be new information but not a significant amount.

**Chair Klein** stated he was inclined to allow public testimony only on topics within the yellow handout and the supplement to the staff report.

**Mr. Monahan** suggested taking a few minutes to allow the public to review the new documents, and then have the Applicant explain the significance of the new information before allowing public comment.

The Commission took a brief recess and reconvened at 7:05 p.m.

**Chair Klein** called for the Applicant's testimony.

**Tim Riley, Clunas Funding Group, 201 B Ave, Suite 270, Lake Oswego, OR**, explained that the supplemental material was submitted to address public concerns regarding the visual impact on the neighborhood of 2 versus 3 homes on the site. For visual comparison, photographs were presented of existing properties on R7 and R10 parcels in the same neighborhood with similar frontage dimensions as the subject site. The idea was to imagine placing the homes pictured on the vacant subject site.

- The R7 photo showed 3 homes on Pennywood Dr at an angle because all 3 would not fit if the picture were taken directly in front. The Brae St photo was taken just south of the site to offer a visual comparison of an R10 parcel.
- As staff mentioned at the previous hearing, the main difference between R7 and R10 was that the houses were closer together. The Applicant believed the photos provided the best way to see both zones side by side.
- The value of the proposed homes was also a big discussion at the prior hearing. The Applicant planned to construct houses that fit in the neighborhood, similar to those pictured.



The visual impact comparison provided the best representation of how the Applicant believed things would look, and was the reason for the supplemental material.

- The last page of the supplement noted bullet points that had already been covered, essentially stating the visual impact would not be significant.

**Commissioner Bresaw** asked for the lot dimensions of the 3 lots pictured from the Pennywood subdivision and the proposed lots for comparison.

- **Mr. Riley** responded that the total width of the 3 Pennywood lots was approximately 240 ft with each lot being approximately 75-ft to 80-ft wide. The R10 lots were roughly 220 ft to 240 ft wide. The subject site was 251-ft wide, but the required improvements had to be accommodated, which would narrow the width, resulting in proposed lots of approximately 70-ft to 80-ft wide by 100-ft deep.

**Commissioner Churchill:**

- Noted the view of the Pennywood properties was looking northwest, and the total lot corners were located way past the photo's edges.
  - **Mr. Riley** replied that the edge of the far lot was not much further than the building, though it was outside the picture.
- Stated the photograph on 5.2 Page 17 appeared deceptive and did not actually address density. The photograph was taken to make the R7 and R10 densities appear similar, but they were not. The lot line differences between the Brae St and Pennywood properties were radically different. A better representation showing where the approximate mass of the buildings would fall on the property would indicate quite a difference in density.
  - **Chair Klein** understood the concern about the photo, but believed that the comparison regarded frontages of 240 ft versus 240 ft, which the project was confined to.
- Clarified his concern was that when the right-of-way adjustments were taken out and the parcel subdivided into the 3 lots, the site would be even more dense, which was not shown in the photos. As noted in Item D, he believed there would be impact to houses to the south.
- Asked why the Applicant did not show the frontage of the R7 property lines. The R10 photograph showed the frontages as well as additional property to the right.
  - **Mr. Riley** explained he chose the best angle he believed would be consistent with each. The angle needed to capture the whole Pennywood frontage would have been so severe, and the middle house or how close the homes were would probably not have

244           been seen. In the R10 photograph, the 2 houses were about as close together as the 2  
245           houses in the R7 photograph.

- 246       • Stated that it did not appear so from the aerial photograph, which was his challenge.

247

248       **Chair Klein** called for public testimony in favor of, opposed, and neutral to the application with  
249       regard to the new information presented.

250

251       **Debbie Zecic** agreed that the pictures were entirely deceptive. The Applicant neglected to  
252       photograph the lot on the corner that was quite large. Various sizes of lots existed in the  
253       neighborhood.

- 254       • She reiterated her procedural concern, again noting that the Commission indicated at the  
255       last meeting that they would only vote tonight and there would be no further public  
256       testimony. That was why more people did not attend, especially her neighbors.
- 257       • She did not know if what was stated would sway the Commission's decision, but she was  
258       troubled by the procedure.
- 259       • The minutes indicated it was a clear cut case, that one additional Commissioner was  
260       needed to read the minutes and break the tie vote. Testimony was only being given by  
261       herself and the developer, and the public was being short-changed if they shared the same  
262       understanding.

263

264       **Chair Klein** clarified that generally if new information was brought forward, then that portion  
265       was opened to public testimony.

266

267       **Ms. Mangle** offered to find the draft copy of the minutes from the prior meeting.

268

269       **Mr. Monahan** believed it was worthwhile to review the minutes.

270

271       The Commission took a brief recess and reconvened at 7:23 p.m.

272

273       **Chair Klein** stated that in the November 24, 2009, meeting minutes, Mr. Monahan did say that  
274       no public testimony would be taken at the next meeting.

275

**Mr. Monahan** explained that some of the new information was new evidence, and thus he took Ms. Zecic's comments as a request for an opportunity for public comment on that new evidence, including people who were not present tonight.

- ORS 197,763 Section 6c stated that in a continuance hearing, if new evidence was submitted, then there is the opportunity for public response, and during that period, the record was left open.
- He recommended the Commission hold the record open for written submission of comments on the new information for 7 days. At the end of that time, any new written information should be provided to the Applicant. At the next meeting, the first order of business should be to provide the Applicant the opportunity to rebut any new written information received during that 7-day period, followed by deliberations by the Commission.
- During the Applicant's rebuttal to new written comments, if any new evidence was submitted, it would have to be addressed. He cautioned the Applicant to avoid adding new evidence. If no written comments were received in the next 7 days, there was no need for rebuttal.
- Applicants always have the right to bring in new evidence, but run the risk of running afoul of the Commission being given the opportunity to make a decision. He also recommended that the Applicant be allowed to comment on anything stated by Ms. Zecic.

**Ms. Mangle** added that if the Commission proceeded as discussed, staff would contact all the neighbors who attended the last hearing to be sure they were aware of the new information and continued hearing.

**Commissioner Batey** stated that it was also contingent on all the Commissioners present being able to attend the next meeting.

**Mr. Monahan** agreed the scheduling of the continuation should be for a time when the 5 Commissioners present could attend.

**Chair Klein** confirmed that all the Commissioners present could attend the next meeting in 2 weeks. He confirmed the Applicant did not want to give rebuttal to comments received tonight.

**Mr. Monahan** clarified that the only rebuttal allowed at the next meeting would be to the written public comments received by 5:00 p.m. on Tuesday, January 19, 2010. There would be no

310 opportunity for public comment at the next meeting, providing the Applicant presented no new  
311 evidence.

- 312 • He reminded the Commission that it was a two-step process. If anyone felt that everything  
313 was not discussed today and the application was approved and sent to the City Council,  
314 there would be additional opportunity then for comments.

315

316 **Pam Michael, 13181 SE Pennywood Ct**, asked when staff would mail notification to the public  
317 to allow enough time for written comment to be received within 7 days from tonight. She was  
318 also concerned about the surrounding neighborhood being notified, not just those who testified  
319 at prior hearings.

320

321 **Ms. Mangle** replied that staff would use the best contact information available and hand deliver,  
322 call, or email neighbors. The public in attendance was the best conduit to get the word out to the  
323 neighborhood.

- 324 • She clarified the testimony was limited to the two pieces of new information presented  
325 tonight. The hearing would not be started all over again.

326

327 **Ms. Michael** suggested it might be advisable to notify the entire neighborhood, because they  
328 may not have been able to attend the previous meeting.

329

330 **Chair Klein** agreed the information was public, but two meetings had already been held.  
331 Anyone with concerns that was unable to attend one of the two meetings at this point, needed to  
332 get written testimony sent in on time.

333

334 **Commissioner Batey** added that anyone not able to attend the initial meeting could still have  
335 submitted written comment and staff would have their contact information.

336

337 **Ms. Mangle** said that staff would also post a sign on the site with updated information.

338

339 **Ms. Michael** said the sign was down for a few days and then went up again.

340

341 **Commissioner Churchill** asked if Ms. Michael was asking for a list of neighbors within the 300-  
342 ft radius that she could contact instead of staff. It sounded as though she preferred a re-notice  
343 for the 300-ft radius.

- **Ms. Michael** asked that anyone affected by the application should be notified.
- **Ms. Mangle** confirmed the list of notification was public information, so Ms. Michael could pick up a list and notify neighbors. Also, information would be provided to the Lake Road NDA for their meeting tomorrow night. Staff would use the information and time to make the best effort in contacting the public. She was open to further suggestions.
- She confirmed with Ms. Michael if staff could cross her off the notification list since she was present at this meeting.

**Mr. Monahan** clarified that the Commission should formally continue to a date certain of Tuesday, January 26, 2010, after leaving the record open until 5:00 p.m. on Tuesday, January 19, 2010, for written comments only about the new evidence submitted by the Applicant as part of the staff report tonight.

**Commissioner Batey moved to continue ZC-09-01, TFR-09-04, to a date certain of January 26, 2010, leaving the record open until 5:00 p.m. on January 19, 2010, only for written comments restricted to the two items of new evidence submitted tonight.**

**Commissioner Churchill seconded the motion, which passed unanimously.**

### 5.3 Summary: Minor Land Partition

Applicant/Owner: Planning Resources, Inc./Garry Suazo

Address: 4033 SE Howe St.

File: MLP-08-02, TPR-08-03, VR-08-01

Staff Person: Brett Kelter

**Chair Klein** called the public hearing for MLP-08-02, TPR-08-03, and VR-08-01 to order at 7:36 p.m. and read the minor quasi-judicial hearing format into the record.

**Brett Kelter, Associate Planner**, noted the applicable approval criteria of the Milwaukie Municipal Code as found on 5.3 Pages 7 and 8 of the packet, which was entered into the record. Copies of the report were made available at the sign-in table.

**Chair Klein** asked if any Commissioners had a conflict of interest or any ex parte contacts to declare.

378 All Commissioners had visited the site, but no Commissioner declared a conflict of interest, bias,  
379 or conclusion from a site visit.

380

381 **Commissioner Wilson** declared that he had talked with the owner during his site visit, which  
382 was some time ago. He could not remember his conversation with the owner.

383

384 **Ms. Mangle** advised that if Commissioner Wilson recalled something specific about his  
385 conversation with the owner during the meeting, he could share the information at that time.

386

387 No Commissioner's participation was challenged by any member of the audience, nor was the  
388 jurisdiction of the Planning Commission to hear the application. There were no other ex parte  
389 contacts to declare.

390

391 **Mr. Kelter** presented the staff report via PowerPoint, noting that while such applications were  
392 normally done as a Type II administrative review, staff brought this application before the  
393 Planning Commission because of the variances requested.

- 394 • He clarified that the 18-ft access was a proposed easement for access to all 3 parcels off  
395 40<sup>th</sup> Ave rather than Howe St, though that would not necessarily occur. The existing house  
396 was currently accessed via Howe St.
- 397 • The carport or detached garage pictured in one drawing located behind the house on Parcel  
398 1 would provide the required covered parking, and would be accessible by Howe St.

399

400 **Chair Klein** noted that access for the 3 lots was not pertinent to subdivision application, but  
401 would be reviewed by staff at a later date.

- 402 • **Mr. Kelter** agreed, adding that access details for the lots would be worked out during  
403 the building permit process for Parcels 2 and 3. Parcel 1 would need to establish a clear  
404 access as well.

405

406 **Commissioner Churchill** replied that access did help clarify the impact of the public area  
407 improvements. He was trying to understand the special public improvements on 40<sup>th</sup> Ave. The  
408 one access required under the application seemed reasonable.

409

410 **Chair Klein:**

- 411 • Asked if there was an overlay that showed the location of the trees that could be reviewed to

be sure the access area would not damage the trees.

- **Mr. Kelter** replied he did not have a slide showing both the trees' location and proposed access. He might be able to show where the proposed access would be located over the proposed compound shared lot line.

- Reiterated that the access was proposed, so was not pertinent to tonight's decision on the subdivision. There might be 3 accessways to the site, but that would be addressed at a later date.

**Commissioner Churchill** responded that 3 accessways would dramatically change his decision regarding public area improvements, though technically it was part of the site development plan application.

**Mr. Kelter** concluded the staff report, noting that the 120-day clock had already been extended to a full year, with a deadline of March 3, 2010. Although the timeline was tight, he believed there was time for a continuance to 2 weeks from tonight to allow time for an appeal to the City Council.

Staff responded to questions and comments from the Commission as follows:

- **Mr. Kelter** stated that one condition assured the preservation of the trees in the right-of-way as much as practical when construction of the sidewalks began. A tree preservation restriction of sorts would be placed on the plat requiring the homeowner to submit a report to the Planning Director for review before anything could be done to the trees. As the property changed hands, the restriction would continue to protect the trees.
  - He also clarified that the access easement was on Parcels 2 and 3. The proposed new property line between Parcels 2 and 3 was indicated on the map as a solid jogging line. The Code had standards for allowing a maximum amount of jog and the proposal met it for both parcels. Part of the easement was on Parcel 2 and the square footage indicated the total for Parcel 2. The easement did not come into play when determining the lot area because it was like an overlay.
  - He confirmed that if Parcel 1 took its primary access from 40<sup>th</sup> Ave, then it would function a bit like a flag lot. Currently, the house fronted Howe St.
- **Brad Albert, Civil Engineer**, confirmed that minimum spacing standards applied between driveways, but the proposal was for a shared access for all 3 parcels, which seemed to make the most sense. Technically, Parcel 2 could continue to take access from Howe St,

but access for Parcel 3 was very limited, due to stormwater drainage, and would probably have to share access with Parcel 1.

- While having a shared access for all 3 sites would reduce stormwater runoff due to the reduced square footage of paving, the real positive was that the ingress/egress for 3 sites would be at just one conflict point. While each parcel could have its own access on either Howe St or 40<sup>th</sup> Ave, it was beneficial to have one access point, especially with the view corridor created by the trees.
- There was no particular advantage in having access to the parcels off Howe St rather than 40<sup>th</sup> Ave because both were classified as local streets at this intersection. Howe St was a collector starting a couple of blocks away and from the south; 40<sup>th</sup> Ave was labeled as a neighborhood route. The Street Classification slide was shown to aid in understanding. If Howe St was a higher class street at the site, the Applicant would be required to take access off 40<sup>th</sup> Ave, but at this point the choice was the Applicant's.
- **Ms. Mangle** noted that a site plan showing the tree locations, access easement, and the lots was included in the Applicant's material as Attachment 3.b.iii Sheet 3/3.
- **Mr. Kelter** confirmed that one tree would have to be removed to allow for paving. The other trees could probably be saved.
- He understood concerns about the Applicant changing the orientation of the existing house and clarified that staff was evaluating Parcel 1 for width and depth as it faced Howe St. He utilized the displayed maps to indicate the required front, rear, and side yard setbacks, and where a 6-ft high fence would be allowed.
- He noted that additional correspondence had been received by staff and distributed an email from Dinnelle Wright, who lived a couple of lots south at 9731 40<sup>th</sup> Ave. She raised concerns about the variance requests, including some confusion about what was actually being requested. He had responded to her comments via email, and confirmed that she agreed with staff's recommendations.

**Chair Klein** called for the Applicant's testimony.

**Dan Jung, Planning Resources, Inc, 17690 Boones Ferry Rd, Lake Oswego, OR**, thanked staff for their help during the application process.

- Overall, the Applicant and property owner agreed with staff's findings and conditions of approval, except that they requested that the Planning Commission consider the requested variance for delaying the improvements on SE Howe St. As a corner property, dedication



and improvements were required on 2 streets.

- Because the current width of 40<sup>th</sup> Ave was 20 ft, the improvements would be very minimal and pertinent, providing an immediate benefit, especially the asphalt in that location.
- However, SE Howe St was a uniform 40-ft width and the improvements were also uniform for the most part. It was functioning for vehicles. Putting in additional asphalt and sidewalk improvements along the Applicant's frontage now did not appear to really benefit anyone, because no other parcels on the street would have a sidewalk.
- The Applicant proposed to sign and record a waiver of non-remonstrance for a future Local Improvement District (LID) instead of completing improvements now.
- He clarified that the access easement was shown to give the property owner options for future development. He was hesitant to say that they wanted to condition the access easement because 2 off-street parking spaces were required. With the one access, getting 2 parking spaces to each lot might be difficult, but he was not sure. Again, the access easement was just a consideration of future development. While recording a plat, it seemed a good time to also record the easement.

There were no questions for the Applicant.

**Chair Klein** called for public testimony.

**Steve Males, 4034 SE Howe St, Milwaukie**, noted his property's location on the displayed map across the street from the subject property where he has lived for 22 years. He asked that the trees be saved. He heard the comments about the tree on the corner where the sidewalk would be located and did not believe visibility would be an issue if the speed limit was followed.

- He supported improvements that made sense, but did not want sidewalks on Howe St because the proposed sidewalk would dead-end into a fence or tree.
- He asked if the Commissioners had noticed the corner of 40<sup>th</sup> Ave and Olsen St during their site visit. Houses on 40<sup>th</sup> Ave were too close to the street to allow for widening.
- The City needed a game plan [about the sidewalk's continuation] before having a partial sidewalk installed. He indicated on the displayed map a corner lot on 40<sup>th</sup> Ave that had no room for a sidewalk. Sidewalk corners on Olsen St did not even closely meet where sidewalks would extend down 40<sup>th</sup> Ave heading north. It did not seem feasible to require someone to pay that much money for all that work until a game plan existed. The

- 514 improvements should be done all at one time.
- 515 • He added he did not want sidewalks going out into the street to avoid trees, like the one on
- 516 Olsen St that caused traffic problems in the snow.
- 517 • He had talked with the property owner several times who shared with him that he did not
- 518 want to get out of doing anything, but he did not want to do foolish things or do something
- 519 twice.
- 520 • He believed the application was a good plan and he hoped it would go forward. He noted
- 521 the Applicant had no room for a sidewalk at the end house on Howe St. The sidewalk would
- 522 serve no purpose.

523

524 **Chair Klein:**

- 525 • Noted that a sidewalk existed on that corner where it came down 42<sup>nd</sup> Ave, but not down
- 526 Howe St.
- 527 • **Mr. Males** asked if there was a definite plan for the street. The picture showing 40<sup>th</sup> Ave
- 528 toward Olsen St was very deceiving because the street narrowed and 2 vehicles could
- 529 not pass there.
- 530 • Explained that more right-of-way would be available than currently existed. He understood
- 531 not wanting to put the car before the horse. However, good street design standards had
- 532 already been set to ensure the desired design was achieved as development occurs.
- 533 Essentially, a master plan was in place about what would happen on a particular street,
- 534 although when those other improvements would happen was another issue.
- 535 • **Mr. Males** responded that to run sidewalks the way the City wanted meant that some
- 536 homes would have to wait for sidewalks until they were torn down and rebuilt.
- 537 • Agreed that was an unfortunate reality sometimes.
- 538 • **Mr. Males** reiterated that doing the sidewalks like that did not make sense. He drove
- 539 along that street each day and could see what would happen.
- 540 • Reiterated that he understood Mr. Males' concern.

541

542 The photograph looking east down Howe St was displayed. No view looking the other direction

543 was available.

544

545 **Chair Klein** called for any additional comments from staff.

546

547 **Mr. Albert** verified that the City did want incremental improvements to occur with development,

especially on a corner lot, which would start whatever improvements were needed.

- He believed that with the start of the subject project, the City had a game plan for 40<sup>th</sup> Ave heading north and east on Howe St. The City had always required that the applicant or developer do the improvements at the time of development, but a non-remonstrance agreement put the improvements on the future homeowners of the partition.

**Chair Klein** called for the Applicant's rebuttal or additional comments, which was declined. He closed the public testimony portion for MLP-08-02, TPR-08-03, and VR-08-01 at 8:25 p.m.

### **Planning Commission Discussion**

#### **Commissioner Wilson:**

- Opposed the tree protection restrictions. He did not know if it increased or decreased the value of a property, which was not the issue, but it did establish more rules and regulations that were not desirable. He asked if the tree protection restrictions would go into effect if there was a delay.
- **Ms. Mangle** responded that once in place, the tree protection would not be permanent, but would impose the same kind of restrictions as if the trees were in the right-of-way. The homeowner would have to obtain City permission through a right-of-way tree permit to remove the trees if they were diseased or had other problems.
- Understood about the trees in the right-of-way, but was concerned about restrictions involving the other trees.
- **Ms. Mangle** replied the restrictions regarded the trees that would be in the right-of-way under normal circumstances, but would remain still on private property if the variance was approved.
- **Chair Klein** clarified that the right-of-way would include the trees now, but if the variance moved the right-of-way from 25 ft to 20 ft, the trees would be outside of the right-of-way and not subject to a review if the homeowner wanted to remove them at a later date. He asked staff for input on Ardenwald and the existing tree ordinance.
- **Ms. Mangle** explained that the City's tree ordinance only protected trees in the right-of-way or water quality resource areas, but not on private property. The main comments submitted from the Ardenwald NDA regarded protecting the trees.
- Stated that private property is private property, and though the right-of-way was public, putting restrictions on private property was not fair.

- Favored delaying the improvements on Howe St. He agreed it did not make sense because the sidewalk would end at an existing fence.

**Commissioner Batey** disagreed on both counts. The incremental improvements issue had come up often and was debated hotly in her neighborhood. She was sensitive to concerns about placement of the sidewalks in areas where houses were built 5 ft from the right-of-way, which was a recurring issue.

- She was not concerned about a sidewalk ending at a fence, because through the years the City had seen infill and sidewalks connected. Both 40th Ave and 42nd Ave did have developed sidewalk systems, so Howe St was a natural connector that should be encouraged. This was heard in comments from the NDA and from Ms. Wright. She supported staff's recommendations to not delay the improvements on Howe St.
- The recommendations about the trees were a fair compromise given that the 5 extra feet were not being required for the right-of-way.

**Commissioner Bresaw** also favored staff's recommendations. It was worthwhile to put a sidewalk on Howe St because the property was 145 ft wide, and people would use it.

- Protecting trees was very important, though she would not want very tall trees next to her house due to safety issues. However, the trees had been there a long time and would hopefully remain longer. If there was a safety issue, the homeowner would be allowed to remove them. She planned to vote in favor of the application.

**Commissioner Churchill** stated that the site was very unique in Milwaukie and added character. He was reminded of many challenged arterials or even local streets in Mill Valley, Larkspur, and Corte Madera, CA, that had a lot of character.

- The trees added the ultimate traffic-calming device and interesting character to the street. Without them, the street would appear like any other average street in suburban USA, so he liked staff's plan to work around the existing trees.
- He was torn about Howe St after listening to the Applicant and neighbors. Connecting the improvements to 42<sup>nd</sup> Ave would be the ultimate challenge. However, he supported staff in asking for the improvements now. He wondered if it was possible to transition at the eastern edge of the parcel, so the sidewalk did not run into the fence.
- He complimented staff for the successful compromise on 40<sup>th</sup> Ave.

**Chair Klein** preferred sidewalks today rather than in the future, so he saw no reason to delay. He understood it was not desirable to have sidewalks that did not connect, but the requirement had been City policy for years. If the desired improvements were not implemented, then they would never be completed; therefore, unusual adjustments to the Applicant's property were required now to allow for the improvements for the future. He supported staff's recommendations.

- Knowing the Ardenwald NDA's strong point of view regarding trees, he saw no reason to oppose staff recommendations. The trees added value and character to the neighborhood. He walked the street often, so having some pedestrian access would be great.

**Commissioner Churchill** confirmed that staff had not considered stopping street improvements short of a condition like a fence in the past, but went right up to the property line.

**Commissioner Wilson** clarified that he loved trees, but asked if precedence was being established to implement tree restrictions on private property or if similar situations happened on other lots.

- **Mr. Kelter** responded that he had discussed that question with Mr. Monahan as research for writing the conditions, because staff was concerned about getting into a taking situation that might require more than was warranted.
- The special circumstance was that the Applicant was requesting a variance, so this was not a normal implementation of the rules. The Applicant was asking for some variation from those rules. One criterion was to determine if anything could be done to mitigate the impacts of the variance. It seemed appropriate to require some protection for the trees in exchange for dedicating 20 ft instead of 25 ft.
- **Ms. Mangle** added that with the variance, essentially the public was giving up the ability to protect the trees. If the Applicant had not requested a variance or the variance was not approved, the public would be able to protect the trees.

**Chair Klein** added that the Applicant was in support of that condition.

**Mr. Kelter** noted the following two housekeeping language revisions because the findings were not reissued for the meeting:

- In Finding 4, the date of the public hearing should state, "~~December 8, 2009~~ **January 12, 2010.**"

- Because an easement granted permission, Condition 3B, which related to trees should note the restriction. Sentence 1 of Condition 3B was amended to state, "A ~~public conservation easement~~ **tree conservation restriction** shall be provided..."

- He asked if Ms. Wright's written comment received today was best included in the findings or referenced as an exhibit.

**Mr. Monahan** replied that the comment from Ms. Wright just needed to be part of public record. The findings remained as presented unless the Commission found reason to modify them because of something within the testimony.

**Ms. Mangle** confirmed that the Applicant agreed to the changed wording.

**Commissioner Bresaw moved to approve MLP-08-02 and TPR-08-03 allowing the partitioning, and the variance request to dedicate 20 ft to the public right-of-way on 40<sup>th</sup> Ave; and to deny the variance request to eliminate the on-street parking strip on 40<sup>th</sup> Ave and eliminate the required street improvements to Howe St; to adopt the recommended findings and conditions in support of approval found in the attachments with Finding 4 changed to January 12, 2010, and Condition 3B amended to reflect tree preservation easement. The motion was seconded by Commissioner Churchill and passed 4 to 1 with Commissioner Wilson opposing.**

**Chair Klein** read the rules of appeal into the record.

## **6.0 Worksession Items – None**

## **7.0 Planning Department Other Business/Updates**

### **7.1 Planning Commission Notebook page updates**

**Ms. Mangle** distributed additional items to the Planning Commission to go with notebook page updates of the republished Code mailed earlier. The update was a customer service project that would make the Code easier for applicants and the public, and would help staff and the Commission as well. Marcia Hamley put a large amount of work into the project and was continuing to do so.

- She reported that the Harmony Mini-Storage application, which required a Conditional Use when annexed into the City, had been caught up in financing and other development

684 problems, then started to come together last month. However, the application did not have  
685 enough time to be substantially complete within the time limit allowed by Code. The  
686 Applicant was working closely with Susan Shanks and submitted an application this week  
687 for a 2-year variance from the time limit requirement to allow time for construction.

- 688 • The Applicant requested a 1-year variance, but staff advised that before going through  
689 the process he should be sure the variance allowed enough time to build a bridge and  
690 substantially complete the work, meaning everything except for the trees and striping in  
691 the parking lot. The intent was to encourage the Applicant to just complete the project.
- 692 • She requested preliminary reactions to the variance before a lot of work was put into it. The  
693 intent was to not have to bring the 2-year variance back before the Commission. Pre-  
694 application activity was high, but Harmony Mini-Storage was the only large commercial  
695 project happening in the City right now.

696  
697 **Commissioner Batey** commented that improvements were needed for the wetlands if nothing  
698 else.

699  
700 **Chair Klein** noted it was important to remember what could be built on the site versus what was  
701 proposed. The Harmony Mini-Storage had a very limited impact for the zoning on the site. He  
702 did not want another project started on the site. It would be nice if the Applicant would break  
703 ground, but he did not have a problem with the 2-year extension.

704  
705 **Commissioner Churchill** commented that developers who have an opportunity to delay  
706 something often bring the project right up to the time limit again, perhaps selling later. However,  
707 a decision had to be made whether the entire process started again or the time variance was  
708 approved. He suggested having a progress milestone.

- 709 • **Ms. Mangle** replied that a milestone could be explored to nudge the Applicant along.

710  
711 **Commissioner Batey** asked about the house conversion on Harmony Rd.

712  
713 **Ms. Mangle** replied that the house conversion was going forward, but instead of a minor  
714 remodel of the residence to office space, the house would be torn down for a new building. The  
715 Applicant wanted to do the project right instead of fussing around with the old house. She did  
716 not believe the project would return to the Planning Commission, because the project would  
717 only require a building permit

718

719 **8.0 Planning Commission Discussion Items**

720 **Commissioner Batey** confirmed with Marcia Hamley that the blank #10 of the republished  
721 Code handout could be removed from the Notebook because it was superseded by the Public  
722 Works Standards.

723

724 **Commissioner Bresaw** noted that the grade of the house on Vernie Ave was high compared to  
725 the next lot. She asked how it would tie into the Lake Rd widening and sidewalk improvements.

726

727 **Mr. Albert** answered that the Lake Rd improvements were consistent with the Lake Rd  
728 Multimodal Plan. The Vernie Ave sidewalk ended at a keystone wall. Any improvements further  
729 down would require fill and a retaining wall. The sidewalk would remain straight.

730

731 **9.0 Forecast for Future Meetings:**

732 January 26, 2010 1. Public Meeting: CSU-08-05 post-decision requirement to review  
733 Pond House parking and uses

734 2. Worksession: Planning Commission Bylaws

735 3. Worksession: Light Rail briefing Part 1

736

737 February 9, 2010 1. Public Hearing: CSU-09-11 NCSD administrative offices *cont'd*  
738 *from 1/12/10*

739

740 **Ms. Mangle** reviewed the upcoming meeting schedule, noting that the January 26, 2010,  
741 meeting agenda might need adjusting depending on the length of the Bowman & Brae zone  
742 change hearing that was just continued. The Bylaws might be postponed to another meeting.

- 743 • The DLC would have a similar Light Rail briefing on January 27, 2010. A Light Rail meeting  
744 was planned for March 9, 2010, as a joint worksession with the Planning Commission and  
745 the Design and Landmarks Committee (DLC). TriMet would be presenting more specific  
746 details about the proposal for the Milwaukie area. Design review meetings would be held  
747 eventually.

748

749 **Chair Klein** believed the January 26 Light Rail briefing was very important because if it was  
750 moved to February 9, it conflicted with the Ardenwald NDA meeting. He wanted the NDA to



have the opportunity to attend.

**Ms. Mangle** updated that Mr. Marquardt was working hard with JoAnn Herrigel and her consultants on the Riverfront Park application. The plan was to place it on the agenda for the February 23, 2010, meeting. The DLC had recommended approval of the design review portion of the application with some conditions and post-approval review. The Water Quality Resource application was the difficult part. Staff had reviewed and requested more information from David Evans & Associates. The application was not quite ready for the Planning Commission, but hopefully it would be by February 23, 2010.

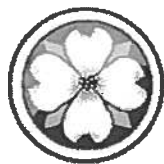
Meeting adjourned at 8:58 p.m.

Respectfully submitted,

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

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Jeff Klein, Chair



# MILWAUKIE

*Dogwood City of the West*

**To:** Planning Commission

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

**From:** Susan P. Shanks, Senior Planner

**Date:** February 16, 2010, for February 23, 2010 Public Hearing

**Subject:** File: VR-10-01 (Variance)

**Owner/Applicant:** Hans Thygeson

**Site Address:** 5945 and 5965 SE Harmony Rd

**Site Legal Description (Map & Taxlot):** 1S2E31D 01800, 01900, 01990

**NDA:** Lake Rd NDA, Linwood NDA, and Oak Lodge Community Council

## ACTION REQUESTED

Approve application VR-10-01 and adopt the recommended Findings and Conditions of Approval found in Attachments 1 and 2. This action would extend the timeframe within which Milwaukie Ministorage, a previously approved conditional use in the Business Industrial (BI) Zone, could complete substantial construction and, thereby, retain its conditional use approval.

## BACKGROUND INFORMATION

The Planning Commission approved construction of Milwaukie Ministorage at 5945 and 5965 SE Harmony Rd (formerly 5900 and 6011 SE Harmony Rd) in August 2008 (Land Use Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06). Ministorage facilities are conditional uses in the BI Zone. The code requires substantial construction of conditional uses within six months of approval, with allowance for a one year extension. An extension was requested and approved by the Planning Commission in February 2009, which extended the substantial construction deadline to February 27, 2010. The Applicant has not been able to meet this deadline due to project and site complexities and financial complications in the construction lending market. As a result, the Applicant is requesting that the Planning Commission grant a variance to the substantial construction deadline and extend it to February 27, 2012.

The policy intent of the requirement to "substantially construct" a project that receives a conditional use permit is to ensure that conditional uses are substantially—not completely—constructed while the circumstances under which they were approved still exist. This policy also applies to variance requests. What this means is that these types of projects have a limited timeframe within which to utilize the land use approvals that have been granted. Other types of

projects theoretically have an unlimited timeframe within which to begin and complete construction. In all cases, however, a development site is not allowed to be used or occupied until all conditions of approval related to final occupancy have been met.

#### **A. Site and Vicinity**

The site consists of two properties at 5945 and 5965 SE Harmony Rd in the BI Zone. The smaller property is 0.17 acres in size, and the larger one is 2.79 acres in size. The 2.79-acre site is largely undeveloped. The existing uses are single-family residential, which are nonconforming uses in the BI Zone. The site is bisected by Minthorn Creek, a designated water quality resource area, and is bounded to the north by railroad right-of-way and Railroad Ave and to the south by Harmony Rd. Access to the site is obtained through Harmony Rd.

The surrounding area consists of a single-family residential neighborhood to the north and a multi-family residential development to the east. Industrial uses extend to the west and south. The site is within close proximity to two 3-legged intersections: 1) the Harmony Rd, Lake Rd, and International Way intersection and 2) the Harmony Rd, Linwood Ave, and Railroad Ave intersection.

#### **B. Zoning Designation**

The site is zoned Business Industrial.

#### **C. Comprehensive Plan Designation**

The site has a land use designation of Industrial.

#### **D. Land Use History**

**August 2008:** Planning Commission approved land use applications CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06 for construction of a ministorage facility. The Commission's decision approved the following development proposal with conditions:

- Construction of two three-story buildings and associated parking on either side of Minthorn Creek. Buildings 1 and 2 to contain approximately 76,575 and 46,190 square feet of gross floor area respectively, with a combined footprint of 41,725 square feet.
- Construction of a clear span steel and wood bridge over Minthorn Creek to access the northern portion of the site.
- Restoration of the Minthorn Creek riparian area to an equal or better condition to mitigate for development encroachment and impacts.
- Construction of on- and off-site right-of-way improvements on Harmony Rd consistent with City and County mobility and safety requirements.
- Shared access with the neighboring industrial property to the west.

**September 2008:** City Council approved land use application A-07-02 for annexation of the site to the City of Milwaukie and application of the City's BI Zone and Industrial land use designations.

## E. Proposal

The Applicant is requesting a variance to Milwaukie Municipal Code (MMC or the Code) Section 19.1013, which states that a conditional use approval shall become void if substantial construction has not been completed with six months of the approval or within one year of an extension request. The Applicant proposes to extend the conditional use deadline to February 27, 2012 to allow time to complete substantial construction. See Attachment 3, Applicant's materials, for more detail.

The proposal requires approval of the following applications:

1. VR-10-01

## KEY ISSUES

### Summary

Staff has identified the following key issues for the Planning Commission's deliberation. Aspects of the proposal not listed below are addressed in the Findings (see Attachment 1) and generally require less analysis and discretion by the Commission.

- A. Does the proposal meet the variance approval criteria?
- B. What constitutes substantial construction?

### Analysis

#### A. Does the proposal meet the variance approval criteria?

During the 2008 land use hearings on the underlying conditional use application, it was acknowledged that the site had unusual conditions over which the Applicant had no control and which, in turn, created site development challenges. These conditions included the location of the site along a complicated transportation corridor and the bisection of the site by Minthorn Creek, a designated water quality resource area. It was also recognized at that time that the proposed project was large in size and complex in nature. Understandably, the complexity and challenges associated with development of this site have continued into the construction phase of the project.

The City's conditional use policy, however, does not take site conditions or project size or complexity into consideration. It requires substantial construction of all conditional uses within six months of approval, with an allowance for a one-year extension. Staff does not believe that this is a realistic time frame within which to finance<sup>1</sup> and construct a large, complex project. This is why staff will be requesting a variance to this same code section, i.e. MMC 19.1013, for redevelopment of Riverfront Park. This is also why the Planning Commission approved a substantial construction variance request for the Kellogg Treatment Plant when it was under construction in the 1970's.<sup>2</sup>

Staff believes that the intent of MMC 19.1013 is to ensure that conditional uses are constructed while the circumstances under which they were approved still exist. The

<sup>1</sup> Financing for this project has been particularly challenging in this economic climate.

<sup>2</sup> Riverfront Park and the Kellogg Treatment Plant are conditional uses due to their location in the Willamette Greenway Zone.

existing land use and development patterns in the and around the project area have not changed dramatically since this project was approved and are unlikely to substantially change in the next two years (see Chris Maciejewski's comments in Attachment 5). Consequently, staff does not believe that the intent of MMC Section 19.1013 would be violated by granting this variance.

Staff believes that the Applicant has requested the minimum variance necessary to complete substantial construction of this project, given its size and complexity, and that the Applicant's request for a two-year extension is reasonable. The Applicant is committed to moving this project forward. Specifically, the Applicant has prepared construction plans and submitted for building permits with the County and the City (see Attachment 4). The Applicant has also paid the required plan review fees, totaling more than \$13,000.

Staff also believes that there are no alternatives to this variance. The Applicant's substantial construction deadline expires February 27, 2010. Without a variance, the conditional use approval for this site will expire and construction of this project will not be allowed to proceed under the project's 2008 land use approvals. The Applicant could seek new land use approvals for the same project by resubmitting all five land use applications. However, staff does not believe that this is in the public or the Applicant's best interests. Since there have been no significant changes to the proposal, the approval criteria, or the site conditions, it is highly unlikely that repeating the review process would result in a different decision. The public cost of re-reviewing the underlying applications would likely exceed the application fees paid by the Applicant. Staff also believes that it would unnecessarily add to the costs of the project and delay the redevelopment of this site.

Lastly, staff has not identified any adverse impacts to adjacent property owners as a result of this variance. On the contrary, staff believes that redevelopment of this site as proposed would provide more benefits to the surrounding area and its residents than allowing it to remain vacant and abandoned. Specifically, redevelopment would improve pedestrian safety and mobility through the construction of frontage improvements and would improve water quality and habitat through mitigation plantings along Minthorn Creek. Moreover, this project's low trip generation would have only minor impacts on the Harmony Rd corridor and the two adjacent three-legged intersections as detailed in the underlying land use approvals for this project.

In summary, staff believes that the Applicant's variance request meets all three variance criteria, namely that:

- The property in question has unusual conditions over which the applicant has no control.
- There are no alternatives to the variance and the variance is the minimum variance necessary to allow for reasonable use of the property.
- Adverse effects upon other properties as the result of the variance will be appropriately mitigated.

#### **B. What constitutes substantial construction?**

The Applicant proposed phasing the construction of the project after the Planning Commission approved the ministorage facility in August 2008. Since substantial construction—not full project construction—is required to retain the site's conditional use approval, staff initially determined that the Applicant's proposal to construct Building 1 (the southernmost building fronting Harmony Rd), including all related improvements and

mitigations, met the substantial construction requirement. However, with the Applicant's submission of this application and the possibility that Building 2 (the northernmost building) may not be built soon, if ever, staff believes it is appropriate to revisit—and be clear on—what it means for this project to comply with the substantial construction requirement given that retention of the project's conditional use approval hinges upon completing substantial construction within a specified timeframe.

The Code does not define the term “substantial construction.” As a result, it is open to interpretation whether it should be applied to individual buildings (e.g. partial construction of each building in a multi-building project) or to the project as a whole (e.g. complete construction of a single building in a multi-building project). It is also open to interpretation whether all site improvements need to be completed or final building occupancy needs to be obtained for substantial construction to have occurred. Staff consulted with the City Attorney and Building Official for guidance on this matter and, while there is no Oregon statute or judicial interpretation related to the definition of this term, there is a general practice in the development community for what this term means. Generally speaking, a building is considered to be substantially complete when it is ready to be occupied but not necessarily ready to receive a final certificate of occupancy due to punch list items that could include anything from street improvements to landscaping. Based on this information, staff recommends the following:

- Allow the Applicant to complete the project in phases by constructing Building 1 now, and Building 2 and the bridge over Minthorn Creek later. Phasing of large projects is common, and, in this case, makes sense since the site's design allows Building 1 and Building 2 to operate independently. Staff recommends that the Commission consider completion of Building 1 an appropriate utilization of the project's conditional use approval
- Require the *complete construction* of Building 1 by the new substantial construction deadline. This includes completion of all interior and exterior building improvements that are necessary for Building 1 to be operational including, but not limited to, any exterior HVAC equipment, electrical cabinets, and stormwater management facilities. All building inspections related to Building 1 must be completed by the new substantial construction deadline as well. All other required on- and off-site improvements would be required for final occupancy and need not be completed by the new substantial construction deadline.

Staff does not believe that it is neither necessary nor appropriate to require final occupancy to meet the deadline for substantial construction. If the substantial construction bar is set too high, it may result in the construction of a building that would not be allowed to be used for its intended purpose. Furthermore, there is no risk to the City that any remaining site improvements would not be completed, as it is the City's normal practice to require completion of all on- and off-site improvements prior to occupancy. In this case, it would mean that the City would not allow Building 1 to be occupied until all parking areas, transportation improvements,<sup>3</sup> and stormwater facilities are constructed and all lighting,

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<sup>3</sup> Since the transportation impact study (TIS) evaluated the project as a whole and not the separate impacts of each building, it is impossible to know—without a new TIS—whether the required off-site improvements are proportional or warranted for just Building 1. In the absence of a new TIS (with concomitant resubmission of the underlying land use application describing a pared-down project involving only one building), staff believes that requiring all on- and off-site transportation improvements as part of final occupancy is both appropriate and defensible.

landscaping, and vegetative screening are installed. Furthermore, staff believes that requiring mitigation plantings on the south side of the creek as part of final occupancy for Building 1 is both appropriate and warranted, especially since it is not known whether the Applicant will ever construct the bridge and Building 2.<sup>4</sup> Mitigation plantings would be installed pursuant to the Applicant's 2008 Water Quality Resource Report.

## CONCLUSIONS

### A. Staff recommendation to the Planning Commission is as follows:

1. Approve the variance request to extend the project's conditional use authorization to February 27, 2012. This would extend the timeframe within which Milwaukie Ministorage, a previously approved conditional use in the Business Industrial (BI) Zone, could complete substantial construction and retain its conditional use approval.
2. Adopt the attached Findings and Conditions of Approval.

### B. Staff recommends the following key conditions of approval (see Attachment 2 for the full list of Conditions of Approval):

- Complete construction of Building 1 by February 27, 2012.
- Construct all on-site improvements related to the operation of Building 1 prior to final occupancy for Building 1.
- Construct all on- and off-site transportation improvements prior to final occupancy for Building 1.
- Install all mitigation plantings on the south side of Minthorn Creek prior to final occupancy for Building 1.
- Provide annual progress reports in January via e-mail to the City of Milwaukie Planning Director until a final certificate of occupancy is obtained for Building 1.

## CODE AUTHORITY AND DECISION-MAKING PROCESS

The proposal is subject to the following provisions of the Milwaukie Zoning Ordinance, which is Title 19 of the Milwaukie Municipal Code (MMC).

- Subsection 1.04.030 Interpretation of Language
- Section 19.702 Circumstances for Granting Variances
- Subsection 19.1011.3 Minor Quasi-Judicial Review
- Section 19.1013 Time Limit on a Permit for a Conditional Use or Variance

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<sup>4</sup> The Applicant is not proposing to construct Building 2 or the bridge over Minthorn Creek, a designated water quality resource area, at this time. The bridge, and its associated encroachments and impacts to Minthorn Creek, was the main reason why the City was able to require the types and amounts of mitigation plantings that it did in the 2008 Notice of Decision. Unlike the bridge crossing, the construction of Building 1 will not permanently impact the water quality resource area. However, it will temporarily impact this area during construction and indirectly impact this area through increased stormwater discharge.

This application is subject to minor quasi-judicial review, which requires the Planning Commission to consider whether the Applicant has demonstrated compliance with the code sections shown above. In quasi-judicial reviews, the Commission assesses the application against review criteria and development standards and evaluates testimony and evidence received at the public hearing.

The Commission has 4 decision-making options as follows:

- A. Approve the application subject to the recommended Findings and Conditions of Approval.
- B. Approve the application with modified Findings and Conditions of Approval. Such modifications need to be read into the record.
- C. Deny the application upon finding that it does not meet approval criteria.
- D. Continue the hearing.

The final decision on these applications, which includes any appeals to the City Council, must be made by May 12, 2010, in accordance with the Oregon Revised Statutes and the Code. The Applicant can waive the time period in which the application must be decided.

## COMMENTS

The proposal was referred to the following departments, agencies, and associations on January 12, 2010: City of Milwaukie Engineering and Building Departments; Lake Road and Linwood Neighborhood District Associations (NDA); Oak Lodge Community Council; and Clackamas County Department of Transportation and Development. The following is a summary of the comments received by the City. See Attachment 5 for further details.

- **Paul Hawkins, Land Use Chair, Lake Road NDA:** Supportive of the variance request.
- **Eleanore Hunter, Chair, Oak Lodge Community Council:** Supportive of the variance request.
- **Chris Maciejewski, City of Milwaukie Traffic Engineer, DKS Associates:** Updating the Applicant's October 2008 transportation impact study would likely not result in any new findings or mitigations.
- **Robert Hixson, Civil Engineering Associate, Clackamas County Department of Transportation and Development:** No objections to the variance request.
- **Tom Larsen, Building Official, City of Milwaukie:** No comment.

## ATTACHMENTS

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

1. Recommended Findings in Support of Approval (attached)
2. Recommended Conditions of Approval (attached)
3. Applicant's Narrative and Supporting Documentation dated January 7, 2010
4. Structural Permit Application #090475 dated December 11, 2009
5. Comments Received
6. Exhibits List



**ATTACHMENT 1**  
**Recommended Findings in Support of Approval**  
**Casefile # VR-10-01**

(Substantial Construction Variance for Milwaukie Ministorage Facility)

1. The applicant, Hans Thygeson of HT Investment Properties, LLC, has applied for approval to extend the timeframe within which Milwaukie Ministorage, a previously approved conditional use in the Business Industrial (BI) Zone at 5945 and 5965 SE Harmony Rd, could complete substantial construction and, thereby, retain its conditional use approval. The land use application is VR-10-01.
2. The Planning Commission approved construction of Milwaukie Ministorage at 5945 and 5965 SE Harmony Rd (formerly 5900 and 6011 SE Harmony Rd) in August 2008 (Land Use Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06). Ministorage facilities are conditional uses in the BI Zone. The code requires substantial construction of conditional uses within six months of approval, with allowance for a one year extension. In February 2009 the Planning Commission approved a request to extend the deadline for substantial construction to February 27, 2010. The applicant has not been able to meet this deadline due to project and site complexities and financial complications in the construction lending market. As a result, the applicant is requesting that the Planning Commission grant a variance to the substantial construction deadline and extend it to February 27, 2012.
3. The proposal is subject to the following provisions of the Milwaukie Municipal Code (MMC):
  - Subsection 1.04.030 Interpretation of Language
  - Section 19.702 Circumstances for Granting Variances
  - Subsection 19.1011.3 Minor Quasi-Judicial Review
  - Section 19.1013 Time Limit on a Permit for a Conditional Use or Variance
4. Sections of the Milwaukie Municipal Code not addressed in these findings are found to be not applicable to the decision on this application.
5. Public notice has been provided in accordance with MMC Subsection 19.1011.3 Minor Quasi-Judicial Review. A public hearing was held on February 23, 2010, as required by law.
6. MMC Subsection 19.702.1 Criteria for Granting Variances

The Planning Commission approves the variance request upon finding the following:

- A. MMC 19.702.1.A requires that the property in question has unusual conditions over which the applicant has no control.

During the 2008 land use hearings on the underlying conditional use application (Master File #CU-07-02), it was acknowledged that the site had unusual conditions over which the applicant had no control and which, in turn, created site development challenges. These conditions included the location of the site along a complicated transportation corridor and the bisection of the site by Minthorn Creek, a designated water quality resource area. It was also recognized at that time that the proposed project was large in

size and complex in nature. Understandably, the complexity and challenges associated with development of this site have continued into the construction phase of the project.

The City's conditional use policy, however, does not take site conditions or project size or complexity into consideration. It requires substantial construction of all conditional uses within six months of approval, with an allowance for a one-year extension. The Planning Commission finds that this is an unrealistic time frame within which to finance and construct this project due to the site's unusual conditions and concomitant development challenges.

The Planning Commission finds that the intent of MMC 19.1013 is to ensure that conditional uses are constructed while the circumstances under which they were approved still exist. The existing land use and development patterns in and around the project area have not changed dramatically since this project was approved and are unlikely to substantially change in the next two years. Consequently, the Planning Commission finds that the intent of MMC Section 19.1013 would not be violated by granting this variance.

The Planning Commission finds that this criterion is met.

- B. MMC 19.702.1.B requires that there are no alternatives to the variance and that the variance is the minimum variance necessary to allow for reasonable use of the property.

The Planning Commission finds that there are no alternatives to this variance. The Applicant's substantial construction deadline expires February 27, 2010. Without a variance, the conditional use approval for this site will expire and construction of this project will not be allowed to proceed under the project's 2008 land use approvals. The Applicant could seek new land use approvals for the same project by resubmitting all five land use applications. However, the Planning Commission finds that this is not in the public or the Applicant's best interests. Since there have been no significant changes to the proposal, the approval criteria, or the site conditions, it is highly unlikely that repeating the review process would result in a different decision. The public cost of re-reviewing the underlying applications would likely exceed the application fees paid by the Applicant. It would also unnecessarily add to the costs of the project and delay the redevelopment of this site.

The Planning Commission finds that the Applicant has requested the minimum variance necessary to complete substantial construction of this project, given its size and complexity, and that the Applicant's request for a two-year extension is reasonable. The Planning Commission finds that the Applicant is committed to moving this project forward in that the Applicant has prepared construction plans, submitted for building permits, and paid all applicable plan review fees to the City and the County.

The Planning Commission finds that this criterion is met.

- C. MMC 19.702.1.C requires that adverse effects upon other properties as the result of this variance shall be appropriately mitigated.

The Planning Commission finds that there are no adverse impacts to adjacent property owners as a result of this variance. On the contrary, the Planning Commission finds that redevelopment of this site as proposed will provide more benefits to the surrounding area and its residents than allowing it to remain vacant and abandoned. Specifically, redevelopment will improve pedestrian safety and mobility through the construction of

frontage improvements and will improve water quality and riparian habitat through mitigation plantings along Minthorn Creek. Moreover, this project's low trip generation will have only minor impacts on the Harmony Rd corridor and the two adjacent three-legged intersections as detailed in the underlying land use approval for this project (Master File #CU-07-02).

The Planning Commission finds that this criterion is met.

#### 7. MMC Subsection 1.04.030 Interpretation of Language.

The term "substantial construction," as used in MMC 19.1013, is not defined. Pursuant to MMC 1.04.030, however, all words and phrases shall be construed according to the common and approved usage of the language and all technical words and phrases, as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. The Planning Commission finds that the term "substantial construction" is a technical phrase that has acquired a peculiar and appropriate meaning in the construction industry. The Planning Commission finds that a building is considered to be substantially constructed when it is ready to be occupied, but not necessarily ready to receive a final certificate of occupancy due to punch list items that could include anything from street improvements to landscaping.

In applying this definition, the Planning Commission finds that substantial construction of this particular project means the following:

- Completion of the project in phases. The Applicant is allowed to complete the project in phases by constructing Building 1 now, and Building 2 and the bridge over Minthorn Creek later. Phasing of large projects is common, and, in this case, makes sense since the site's design allows Building 1 and Building 2 to operate independently. The Planning Commission finds that completion of Building 1 is an appropriate utilization of the project's conditional use approval.
  - Complete construction of Building 1 by February 27, 2012. This includes completion of all interior and exterior building improvements (and associated inspections) that are necessary for Building 1 to be operational including, but not limited to, any exterior HVAC equipment, electrical cabinets, and stormwater management facilities. All other required on- and off-site improvements would be required for final occupancy and need not be completed by February 27, 2012.
8. The Planning Commission finds that the existing Transportation Impact Study and Water Quality Resource Report that are associated with the underlying land use approvals for this project (Master File# CU-07-02) are still valid. The Planning Commission also finds that construction of all on- and off-site transportation improvements and installation of all mitigation plantings on the south side of Minthorn Creek prior to final occupancy for Building 1 are consistent with the underlying land use approvals for this project (Master File# CU-07-02).
9. The proposal was referred to the following departments, agencies, and associations on January 12, 2010: City of Milwaukie Engineering and Building Departments; Lake Road and Linwood Neighborhood District Associations (NDA); Oak Lodge Community Council; and Clackamas County Department of Transportation and Development. The comments received are summarized as follows:
- **Paul Hawkins, Land Use Chair, Lake Road NDA:** Supportive of the variance request.

- **Eleanore Hunter, Chair, Oak Lodge Community Council:** Supportive of the variance request.
- **Chris Maciejewski, City of Milwaukie Traffic Engineer, DKS Associates:** Updating the Applicant's October 2008 transportation impact study would likely not result in any new findings or mitigations.
- **Robert Hixson, Civil Engineering Associate, Clackamas County Department of Transportation and Development:** No objections to the variance request.
- **Tom Larsen, Building Official, City of Milwaukie:** No comment.

**ATTACHMENT 2**  
**Recommended Conditions in Support of Approval**  
**Casefile # VR-10-01**

(Substantial Construction Variance for Milwaukie Ministorage Facility)

1. Complete substantial construction of the Milwaukie Ministorage project by February 27, 2012. (Refer to the underlying Notice of Decision for a more detailed description of this project: Master File #CU-07-02). Substantial construction includes the following:

- **Complete Construction of Building 1.** This includes completion of all interior and exterior building improvements that are necessary for Building 1 to be operational including, but not limited to, any exterior HVAC equipment, electrical cabinets, and stormwater management facilities. All building inspections related to Building 1 must be completed and Building 1 must be ready for occupancy by the substantial construction deadline.

Construction of the above-listed improvements shall be completed in accordance with the underlying Notice of Decision dated August 27, 2008 for Land Use Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06.

2. Obtain a certificate of occupancy for Building 1. A certificate of occupancy requires completion of the following improvements:
  - Construction of all on-site improvements related to the operation of Building 1 including, but not limited to parking and loading areas, landscaping, and frontage improvements.
  - Construction of all off-site transportation improvements.
  - Construction of all mitigation measures related to Building 1 including, but not limited to, vegetative screening.
  - Installation of all water quality resource mitigation plantings on the south side of Minthorn Creek as described in the Applicant's 2008 Water Quality Resource Report or submission of a Water Quality Resource application for Type II review that includes an analysis of Building 1's impacts on the water quality resource area and an alternate mitigation plan for review, approval, and implementation.

Construction of the above-listed improvements shall be completed in accordance with the underlying Notice of Decision dated August 27, 2008 for Land Use Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06.

3. Provide annual progress reports in January via e-mail to the City of Milwaukie Planning Director until a final certificate of occupancy is obtained for Building 1.