CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Milwaukie City Hall
10722 SE Main Street
TUESDAY, September 23, 2008
6:30 PM

COMMISSIONERS PRESENT
Jeff Klein, Chair
Dick Newman, Vice-Chair
Scott Churchill
Teresa Bresaw
Charmaine Coleman
Paulette Qutub
Lisa Batey

STAFF PRESENT
Susan Shanks, Senior Planner, AIC
Bill Monahan, City Attorney

COMMISSIONERS ABSENT

1.0 CALL TO ORDER
Chair Klein called the meeting to order at 6:39 p.m. and read the conduct of meeting format into the record.

2.0 PROCEDURAL MATTERS

3.0 PLANNING COMMISSION MINUTES
3.1 June 24, 2008

Commissioner Churchill moved to approve the June 24, 2008 meeting minutes, amending Chair Klein's comments on 3.1 Page 43, beginning on Line 1429 as follows:
(Note: added language in bold, italicized text; deleted language struck through)
- **"Chair Klein** ~~suggested the Code be written specifically instructing people to get under a certain 'bar,' and telling them where the next bar would be if they did not get under **to set** the first bar .~~***stated that inevitably, people would always try to get under the bar, so the bar needed to be set mid-level and then be consistent.*** The policy ~~could~~ ***should*** be left at ~~a~~ mid-level ~~area~~ and then people would know if they did a big project, improvements would be required**.** If not, ~~they~~ ***people*** would do whatever they could to stay under that mid-level bar."

Commissioner Bresaw seconded the motion, which passed unanimously.

3.2 July 8, 2008
Commissioner Newman moved to approve the July 8, 2008 meeting minutes as written. Commissioner Bresaw seconded the motion, which passed 6 to 0 to 1 with Commissioner Batey abstaining.

3.3 August 12, 2008
Commissioner Bresaw moved to approve the August 12, 2008 meeting minutes as written. Commissioner Batey seconded the motion, which passed 6 to 0 to 1 with

Commissioner Churchill abstaining.

Approved Planning Commission Minutes can be found on the City website at www.cityofmilwaukie.org.

4.0 INFORMATION ITEMS – City Council Minutes
City Council Minutes can be found on the City website at www.cityofmilwaukie.org.

5.0 PUBLIC COMMENT – There was no public comment.

6.0 PUBLIC HEARINGS – None.

7.0 WORKSESSION ITEMS
7.1 Planning Commissioner Training City Attorney: Bill Monahan

Bill Monahan, City Attorney suggested the most effective way to conduct the training was to respond to the Commission's questions about real life situations as they reviewed the "Oregon Land Use Process Substance and Procedure Training" 7.1 of the packet.

- He noted that the "Fasano vs. Board of Commissioners of Washington County" decision set the framework for the Commission's responsibilities in reviewing quasi-judicial applications. It was important to adhere to due process, which included allowing an opportunity for public awareness of and input about the application; that the Commission is viewed as an impartial tribunal making a decision based on clearly established standards addressed by staff's analysis of the application; and that a written decision is reached, accompanied with an explanation about how the decision was made.
  - * When the process is followed correctly, he found that a majority of those who might have been concerned about an application actually only wanted to ensure the application was clearly understood, analyzed properly, and that the opportunity was made available for input.
  - * Most are suspect when it appears a decision is made without transparency, clearly applied standards, or any explanation of how the decision was made.

Mr. Monahan reviewed the "Oregon Land Use Process Substance and Procedure Training" while responding to questions and comments from the Commission and staff as follows:

Commissioner Batey:

- Asked whether the clearing of trees on the Milwaukie Mini-Storage site should have been brought up in response to the scripted site visit question as she had questioned whether the presented materials reflected the reality.
  - * **Mr. Monahan** answered yes. Though some jurisdictions did not encourage site visits, it was important for Commissioners to raise such observations because the Commissioners' perspectives and personal knowledge as members of the community were valuable in the process.
  - * He noted that site visits create a higher level of obligation for disclosure.
- Confirmed that she should identify any inconsistency noted on a site visit and asked whether the site visit's timing was pertinent to the question.

* **Mr. Monahan** advised the earlier the better in identifying inconsistencies so staff could address such items and/or defer them to the applicant who would have to demonstrate compliance with City codes and give others the opportunity to rebut.
* The timing of a site visit applied only after one was aware of an application because historical knowledge could be outdated. However, if one was very well-versed in a property, one might feel the need to share and that could be helpful.

Chair Klein:

- Asked about providing the Commission with knowledge of something outside the application.
  * **Mr. Monahan** responded he first would question how the information had been obtained because historical information might be great to add, if it is still relevant.
  * He discouraged independent inquiry by a Commissioner into information that might be relevant but was not in the staff report. Instead, staff should be notified of missing information and requested to check on it before the meeting.
    – Staff could then frame the question, provide any answer pertinent to the analysis of the application, and distribute that information to the Commission.
    – Commissioners should only research additional application information if staff delegated that research because a Commissioner might go off on a tangent, and obtain unintentional information.

Susan Shanks, Senior Planner, AIC asked if and when staff should alert the Commission if unrelated differences are seen by staff at the site that are not reflected in the application.

* **Mr. Monahan** replied such differences should be brought to the Commission's attention, adding that staff might have the best information available to provide a proper response. Staff should do further research and provide a memo to the Commission and applicant prior to or at the beginning of the meeting.

Mr. Monahan continued his discussion of the element of evidence, emphasizing that Oregon Revised Statute (ORS) 197.763 required that any new evidence presented at the hearing in support of an application gave an automatic right to a continuance to anyone who requested it in order to allow time for consideration to opponents and proponents.

* He did not believe this had an automatic tolling of the 120-day clock, but offered to further research the issue.

- He continued his review of the material, noting the importance of the record containing all evidence the Commission had relied on, both for transparency to the public and the provision of enough evidence to support the decision in case of appeal.
  * He explained that the "raise it or waive it" provision meant any issues not raised at the local proceedings were waived if the matter was taken up on appeal to the Land Use Board of Appeals (LUBA).

Chair Klein noted that Mr. Hammersly had a continuance on his application to ensure he was prepared to present the Commission with all the evidence because he thought an appeal would be needed.

Commissioner Batey asked whether adequately raising an issue in an application with extensive public participation was enough to allow someone to continue a hearing, even

though the issue might not be adequately discussed.

* **Mr. Monahan** noted that could still be enough to have a remand. The obligation or burden was on the applicant to review any and all submitted information, which was why staff ensured the applicant received everything.
  - If the decision was for approval, the City relied on the applicant to defend the approval. However, if the City denied an application and the applicant appealed, the City would have to defend its decision. In fact, if the applicant won on a contentious issue, the findings were often the most appropriate place for the applicant to ensure each and every criterion was addressed to connect the standards with the findings.
* **Ms. Shanks** confirmed issues could be raised verbally and in written testimony.

Commissioner Bresaw asked if it was advisable that some applicants waived their right to speak.

* **Mr. Monahan** noted many applicants believed it best, strategically, to rely on staff rather than risk speaking.
* He clarified the applicant would not be able to appeal to LUBA on any information outside of the staff report and the contents of the application. However, the applicant could appeal to City Council; the "raise it or waive it" standard applied only to LUBA appeals.

Commissioner Churchill:

- Confirmed an applicant that chose not to testify could request to leave the record open, and asked when the applicant should make that request.
  * **Mr. Monahan** explained that such a request must be made before the public hearing was closed or the applicant would have to ask for the Commission's indulgence to reopen the public hearing, which they were not required to give.
  * He cautioned that asking staff a question after closing the hearing could elicit new information not yet heard, and if so, the hearing should be reopened.
- Asked if some type of notice should be provided to the applicant before the close of the public hearing if additional supporting information necessitated a continuance or leaving the record open.
  * **Chair Klein** read "All testimony and evidence must be directed toward the applicable substantive criteria as described or other criteria in the plan or land use regulation which one believes to apply to the decision. Failure to raise an issue accompanied by statements or evidence sufficient to afford the Planning Commission an adequate opportunity to respond to each issue precludes appeal to the City Council or LUBA based on that issue. The applicant has the burden of proving that the application is consistent with the City of Milwaukie…"
  * **Mr. Monahan** noted a statement should be made announcing the opportunity to request a continuance if the request was made before the close of the hearing, which applied to the applicant as well as everyone else.
- Queried whether leaving the record open also required additional evidence as with a continuance.
  * **Mr. Monahan** replied leaving the record open could be for anyone wanting to submit more information in writing or just for the applicant, who might want to submit additional evidence.
  * The Commission could continue the matter for more public testimony at another hearing or for the submission of written materials only.

    * In the first evidentiary hearing, the Commission's first hearing on any matter, there is an outright allowance of a continuance if anyone raised it prior to the close of the first public hearing. However, the Commission could decide whether the continuance would be limited to the submission of written evidence.
- Confirmed that the person requesting a continuance at the first public hearing was not required to state there was additional evidence.
    * **Mr. Monahan** noted the statute stated such a request would automatically be given a minimum 7-day delay, during which anyone could submit additional information. He further explained that if a continuance request was made at the second evidentiary hearing or at the City Council level, the response was discretionary on the part of the decision maker.

Commissioner Batey:
- Asked if the applicant was always entitled to a continuance if willing to waive the 120-day clock.
    * **Mr. Monahan** believed it was discretionary but always advisable to give the applicant the opportunity if they wanted additional time and were willing to grant the extension, as they would either end up defending it at City Council or beyond.
    * The Oregon Land Use system was set up so property owners and people concerned about property development had the proper, easily understood information as to what an approval would be based on if certain objective criteria were met. Therefore, if an applicant believed they could get an approval by providing more information, they should always be given that opportunity to be consistent with the system.
- Confirmed that reopening the public record was discretionary, but might be a good idea if the applicant believed additional information could be supplied to obtain an approval.

Commissioner Churchill:
- Inquired about finding a way to notify the applicant and/or audience, perhaps announcing, "If anyone wants the record left open, the request must be made now because the public process is about to be closed."
    * **Mr. Monahan** replied that nothing was wrong with saying that and it could be done at the time of the applicant's rebuttal by stating, "This was the applicant's opportunity for rebuttal, and the time to request a continuance of the hearing or to keep the record open to allow additional time to submit evidence."
        – Notifying the audience was up to the Commission. However, announcing that requests for continuance must be made before the record was closed was more balanced when done at the beginning of a hearing rather than at the end, which might frustrate the applicant, or prompt questions about what was missing.
    * He explained a continuance could be as short as a day, but could be 2 weeks or longer; leaving the record open must be for at least 7 days and could be longer.
    * He clarified that tolling the 120-day clock was not automatic. The applicant could still state they wanted the decision within the 120-day period. The request to keep the record open was discretionary if not made at the first evidentiary hearing. Then the Commission had to wrestle between allowing time and running up against the 120-day clock.
- Asked how the Commission would be affected if an audience member requested that the public record be left open for 30days to submit more material just prior to the

close of public testimony, and the Commission just closed the hearing, which left the public record open for 7 days; would that create an appeal opportunity for the applicant?

  * **Mr. Monahan** replied that decision would be at the Commission's discretion. The Commission would not want to extend 30 days and knowingly blow the 120-day clock without the acceptance of the applicant. He suggested negotiating with the applicant for an extension, as the Commission could not require them to waive the 120-day clock.

- Confirmed that, barring the 120-day clock, the Commission could create grounds for an appeal if they did not allow the requested time for evidence to be presented.

Chair Klein:

- Noted the requesting party would also be on the record as wanting more information if they wanted to appeal, therefore stating their earlier position about their grounds for an appeal.
  * **Mr. Monahan** explained that if appeals to City Council were de novo, the requesting party had the opportunity to generate information before the hearing and effectively would need to file an appeal to bring the evidence. A de novo type of appeal hearing was easier for the City than one on the record.
- Asked about the Commission's procedure for closing the record and hearing when someone wanted the record left open solely to provide information to provide grounds for appeal.
  * **Mr. Monahan** clarified the Commission could not make a decision while the record was open. Many times leaving the record open was a staged record where, for example, the Commission stated 7 days would be given for anyone to submit additional information. At the close of those 7 days, all information received would be made available to all parties and the Commission could elect to hold another hearing for rebuttal, or allow an additional 7 days for rebuttal and then accept the applicant's written final rebuttal.
  * However, the matter had to return to the Commission for a decision but not necessarily for public testimony. He agreed that requesting a continuance or that the record be left open could be a stall tactic.
  * He agreed that language should be added to the Chair's script early on that made reference to the rights available to people to ask for a continuance before the end of the public hearing. The City Attorney's office would provide examples of the proposed language.

The Commission discussed the need to be clear but careful with the script's proposed language so as to not appear to invite procedural delays.

Mr. Monahan agreed transparency was critical and noted that any breaks in the proceedings should take place before a natural decision-making period, and that Commissioners not engage in conversation during that break period.

Chair Klein emphasized that when the Commission took a break, conversation on any open matter had to stop and any off-the-record requests for clarification must be referred to staff to avoid a new ex parte contact.

Commissioner Batey expressed concern that the one-page notice of hearing was somewhat formulaic with language not easily understood by laypersons and suggested

the notices should contain certain specific impact warnings for the public.

Commissioner Bresaw agreed, adding it might encourage more public participation and add more evidence for the Commission's consideration.

Chair Klein was concerned the applicant might find such language adversarial. The onus eventually was on the residents to obtain further information because they could not be force-fed information to get them to participate.

- He suggested increasing the radius of information dispersal.

Commissioner Batey reiterated the need for more information about impacts, but explained that boilerplate language stating every possible impact in every application was not wanted, only those that were realistically potential, and suggested verbiage such as "may affect" or "may create."

Commissioner Churchill believed a specific focus on each application could look biased, whereas a general boilerplate statement might not and could trigger more public interest.

Commissioner Batey understood the point and preferred a more specific statement to the current method. She noted if all impacts were listed on every application, people might come out for impacts that were not realistic concerns for an individual application.

- She discussed the Milwaukie High School notice as a good example of inadequate information provided in the notice because residents might not have considered the possibility of increased use or additional lighting.
- A balance was to be struck between generating opposition and ensuring the community was on notice of potential impacts.
  - **Mr. Monahan** stated that if the City wanted to expand the notice or even send out the entire application, they could do so.
  - He noted the difficulty for staff to subjectively draw out an individual application's important issues, and how that could lead to differences of opinion.
  - He explained the language in the relevant statute required an explanation of the nature of an application and the criteria to be met. He noted that it might be appropriate to mention certain possibilities such as increased use, but the idea was to pique the individual's interest.

Commissioner Churchill reiterated his agreement to a brief boilerplate statement but did not believe that resolved Commissioner Batey's concern.

- He also did not believe picking out the relevant issues on each application could be done, as it could appear biased. Encouraging resident participation was up to the neighborhood associations, who did receive more detailed information.

Chair Klein cited the Rowe Middle School hearing, in which Mr. Miller, who lived directly behind the school, stated he had not received any information, even though he had received a notice and could have obtained more information by calling staff.

- He questioned how much information the City was responsible for providing in order to motivate the public to care and participate.

Commissioner Batey clarified that she wanted to add some common sense language to the notices.

* **Ms. Shanks** offered that the notices could be improved for greater readability and accessibility by putting the legalese after the plainer language, using bullet points, changing the font, etc.
  - More information could be provided about the proposal itself, particularly with notice to the neighborhoods because they were not as limited with space as with the newspaper notice.
  - Staff's concern was about accurately pulling out what might be important to the community Staff could not anticipate every possible concern or issue and would not want to dissuade residents from doing their own research because they believed they had been told everything.
  - Staff believed they could appropriately and easily provide more factual information that would be helpful rather than harmful or misleading.

Chair Klein agreed with briefly expanding factual information without providing subjective information, but did not agree with stating specific implications that might be of concern.

- He recalled a quiet zone issue in which people had liked the sound of the train, which illustrated one could never anticipate what someone might like or dislike.

Commissioner Batey believed statements could be made about increased use such as doubling the number of students at an elementary school.

* **Ms. Shanks** believed increased use could be objective information. She asked if the Commission was comfortable with staff reformatting the notice with plainer language up front, moving the legalese down, and providing more detail about the actual project itself.
* Points of contact on the notice included the City's website and the actual planner's name and number. She noted that such points of contact could be highlighted.
* Staff would use bullet points and phrases to keep notices relatively brief so as not to lose the public's interest; it was a delicate balance.

The Commission agreed staff should reformat the notice.

Mr. Monahan emphasized changes to the State statutes regarding conflict of interest and responded to the Commission's questions with the following comments:

- New information discussed about serving on multiple positions stemmed from issues raised in a newspaper article reporting on the Clackamas River Water District Board about an employee of one city being an elected official for a special district and allegations that the person was violating the law by holding two positions.
  * He disagreed a violation had occurred in that particular scenario as that person had not had two conflicting lucrative positions because he had no decision making authority in his employment capacity.
  * In Oregon, the issue had historically been whether one held two lucrative public/governmental positions, meaning some compensation was being received.
    - It was common and permissible for a teacher at one district to coach at another. However, if that person was receiving Public Employees Retirement System (PERS) at both positions, that might be considered lucrative.
    - City Council members receiving a monthly stipend would not be considered lucrative, though receiving a salary would.

- It was not uncommon for paid public officials in one jurisdiction, such as a city engineer, to have outside employment, perhaps consulting, in another municipality. The issue was whether any conflict situation arose in which the person's interests were involved.
  - There was no inherent conflict between being a County employee and a City Council member because it depended upon the specific situation. A City of Milwaukie employee could serve on the City Council, but would have to declare a conflict during budget, salary, and benefit considerations.

Chair Klein asked if the Planning Commission could be held legally accountable on certain things or summoned to LUBA, perhaps.

- **Mr. Monahan** stated the Commission was obligated to follow the law and carry out Commission duties appropriately, but would not be called up to LUBA to defend a decision.
- Commissioners were covered under the City's umbrella policy acting within the scope of their positions, but could be brought up on charges if acting outside their scope or making a decision that was clearly objectionable.

Commissioner Batey asked if the Commission's deliberations would be better tied to the findings rather than expressing the influences that led to their vote.

- **Mr. Monahan** replied the Commission's findings were so well prepared that normally they accepted the findings but wanted to tweak one slightly. If a Commissioner did not accept any other finding, they needed to speak up.
- He explained the importance of the Commission reaching consensus that the wording of a finding was what the Commission wanted. It was always best to have a discussion to clearly identify what findings the Commission wanted.
  - If the Commission found reason to deny an application, then only one finding needed to be made. However, that single item could become the focal point on appeal to City Council or LUBA, so the Commission should be as specific as possible and identify all the reasons for denial.
  - When approving an application, the Commission was obligated to connect the finding to each and every criterion.
- **Ms. Shanks** noted staff was in the process of standardizing the staff report format and had started including language that tied the conditions of approval back to the specific finding and/or the actual Code section on which each was based.
  - This prevented the rationale for a condition from being lost because conditions were frequently used almost like a checklist by both the applicant and staff when applying for a building permit.
  - She reiterated if that connection did not work, Commissioners should speak up because the conditions always had to be based on the findings. Staff wanted to make it more transparent that the findings and conditions were inextricably linked.

Chair Klein noted there were no findings at the end of the Favorite application.

- **Mr. Monahan** clarified that staff had no findings for denial prepared. In that case, the burden shifted to the Commission, because staff had findings in favor and the Commission disagreed; therefore, staff needed to get findings from the Commission.

- **Ms. Shanks** noted that when writing the findings, she used the Commission's voice, stating, "The Planning Commission finds that…" because staff could not technically make a finding.
- **Mr. Monahan** commended staff's ability to write findings, and the Commission's procedure in explaining what was needed in new findings and then reviewing and adopting them as the Planning Commission's own findings, which was critical.

Commissioner Batey:

- Asked about findings in areas where the criteria were subjective, such as with the last Parecki building, where the application was approvable but the Commission did not necessarily have to approve it.
  - **Mr. Monahan** agreed that with subjective criteria, no clear line existed. More of a burden was on the Commission, and ultimately it was their call. This was why discussion was so important about the information provided by the applicant. Having that information provided at the last minute made the burden even heavier.
  - **Ms. Shanks** added that it was up to the applicant to provide convincing and substantial evidence. There could be many different pieces to review, but because it was a discretionary decision and more difficult, it went to the Commission rather than being decided by staff.
    - She agreed that approvable did not necessarily mean the Commission had to approve it.
  - **Mr. Monahan** explained that in writing the findings, words such as suitable, compatible, and acceptable should be used to connect the evidence to the criteria within the Code.
  - **Ms. Shanks** noted the Commission might not agree that a staff finding adequately addressed subjective criteria and might want to make changes, since everyone had different perspectives.
- Believed the Commission might do more negotiating and fine-tuning of the findings and conditions than in a pure Code situation with objective criteria.

Mr. Monahan continued his review of the document, cautioning the Commission to be very careful about addressing purpose statements in the Comprehensive Plan. The Commission's obligation was to follow Code approval criteria, normally the Development Code, unless the Code stated that a section of the Comprehensive Plan was an approval standard.

- The Baker vs. Milwaukie case stated that the Comprehensive Plan governs as a model for the community, but the Ordinance and the Commission dealt with the implementing regulations in the Zoning Code. Comprehensive Plan concepts only affected quasi-judicial hearings when stated as criteria.
- The Zoning Code is the implementing tool that points back to the Comprehensive Plan. If something needs to be addressed, it needs to be in the Zoning Code rather than reference the Comprehensive Plan, which was more of a policy document.
  - If the Commission wanted to use any direction in the Comprehensive Plan, it must be crafted or linked into some approval standard because comprehensive plans were too open to interpretation and were usually outdated.
  - Legislative approvals usually referred to comprehensive plans because that was normally addressed in legislative plan adoption.

Ms. Shanks noted problems existed because certain Code sections, such as Annexation, Conditional Use, and Zoning Code, had criteria of "meet all applicable Comprehensive Plan goals and policies," which was another Code fix project.

Mr. Monahan noted one requirement was that an application needed to be processed within 180 days. He described a recent case where someone challenged the City of continuing to process an application after 180 days, which resulted in the court deciding that if the application was not deemed complete and moved ahead on the 181st day, that application was void and must be started all over again.

* **Ms. Shanks** described a recent case where that had occurred and staff had waived the fee because the applicant had not been notified. Staff then modified the "incomplete letter" to put the applicant on notice that if they did not instruct staff to deem the application complete or staff did not deem it complete, the application was void and another fee would be required.
  - She noted an ORS provision that permitted the clock could be waived 245 days in addition to the 120 days; however, the clock could not be waived indefinitely.

- He noted that was becoming more of an issue in today's economy and could create hardship for anyone holding off on acting on their applications.
- He reviewed Item IV "Conditions of Approval" on Page 11, correcting Item IV (A), as follows: "A ~~LWDUO~~ ***Milwaukie Municipal Code and Development Code*** expressly allows a condition of approval to be imposed."
- Lastly, he stressed the importance of having a proportionality analysis for each and every application, noting that it was not unusual, but required that the applicant do a study and submit information. Applicants are often reluctant to provide information, not only in support of their application, but information they feel might lead to the City finding a justification for imposing exactions.

Commissioner Coleman excused herself from the meeting at 8:35 p.m.

Chair Klein clarified that any Commissioner could communicate with staff and ask them questions. It was important for the Commission to study packet materials and ask questions of staff early enough for them to respond and/or for staff to forward the questions to the applicant. Addressing questions early would help avoid a "deal breaker" being brought out during a public hearing where the Commission might have to deny or continue the matter. He understood questions could always arise unexpectedly or after staff's presentation.

- He alluded to the most recent Parecki application, where communication with staff would have revealed the difficulties staff had in obtaining clear information.

Commissioner Batey:

- Noted things were said at the end of that meeting that might have affected many Commissioners' votes. Staff knew and dealt with items not reflected in the staff report, and she questioned whether Commissioners were supposed to ask what was not in the staff report that should be known.
  * **Ms. Shanks** replied staff struggled with being impartial as facilitators of the process. She did not believe information about the applicant's reluctance to provide information could or should be in the staff report. In staff's effort to remain impartial, some information could be omitted that might be useful. She invited feedback about what would be useful information.

- Believed including information that the applicant had demanded the application be deemed complete would have been helpful to have in the staff report, causing staff's recommendation to be less than wholehearted.
  * **Mr. Monahan** agreed no one was asking staff to be judgmental, but to just state the facts. Staff could have supplied information about the approximate timeline of their requests to remedy an incomplete application and that the applicant had requested the application be processed as if it were complete.
  * **Ms. Shanks** believed staff could add an application history section in the staff report showing when it was submitted, deemed complete, and whether the applicant requested it be deemed complete versus staff arriving at that conclusion.

The Commission consented such information would be very helpful.

Mr. Monahan added that such information could become a flag for the Commission to ask staff what had been requested but not supplied, and ask the applicant what they had done to address the pertinent criteria, enabling the Commission to decide whether or not to hold the matter over.

Ms. Shanks asked if it would be useful for the staff report, when applicable, to include the last incomplete letter. Oregon Law required staff to specify exactly what would complete an application. The incomplete letter explained exactly what was needed to deem an application complete, the reasons approval could not be recommended, and noted informational items not required but that assisted the applicant in thinking ahead about such things as public area requirements at the building permit stage.

- She invited the Commissioners to call staff and request a synopsis of an application should they not have had time to review it in advance. Commissioners were also invited to review the site plan with staff as well.
- She reviewed the general process and timeline of a typical application set to come before the Commission as follows:
  * A pre-application conference was strongly suggested, but rarely required. The process took about a month and could occur well before a submittal.
  * A $125 pre-application fee was charged, basically for an hour of City time. The Building Official, a member from both the Planning and Engineering department, and sometimes the Fire Marshal hold an interdepartmental meeting to review the proposal, conduct a site visit, and meet for an hour with the applicant. Notes are compiled informing the applicant of the Code sections to be addressed, timeline, application fees, etc.
  * Though required to review an application within 30 days, staff's internal practice was to review and respond within 10 days, depending upon the complexity of the application and staff's workload.
    – Within that timeframe, staff would either write a boilerplate "complete" letter or a detailed "incomplete" letter; a more time-consuming, tedious process that tied requested information to specific Code requirements.
    – Multiple iterations of an incomplete letter might be required. The 120-day clock only started when the application was deemed complete or when the applicant requested it be deemed complete.
  * Staff needed a minimum of 45 days to process an application through to the Commission. The process included sending the application out for referral, putting notices in the newspaper, writing the staff report, which involved having

specific departments review it, and preparing it to be available seven days before the hearing.

- Staff had revised the Commission hearings schedule to let the applicants know the deadline by which they could submit additional information for it to be included in the staff report and ensure the Commission had enough time to review it. Otherwise, the Commission might deny or continue the matter.

* Application costs varied widely, but generally the two main fees were about $1,500 for items like a Community Service Use, Conditional Use, Variance, etc., and roughly a $600 to $800 range for applications such as a Water Quality Resource application. Different costs were associated with different review levels, such as a Type II, or staff-level decision, versus a minor quasi-judicial review.
  - If an applicant had a number of applications to be heard at once, the policy was to require full price for the most expensive application and half price for the concurrent applications. The Milwaukie Mini-Storage was an unusual example, paying about $6,000 for five applications. A more normal total application cost might be $1,500 to $2,000.

Chair Klein commented that with applicants spending as much as $750 to $2,000 on an application, it was important that the Commission review and understand the material, as what the Commission did was important.

Commissioner Bresaw noted that Gary Firestone's prior class had impressed upon her that good reason to approve existed if the positive impacts were greater than the negative impacts and reasonable conditions could be imposed.

* **Mr. Monahan** affirmed that approval was required for an approvable application if reasonable conditions could be crafted and imposed. This mostly pertained to clear and objective standards versus discretionary standards. Approval was less of a judgment call with objective standards as to whether or not the conditions actually addressed them.

Commissioner Batey noted she had heard Gary Firestone speak on the TriMet Southgate Park and Ride LUBA appeal, and found it ironic after the City spent all that time and effort to defend it.

8.0 DISCUSSION ITEMS

Chair Klein asked about the status on upcoming various Code change projects.

* **Ms. Shanks** noted the different stages of the four Code projects as follows:
  - The Transportation Code amendment project being done by Ms. Shanks was furthest along in the process.
  - The Parking Code amendment project was being led by Ryan Marquardt, who was actively working with a consultant and was moving forward, although probably behind the Transportation Code amendments.
  - Brett Kelver was working on Title 13, the Nature in Neighborhoods Metro Title the City was required to be in substantial conformance with by a certain deadline. The project was very active, but quite complex and very technical because it dealt with habitat, not necessarily water quality, and addressed both regulation and the encouragement of development practices to promote habitat conservation.

- While water quality resource boundaries were clearly defined, the habitat conservation areas were mapped with no linear measurement. The conversation areas mostly corresponded with water quality resource boundaries, but not quite. Many jurisdictions questioned whether two similar layers should exist or if the layers should be combined for simplicity and implementation, both for staff and property owners.
- A Commission worksession could be expected soon.

— The Design Standards Code amendment project to address single- and multi-family housing issues like massing and context had been Bob Fraley's project, and had not progressed very far. The project would be slowed due to staffing changes, but staff understood it was still a priority.

- She attended the Lake Rd Neighborhood District Association (NDA) meeting last month because of their deep concern and interest in being involved with the revisions due to the large house that was half built at Lake Rd and Verne Ave.
  - The house had been foreclosed on and Tom Larsen, the Building Official, had stated the new owner was moving the project along.
  - Technically, a building could remain half built, as long as the building was boarded up in compliance with certain rules so as not to be a nuisance.

Commissioner Batey noted a foundation that had been in Island Station near Spring Park for 20 years that was not boarded up, but was occasionally fenced off. Code Enforcement had made the owners fence the foundation off, but the owners had used that as an excuse to not maintain the property.

* **Commissioner Churchill** believed the foundation was a hazard for children.
* **Ms. Shanks** suggested Commissioners call Code Enforcement if they questioned whether a property met the criteria of being a nuisance.

Commissioner Churchill:

- Asked about the light screening and point-by-point foot-candle analysis on the eastern property line on the high school track and field.
  * **Ms. Shanks** recalled the foot-candle analysis had met the requirement. She was uncertain about the shrub and tree requirements, but noted that Mr. Kelver's inspection of the shrubs had revealed that the height requirement had not been met.
  * The School District contacted their landscaper about the error, noting that the right item had been ordered. She believed the applicant had provided a letter stating they would remedy the noncompliance within a certain time period.
  * She noted the project was not complete, so the City still had leverage to ensure compliance. Mike Swanson and Kenny Asher had been involved in evaluating where to draw the line and where going forward was reasonable.
- Stated that in his subjective review before the track opened, he noted a lot of stray light with some pretty high foot-candle levels on the eastern edge.
  * **Ms. Shanks** agreed to send the lighting report created by the applicant's licensed engineer, which staff had relied on to confirm compliance. . She added that Commissioner Churchill's review might have possibly predated the applicant's light adjustments.

Commissioner Bresaw noted the applicant had removed the blackberries on the

hillside, which was a big improvement

Chair Klein asked about the public use issue. He believed the dog walking issue was obvious, but use of the track had been a longstanding privilege.

* **Ms. Shanks** agreed public use was an issue, noting she had heard indirectly that the public was not being allowed to use the track and field in the early morning hours or at other times when the public had been accustomed to using it.
  - The issue was unfortunate and similar to the Immovable Foundation Church, who had agreed they would allow the same level of public use, but then decided to restrict public use.
* **Commissioner Churchill** stated the NDA was told not to worry by the School District's Public Relations Officer because the track would be open 24/7. The NDA thought that unreasonable as it could result in vandalism; they merely wanted the track open around 6 a.m. like other area high schools.
* **Ms. Shanks** offered to follow up to ensure the District was not drastically limiting public use.

9.0 OLD BUSINESS -- None.

10.0 OTHER BUSINESS/UPDATES

10.1 Planning Commission Notebook Interim Reference Pages Staff: Susan Shanks

Ms. Shanks reminded the Commission to insert the Interim Reference Pages into their binders and that staff was available for assistance if needed.

- She also reminded the Commission of the email she sent regarding the third-quarter Statement of Economic Interest (SEI) form that the Commissioners had to fill out.
  * **Mr. Monahan** clarified that the State sent the Commissioners their annual SEIs and took the obligation very seriously. The City was emailing the quarterly forms, but forms were also available online to download and print, so Commissioners could just check the box for each quarter accordingly. The 2007 legislature changed filling out the SEI form from an annual to a quarterly requirement.
  * **Ms. Shanks** offered to provide the website link and/or hard copies of the SEI as needed.

11.0 NEXT MEETING: October 14, 2008

11.1 CSU-08-02: Immovable Foundation Church CSU Major Modification for 4011 SE Lake Rd.

11.2 Update on Metro Title 13 – Nature in Neighborhoods (Tentative)

Ms. Shanks stated staff hoped to provide this update but that it was still tentative.

Commissioner Bresaw stated she had received an email from Cami Waner, which she had forwarded to staff and asked if that would be an ex parte contact to declare for all the Commissioners or just for her.

* **Ms. Shanks** explained Commissioner Bresaw had received the email because she was associated with the Lake Rd NDA within the City's database, and assured her that the email would be included in the staff report.
* **Mr. Monahan** clarified the ex parte contact had been cured because staff had received the email and would include it within the staff report, so a declaration was unnecessary.

Forecast for Future Meetings:
November 11, 2008 is Veteran's Day. The regularly scheduled Planning Commission meeting has been tentatively rescheduled for Wednesday, November 12, 2008.

Meeting adjourned at 9:15 p.m.

Respectfully submitted,

Paula Pinyerd, ABC Transcription for
Alicia Stoutenburg, Administrative Specialist II

Jeff Klein, Chair

MILWAUKIE PLANNING COMMISSION

MILWAUKIE CITY HALL
10722 SE MAIN STREET

AGENDA
TUESDAY, September 23, 2008
6:30 PM

		ACTION REQUIRED
1.0	**Call to Order**	
2.0	**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. Thank You.	
3.0 3.1 3.2 3.3	**Planning Commission Minutes** June 24, 2008 July 8, 2008 August 12, 2008 Approved PC Minutes can be found on the City web site at: www.cityofmilwaukie.org	**Motion Needed**
4.0	**Information Items – City Council Minutes** City Council Minutes can be found on the City web site at: www.cityofmilwaukie.org	**Information Only**
5.0	**Public Comment** This is an opportunity for the public to comment on any item not on the agenda.	
6.0	**Public Hearings**	**Discussion and Motion Needed For These Items**
7.0 7.1	**Worksession Items** Planning Commissioner Training City Attorney: Bill Monahan	**Information Only**
8.0	**Discussion Items** This is an opportunity for comment or discussion by the Planning Commission for items not on the agenda.	**Review and Decision**
9.0	**Old Business**	
10.0 10.1	**Other Business/Updates** Planning Commission Notebook Interim Reference Pages Staff Person: Susan Shanks	**Information Only** **Review and Comment**
11.0 11.1 11.2	**Next Meeting:** October 14, 2008 CSU-08-02: Immovable Foundation Church CSU Major Modification for 4011 SE Lake Rd. Update on Metro Title 13 - Nature in Neighborhoods **The above items are tentatively scheduled but may be rescheduled prior to the meeting date. Please contact staff with any questions you may have.**	

Forecast for Future Meetings:
November 11, 2008 is Veteran's Day. The regularly scheduled PC meeting has been rescheduled for Wednesday, November 12, 2008.

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

Public Hearing Procedure

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.** The staff report is followed by any verbal or written correspondence that has been received since the Commission was presented with its packets.

3. **APPLICANT'S PRESENTATION.** We will then have the applicant make a presentation, followed by:

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

5. **COMMENTS OR QUESTIONS.** Comments or questions from interested persons who are neither in favor of nor opposed to the application.

6. **PUBLIC TESTIMONY IN OPPOSITION.** We will then take testimony from those in opposition to the application.

7. **QUESTIONS FROM COMMISSIONERS.** When you testify, we will ask you to come to the front podium and give your name and address for the recorded minutes. Please remain at the podium until the Chairperson has asked if there are any questions for you from the Commissioners.

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

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

10. **COMMISSION DISCUSSION/ACTION.** It is our intention to make a decision this evening on each issue before us. Decisions of the Planning Commission may be appealed to the City Council. If you desire to appeal a decision, please contact the Planning Department during normal office hours for information on the procedures and fees involved.

11. **MEETING CONTINUANCE.** The Planning Commission may, if requested by any party, allow a continuance or leave the record open for the presentation of additional evidence, testimony or argument. Any such continuance or extension requested by the applicant shall result in an extension of the 120-day time period for making a decision.

12. **TIME LIMIT POLICY.** All meetings will end at 10:00pm. The Planning Commission will pause hearings/agenda items at 9:45pm to discuss options of either continuing the agenda item to a future date or finishing the agenda item.

Milwaukie Planning Commission:

Jeff Klein, Chair
Dick Newman, Vice Chair
Lisa Batey
Teresa Bresaw
Scott Churchill
Paulette Qutub
Charmaine Coleman

Planning Department Staff:

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

OREGON LAND USE PROCESS

SUBSTANCE AND PROCEDURE TRAINING

Presented by:

Bill Monahan

JORDAN SCHRADER RAMIS PC

September 23, 2008

PLANNING COMMISSION
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. Milwaukie's zoning code requires notice beyond 100 feet - 300 feet for Type II (MMC 19.1011.2(A) and minor quasi-judicial (MMC 191011.3(B), and 400 feet for major quasi-judicial applications (MMC 19.1011.4(B).

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 INTERESTED PERSONS 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?

[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)

> 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 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 be 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 LWDUO 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 proportionality based on an individual assessment in each case. All provisions of the LWDUO 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

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

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 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.