CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Milwaukie City Hall
10722 SE Main Street
TUESDAY, May 25, 2010
6:30 PM

COMMISSIONERS PRESENT
Jeff Klein, Chair
Nick Harris, Vice Chair
Lisa Batey
Teresa Bresaw
Scott Churchill
Chris Wilson

STAFF PRESENT
Katie Mangle, Planning Director
Susan Shanks, Senior Planner
Ryan Marquardt, Associate Planner
Brad Albert, Civil Engineer
Bill Monahan, City Attorney

1.0 Call to Order – Procedural Matters
Chair Klein called the meeting to order at 6:30 p.m. and read the conduct of meeting format into the record.

2.0 Planning Commission Minutes – None

3.0 Information Items – None

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

5.0 Public Hearings

5.1 Summary: Riverfront Park *cont'd from 5/11/10*
Applicant/Owner: City of Milwaukie
File: DR-09-01, TPR-09-03, WG-09-01, WQR-09-01, VR-09-03
Staff Person: Ryan Marquardt

Chair Klein called the hearing to order and read the conduct of minor quasi-judicial hearing format into the record.

Bill Monahan, City Attorney, advised that at the close of the last meeting the Planning Commission decided to reopen the public hearing and accept input on the complete application as well as new information. He advised that the Commission go into hearing format, starting with the staff's or applicant's presentation.

Commissioner Wilson stated that he had read the rough draft of the minutes from the prior meeting along with all the material, and talked with Ryan Marquardt. He believed he had enough information to take part in the meeting.

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

Commissioner Batey declared that she received a call from Ed Zumwalt of the Historic Milwaukie Neighborhood District Association (NDA) who was concerned about the lack of non-motorized boat access. They spoke briefly on the phone. He said he might testify, but was not present at tonight's meeting.

Commissioner Churchill stated he also received a similar call from Mr. Zumwalt regarding non-motorized boat access. Someone else left a voice message on the same subject but did not state their name.

Each Commissioner had visited the site. No Commissioner, however, declared a conflict of interest, bias, or conclusion from their 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.

Ryan Marquardt, Associate Planner, presented the staff report via Power Point, stating that the bulk of staff's analysis, findings, and conditions of approval from the May 11th staff report were still in place because there were not many changes from the last hearing. He addressed questions the Commission asked at the May 11th meeting as follows:

- Additional materials submitted by the Applicant and sent to the Planning Commission on Friday addressed non-motorized boat access for the park. The Applicant would provide additional comments during their testimony.
- The left-hand turn pocket off Hwy 99E/McLoughlin Blvd to enter the Riverfront Park area was 140 ft long and would accommodate about 7 standard automobiles or 3, 50-ft long vehicles, such as a vehicle with a boat trailer.
    - City engineering staff measured the existing right-of-way on McLoughlin Blvd and found that the curb on the west side would need to extend west about 4 ft toward the river to accommodate the cross-section on McLoughlin Blvd. No changes would be needed to the east side of McLoughlin Blvd.

Commissioner Churchill asked if engineering staff believed the 3 vehicles with boat trailer combination pocket length was adequate considering the volume of traffic and how that determination was made.

- **Brad Albert, Civil Engineer,** stated that the left-turn pocket capacity of 3 trucks with boat trailers was adequate for the volume entering and exiting the facility, and designed to meet ODOT standards for the designed speed of, peak capacity, and trip generation forecasts for the highway. He deferred to the Applicant for more information.

Commissioner Batey asked if the 4-ft shift on the west side of McLoughlin Blvd would impact the Trolley Trail.

- **Mr. Albert** responded that the Trolley Trail was designed far enough away that the 4-ft shift would not impact it. The existing center turn lane at Washington St was 14-ft wide and could be re-striped to 11-ft wide, so moving the curb may not be required. After his cursory review of the site, the proposed shift would be a maximum of 4 ft, if needed.

JoAnn Herrigel, Community Services Director, thanked the Commission for hearing the application again and noted that more Riverfront Park Board (Board) members were present who would testify. She had provided some material in response to the Commissioners' questions at the last meeting about the non-motorized boat launch. She updated the Commission with information from further research with these comments:

- She found that 2007 open house renditions showed non-motorized boat access at Jefferson St and so had been viewed by the Commissioners and the public. It was also included in the 70% design details provided by David Evans and Associates (DEA) and used in the pre-application meeting with the Army Corps of Engineers (Corps), National Oceanic and Atmospheric Administration (NOAA) Fisheries, National Marine Fisheries Service (NMFS), and other regulators in July 2008.
    - At that time, a NMFS representative indicated to the design team that if multiple things

were along the edge as well as out into the water of the Willamette River, the application might not receive as positive a review as it otherwise might. There was now a new NMFS project manager.
    - The Board believed it was advisable, given that non-motorized boats could be accommodated with the existing structures and current development, to remove non-motorized boat access from the plans submitted to the Corps in January 2008 and the Commission in March 2009. At that time, the Board assumed that non-motorized boats could be accommodated with the transient dock or the boat ramp. Her personal idea was to lower a fork of the transient dock or add something to the edge of it to accommodate non-motorized boats. She never considered not allowing non-motorized boats and wanted to accommodate as many boaters as possible with the proposed design.
- The Board was prepared to offer 4 options to the Corps and NMFS staff reviewing the Corps application within the next couple of weeks. She asked for feedback from the Commission regarding which would be preferable and receive the most positive review. The proposed options were:
    - Option 1: Use the proposed boat launch and transient dock for non-motorized boat launch. These structures were 12 to 18 inches above the water and less convenient, but could be used to access a non-motorized boat.
    - Option 2: Lower part or all of one fork of the transient dock to a 6-inch height, making it easier for non-motorized boat access. This was similar to a dock that non-motorized boats could use on the east side of the Willamette River, north of OMSI. It was also a similar distance from automobile parking as the proposed access in the Riverfront Park plan.
    - Option 3: Put smaller gravel along the top of the boulders along one side of the planned boat ramp to create a non-motorized boat launch alongside the dock next to the boat launch. To avoid conflicts with motorized and non-motorized boats unloading in the same area, a ready lane could be installed for non-motorized boat users to park, unload their vessel, and then move their vehicle to the parking area. This option was not yet designed, but being discussed.
    - Option 4: Reintegrate the access path and launch proposed in the 70% design. This option had not been designed in detail.
    - She proposed that Mr. Williams and DEA develop more details regarding these options and send them to the Corps and NMFS to discuss which options were preferable.
- The Board's considerations regarding the 4 options included:
    - They wanted to accommodate non-motorized boaters. They believed they already were, but needed to explore other options.
    - They wanted to allow a timely approval of the joint permit application, which had already been in review for more than one year. The total review process would take 2 years, so they wanted to be careful to not extend the time the Corps needs for review by adding an additional element. However, discussions with the Corps had not indicated that it would delay the review process.
    - Any option considered had to work for both motorized and non-motorized boats with no conflict.
    - The closest parking lot was some distance from the non-motorized boat launch proposed in the 70% design. The walk down to the transient dock was fairly steep, although not as steep as the launch by OMSI, which had a 25% incline. She proposed that while the design team was considering the access, non-motorized boat groups could be contacted to ask about their preferences.
- After meeting with the head of Water Environment Services (WES), it appeared that a full traffic light would be needed for accessing the riverfront, regardless of the entrance's location. The sewage trucks were mostly going north, so the proposed entrance may need

to be modified, or remain at Washington St, which would not have a major impact on the design.
- Further information was also available about the survey in response to Commissioner Batey's inquiry.

Commissioner Batey:
- Asked if the Board consulted the public through Willamette Riverkeepers or any other groups representing the rowing community before removing non-motorized boat access.
  - **Ms. Herrigel** responded that the focus was primarily to get the application in and make sure it was positively reviewed, so it was not taken out to other organizations.
  - **Gil Williams, David Evans & Associates,** noted that preliminary conversations were held with Travis Williams of Willamette Riverkeepers, who indicated that non-motorized boat access was desired. The notes from those conversations were limited, but there were preliminary conversations about the same time as the pre-application meeting with the Corps.
- Asked if the dock gangplanks were wide enough for 2 people to carry a canoe and pass each other.
  - **Ms. Herrigel** believed the gangplanks were about 6-ft wide.
  - **Mr. Williams** added that the 6-inch height from the water was the primary consideration for easy boarding of non-motorized boats. The regulators look at the footprint on the water, so if the facilities were widened, extended, or added to it was looked at negatively. Maintaining and providing non-motorized access using the existing footprint by lowering the height of one dock would be the way to do it.

Commissioner Churchill stated that the traffic bottleneck did not exist at the water's edge, but at the single point coming from the old log dump down the single path on the transient dock. He understood the footprint on the water was important, but the congestion point appeared to be the narrower part of the ramp.
- **Ms. Herrigel** replied that as designed, the transient dock was 6-ft wide with no railings.
- **Mr. Williams** stated there were railings on the ramp going down to the transient dock, but the width was 6 ft clear inside the railings.

Chair Klein clarified that nothing restricted him driving his 4-Runner with a kayak on top down the boat ramp and unloading the kayak and tying it to the dock, and then parking his vehicle.

Commissioner Churchill:
- Noted comments in Ms. Herrigel's letter about speaking with John Holm of the Army Corps of Engineers, who has been reviewing the Riverfront Park application through the Corps' Joint Permit Application process.
  - **Ms. Herrigel** stated that the Board did speak with Mr. Holm about the 4 options for non-motorized boats and his interpretation was that they would not be a major modification to the original application. Mr. Williams would confer with the other agencies about the options. She wanted to push a little further because several options were being considered, and ask Mr. Holm if there were any options he would not recommend.
  - **Mr. Williams** clarified that the applications went through the Corps and were reviewed by NMFS, who would render a biological assessment. Presenting an addition or revision to the design was not problematic, but had to be justified. If the change did more harm or presented a liability of exposure for NMFS, then a conditioned opinion would be rendered. The access could be included and defined with design drawing and an explanation for the need. Mishka Konine, the NMFS project manager, would render an opinion based on that material.

    - He clarified that the goal of NMFS was to protect the fish.
- Verified that the project started in 1998 and asked if all versions up to 2007 had non-motorized boat access.
    - **Ms. Herrigel** clarified that the option shown tonight was from the 2007 open house, which was the only drawing she could find with a specifically dedicated non-motorized boat ramp.
    - **Mr. Williams** noted it was not actually identified as a non-motorized boat launch but as a secondary path to the water's edge.
- Asked if non-motorized boat access was addressed in preliminary discussions between 1998 and 2007.
    - **Mr. Williams** responded that the original 1998 plans did not have any launching facilities at all. The Downtown and Riverfront Land Use Framework Plan showed a scheme for the riverfront that did not have a boat ramp or any boat access. Limited pedestrian access was available for viewing using steps down to the bank.
- Confirmed that the 2007 version at 70% design included the boat ramp, but that was removed in the July 2008 version.

Chair Klein clarified the Applicant had testified that the boat ramp in the 70% plans was not necessarily designated as a non-motorized boat access, but was primarily a pedestrian access for viewing the water only.

Mr. Williams asked if it had been labeled as non-motorized boat access in prior versions of the plans.

Commissioner Churchill stated that he did not have a copy of previous plans, but he recalled discussions where that path was explained as the way to get kayaks down to the water. He wanted to understand the history of the project.

- **Mr. Williams** said there was this plan, but the ones that went out with the survey did not include the access.
- **Ms. Herrigel** agreed that non-motorized boat access needed to be accommodated. Kayak and canoe users in the community wanted to use the riverfront and she wanted to accommodate them whether or not a specific dedicated ramp was shown in the past. She emphasized that there was no intent to excise it from the plan and she believed it needed to be included again. Removing it had been an oversight while trying to juggle all the balls with the federal, state, and local regulators.

Commissioner Bresaw remembered that a past City Council wanted to remove the motorized boat ramp because there was no room for it.

Ms. Herrigel said she was interested in the Commission's opinions regarding the 4 proposed options.

Commissioner Churchill reiterated that he wanted to understand the history because what the Board did in the meantime was very helpful. He asked if the Board would go to the various kayak and river keeper groups for feedback.

- **Ms. Herrigel** replied that it would be good to check in with kayakers, canoe owners, and the Willamette Riverkeepers, etc., for input and suggestions about what they have seen elsewhere.

Chair Klein called for public testimony in favor of, opposed, and neutral to the application.

Gary Klein, 10795 SE Riverway Ln, stated that he researched the Riverfront Park project at the Ledding Library and found 72 newspaper articles about the project dating back to 1917. He read statements from the newspaper articles, commenting that they sounded similar to what was happening today. He hoped that the plan would move forward.

Mike Stacey, 2740 SE Kelvin St, had been on the Riverfront Board for 7 to 8 years. He was an avid boater and kayaker who had always just used boat ramps, if available, for river access. He suspected that the Marine Board would be licensing kayaks before too long, giving kayakers legal access to everything. The project needed to get going. Dual access at the boat ramp was the best option and close access with a low dock was perfect. He believed the ready lane was a good idea.

Commissioner Batey asked Mr. Stacey if he would have to wait at the top of the ramp with his motorboat while a kayaker was unloading on the ramp. He confirmed that he would.

The Commission took a brief recess and reconvened at 7:20 p.m.

Mr. Marquardt noted that the materials gathered by Gary Klein were distributed to the Commissioners

- He explained that the staff report covered the first 3 options presented by Ms. Herrigel, but the current language would not accommodate reintegrating another access point because of other impacts to the Water Quality Resource (WQR) area that would require modified plans from the Applicant and another review.
- He clarified that staff did not know the range of options the Applicant was considering when the staff report was drafted, so it was drafted with a little flexibility to allow smaller changes in the park plans. However, the fourth option would not be covered under the proposal.

Ms. Mangle added that the findings were crafted to address the concerns raised by the Commissioners, but did not include the 4 proposals presented tonight. She clarified that the first 3 options could be accommodated through findings and conditions. The fourth option required further analysis because staff did not know what that option would look like, how much was impervious surface, what the disturbance would be, and what additional mitigation might be required.

Commissioner Batey confirmed if it was not possible to address the fourth proposal with the separate access point through a new condition, but word it so staff could review it without returning to the Commission.

Ms. Mangle expressed reservations about this approach.

Chair Klein read staff's recommended additional Condition of Approval 3 (5.1 page 3), and stated that he believed the Commission's questions were being addressed. He asked if any Commissioner had questions regarding clarification of testimony at this point.

Commissioner Churchill:

- Reiterated that one proposal did not match staff's language in their report, so the Commission could not effectively choose one of the 4 options.
    - **Mr. Marquardt** clarified that there were two parts to the analysis of the conditions. One part was that the Commission clearly expressed a concern about non-motorized boat launch access in the park. The findings in the Willamette Greenway (WG) section of the staff report clearly expressed that non-motorized boat access should be accommodated.

The second part was how non-motorized boat access should be accommodated. When the staff report was written, staff did not know if the Commission would find it adequate that small portions of the existing proposal could be modified to adequately address their concerns or whether a large change was needed to satisfy the Commission's concerns.

- **Ms. Mangle** believed that the WQR analysis asked applicants to avoid, minimize, and mitigate any impacts into the WQR area. Option 4 was a new access to the river and staff did not know what mitigation was required without analysis, and the Commission was always the final decision maker. The findings were crafted to guide approval of and substantial conformance with the submitted plan. Options 1, 2, and 3 were tweaks to the plan, while Option 4 was a new element that had not been analyzed yet. She did not believe that staff's recommended findings and conditions addressed Option 4 sufficiently.

- Appreciated Ms. Herrigel's effort to bring options to the Commission. Due to timing issues, the Commission was being asked to not consider Option 4 without a continuance of the hearing, but no one wanted to continue the hearing longer than necessary. He also heard that the Applicant wanted to review the options with the non-motorized boat community.
  - **Ms. Mangle** said that throughout the conditions many statements acknowledge that other agencies are involved in permitting the application and if any changes were required to react to the other agencies, then in many cases it would return to the Commission.
  - She clarified that the Applicant was still at 70% design with the plans submitted in 2009. Staff had been preparing for the hearing since, so the design was still at 70%. Any changes to the plans during the last 30% of the design had to be in substantial conformance with the subject plans. If substantially different, the plans would have to go through a WQR analysis and review by the various regulatory agencies, including the Commission.
  - She confirmed this was the last time the application would come to the Commission unless changes were required because of the Corps permit or other requirements.

Commissioner Churchill:

- Asked why the plans were at 70% before addressing the non-motorized boating community.
  - **Mr. Marquardt** replied that the WG criteria had to be considered regarding the types of accesses and users. The Applicant made the case that there was access for a variety of different users. The Commission had to decide if the 3 options were enough to accommodate non-motorized boat access. If a greater change was needed, it could return to the Commission.
- Pointed out that the options for non-motorized boats had not been vetted against the non-motorized boating community.

Chair Klein believed that the question had been answered that non-motorized boat access was included in the current set of plans under review. The Commission would determine if it was adequate or not during deliberations.

- **Ms. Mangle** commented that if the Commission believed Option 4 was the right one or very important to consider and fully develop, then it required further analysis that was not fully reflected in the findings to support approval tonight. More time was required if the Commission chose to develop Option 4.

Commissioner Bresaw asked if Option 4 could be considered in the future. The Commission could approve tonight to get it going, and if there was a conflict between motorized and non-motorized boats, it could be addressed in the future.

- **Chair Klein** noted that the added Condition 3 allowed for that potential.

- **Ms. Mangle** added that as a new element in the park, it would come back to the Commission in the future.

Mr. Monahan commented that if the application could be approved with one of the first 3 alternatives, a modification and new application could come back at a later time if the Applicant found that the approval authorities could grant Option 4, which the Commission could then review. This was the only way to get Option 4.

Ms. Mangle clarified that the Applicant had waived the 120-day clock, but there was a final 1-year deadline from submittal of application, at which point the application would have to start over.

Mr. Marquardt added that September 11, 2010, was the 1-year deadline for the application cycle. The absolute last timeframe for Planning Commission approval was late July/early August to allow appeal time to City Council.

Chair Klein asked what the Commission hoped to find by extending the review process.

Commissioner Churchill hoped that the non-motorized boat community received notice and had the opportunity to provide input into the process. Non-motorized boat access was removed July 2008 with little notification, although not intentionally. The Commission determined there was a lot of missing detail about consideration of non-motorized boat access and the Applicant had apologized for removing it from the plans.

Ms. Herrigel clarified that while there were 4 options, the Applicant requested that the Commission consider the 3 options that did not modify the original application.

Chair Klein asked how many people from the non-motorized boating community had come forward to look at the plans during the past 12 years.

- **Ms. Herrigel** said that in reviewing some of the survey results, the predominant comments were from people that wanted to drive to the park to look at the water from their car in the parking lot, put their motorized boats in the water, and that were advocates for parking lots. There were no kayaker comments, but that question was not directly addressed necessarily. The conversation she had with the Board and interested persons predominantly regarded open space and motorized boat access. People have asked if they could launch kayaks, but it was not the predominant discussion.
- After non-motorized boat access was removed from the plans, no one had commented about it until the Commission meeting. Since the prior Commission meeting, Mr. Zumwalt only made comments to her and the 2 Commissioners. He asked her if non-motorized boats could be accommodated with the facilities currently in the plan and if some other access had, in fact, been removed at some point.
- The existing boat launch was currently used for non-motorized boat launching. People walked all the way up and down the side of the river and put in where they wanted to. The proposed boat launch could also be used by both motorized and non-motorized boaters. She hoped that the boat launch, dock, and transient dock would prevent people from making goat trails by walking up and down the edge of the water to launch non-motorized boats.

Commissioner Churchill:

- Noted that the Applicant's consultant mentioned he had contacted the Riverkeepers.
  - **Ms. Herrigel** replied she was not aware of that contact, so the consultant would have to speak about it.

- Believed the Riverkeepers group was a very important non-motorized boat community. He believed that was the kind of community the Board needed to contact.
- Asked how recently they had been contacted because they were active in discussions with all applications regarding access to the water. He appreciated the larger effort to make contact with them, because they represented a large number of people who have access to the Willamette River.
- Understood that currently non-motorized boat access was done via the boat ramp or the waterfront edge, but asked what was used mostly now, because he had a feeling it might not be the boat ramp.
    - **Ms. Herrigel** stated that she had never seen anyone launch a non-motorized boat there, adding that Mr. Stacey did say he used the boat ramp.

Commissioner Bresaw asked if any grant deadlines were coming up for funding the project. Even if approved tonight, it would be years before the project started.

- **Ms. Herrigel** replied she planned to submit grant applications in April 2011, and though optimistic, construction could begin in Summer 2011.

Commissioner Churchill asked if the Board was contacting other non-motorized boat communities for input to the next 30% of design.

- **Ms. Herrigel** clarified that specifically, she would take the options presented as access alternatives to the non-motorized boat community for their feedback. She understood that 70% designs were basically in pencil and had not been hardened in pen. Pretty much everything was set down on the ground and dimensions were known at 70% design. Generally things were not necessarily moved around when going from 70% to 100%, but details were confirmed and materials specified. The process tonight and also at the Corps would establish what would be hard lined in before the next 30% design was completed.

Chair Klein closed the public hearing at 7:44 p.m.

Planning Commission Discussion

Vice Chair Harris believed that river access was important and non-motorized access was as equally important as motorized access. The existing access provided for both, but could probably be improved. Staff's recommendations clearly required the Applicant to seek ways to improve the access. He saw no reason to not approve the application.

Commissioner Bresaw said she basically agreed and wanted to see construction begin. There could be some conflict between types of boats with the current design, but it could be changed in the future. She agreed there could be goat trails to the river. She wanted the project to move forward.

Commissioner Batey stated that the Board had done a lovely job and the plan was beautiful. She liked the cars all on one end and that the road did not go through the whole park. She loved the fountain and the amphitheater. She did not want the Board to think that the focus on the non-motorized boat access was criticism of the overall plan, but it was a huge mistake to not include it in the application.

- It would have been better to document the goat trail phenomenon that existed now because people would find a way to get their canoe in the water whether access was built or not. She was concerned that the alternatives appeared like an afterthought and were not documented as something that the community wanted from square one. If it had been in the plans from the first with NOAA and the Corps, it would be easier for the City to push for it now.

- She did not own a canoe, but Ms. Herrigel's suggestion to consult with the non-motorized boat community was the right way to go. However, they may consider Option 4 best, so she was concerned that the Commission could not craft findings and conclusions tonight to allow pursuing of Option 4. Although removing non-motorized boat access was a mistake, she would vote to approve the application with the changed conditions drafted by staff.

Commissioner Churchill appreciated the Board's presentation of alternatives and the effort required in developing it. He seconded Commissioner Batey's comments, stating it was a beautiful riverfront plan with great lawn experience, great amphitheater space, and many good attributes. The motorboat access was appropriately located to the south, out of the way of the main thrust of the park.

- Options 1, 2, and 3 had various strengths and weaknesses, but as a kayak user, he would choose Option 4. Concrete or gravel on boulders was hard on boat hulls and not good for launching nice boats. The best surface was a small gravel beach, similar to the current launch south of the boat ramp.
- He understood the challenges with the regulatory agencies that did not want to allow access to the waterfront. A small population would use Option 1, the transient dock, but that may not survive the final design, in which case gravel on boulders or the motorized ramp were the only options.
- Sharing non-motorized boat access with motorboats was not safe because non-motorized boats were very low in the water and motorboats on trailers were very high off the ground, with near misses happening often. Very few people launch non-motorized boats at the boat ramp in Willamette Park, which was a 6-lane ramp. A non-motorized boat could tuck off to one side to launch, but there was fast activity back and forth loading motorboats in and out of the water.
- He liked Option 4 to avoid goat trails that destroyed the native vegetation. He did not believe people would share the ramp and the transient dock was a long distance from parking, so they would come through the native vegetation to access the river.

Commissioner Wilson agreed with Commissioner Churchill regarding access issues.

Chair Klein said he favored the application and complimented the Board for doing a great job.

Vice Chair Harris moved to approve DR-09-01, TPR-09-03, WG-09-01, WQR-09-01, VR-09-03 including the findings and conditions in the staff reports dated May 11, 2010 and May 25, 2010. Commissioner Bresaw seconded the motion.

Commissioner Batey asked if Option 4 was removed from the motion.

- **Ms. Mangle** responded that Option 4 was conceptually part of the project, but was a new element, so when designed and built, it had to return to the Commission for approval as a modification to the approved plan.

Chair Klein clarified that Ms. Herrigel was pursuing the 4 options and other regulatory agencies would review the project. If needed, it would return to the Commission for approval or denial of the 70% reintegration launch proposed design.

Commissioner Churchill asked if the Commission would receive feedback from the Applicant regarding discussions with the non-motorized boat community.

- **Ms. Mangle** responded that the Applicant would be happy to update the Commission at the right time.
- **Mr. Monahan** advised it would not be appropriate as a condition, but was something

between the Commission and Applicant.

Motion passed 4 to 2, with Commissioners Wilson and Churchill opposing.

Commissioner Churchill noted for the record that his vote against the application was not for the work done by the Board, but was due to the lack of community input with the non-motorized boating community.

Chair Klein read the rules of appeal into the record.

The Commission took a brief recess and reconvened at approximately 8:05 p.m.

6.0 Worksession Items

6.1 Summary: Review Procedures Code Amendment project briefing
Staff Person: Susan Shanks

Katie Mangle, Planning Director, stated that the Review Procedures Code project resulted from the Smart Development Code Audit project completed over the past year, which addressed Milwaukie Municipal Code (MMC) Residential Standards and Procedures updates. This worksession would address changes to the structural part of the MCC. The City had not done a good job addressing some of the foundational processes of the MMC, which had not been updated since the 1960s.

- Areas of the Code are not fully compliant with the Oregon Revised Statutes (ORS), are not efficient in terms of using City and public resources, and not as effective, which in many ways is more important than efficiency.
- Commissioner Batey had acted as a sounding board for specific Code issues. Other Commissioners interested in being more involved with the Code project were invited to contact staff. The issues needed to be thought through because they involved processes and choices that underpin the work done by Planning staff.

Susan Shanks, Senior Planner, presented the staff report, which included these key comments:

- The Code project addresses structural problems and gaps in the basic structure of the Code and land use process, including noncompliance with the ORS, and rendering certain Code provisions unenforceable. Review procedures regard the structure for how land use and development review are done in the City, such as who the appropriate decision-making person or body is, who is to be notified, the timeframe within which decisions are made, and time limits on land use approvals, including conditional uses.
  - Having clear direction and process for land use procedures is critical for staff, the City, and applicants.
- Specific goals of the Review Procedures project are:
  - Make the review procedures section consistent with the ORS.
  - Consolidate procedures into one place.
  - Develop a new Development Review Chapter that would be a repository for land use procedures and applications and would also outline the procedure for development review.
    - Currently, applicants have to read the whole Code to determine what applications are required, which is not an effective way to do business for staff or applicants.
    - At present, a review process existed that was just associated with building permits, but the line was blurred between the two. Staff wanted to be very clear where the line was and whether a land use review or building permit review was required, which should just be based on objective criteria.

        - The goal was to make it easier for staff to apply and for the public to use and understand.
    - Address approval criteria for Conditional Uses, Variances, and nonconforming uses and structures, which make up three chapters of the current Code.
        - Along with looking at review procedures in general, the project would consider whether the level of review was appropriate. For example, were more levels of review needed for Conditional Use, or should just one type of Conditional Use always come before the Planning Commission; were more than two types of variances needed for a level of review, and did the approval criteria make sense for the level of review applied.
    - Time limits for Conditional Use and Variances would also be reviewed. Currently substantial construction had a 6-month time limitation. Generally, applications did not have a time limit, but other cities did so staff wanted to review what made sense for Milwaukie.
- This is a technical Code update as opposed to a policy update.
    - While some policy aspects were involved, it was much more limited relative to other Code projects like the Parking or Transportation Chapter projects.
    - Staff was not doing a lot of public outreach, but instead relying on ORS requirements, the City's consultant, other cities' practices, staff's knowledge of the Code, as well as the Planning Commission's experience. Some targeted outreach would be done, but not like with other Code projects in the past because staff believed this to be mostly a technical, legal update with some key questions about some key policy issues.
- She briefly reviewed the timeline for the Review Procedures project, noting that three rounds of draft Codes were expected for the different sections being edited. Two worksessions were planned with the Planning Commission, on July 13th with the consultant, and then again in late August. The adoption process would start in September.
- She explained that staff identified the work as two separate projects, not by the grant, which was for both Code update projects. This Review Procedures project would overlap with and be followed by the Residential Design Standards project in August.
- She highlighted the staff report's attachments, which went beyond this particular project and briefing, but she encouraged the Commission to read them.
    - Attachment 1 Overview and Assessment of Planning Code
        - Originally developed as an overview and staff's assessment of the Code, staff hoped to use the table during the Code update projects to track progress. The table indicated bigger problems, such as legal or best practices issues where the Code was not kept current or structural problems, not Code maintenance work. The table also enabled staff to highlight what the Code included to determine if certain provisions were still needed; some were quite outdated.
        - Though changes may be needed at the Comprehensive Plan level that would need to be reflected in the Zoning Code, the table also indicated staff's assessment of how well the Code implements the current Comprehensive Plan.
    - Attachment 2 Chapter 4 from *A Better Way to Zone* by Donald Elliott
        - The book talked about the best way to govern from a zoning perspective. The chapter was applicable to the Code projects and work done by the Planning Commission. The author listed very specific things that made for a good Zoning Code, such as effectiveness, responsiveness, fairness, efficiency, understandability, and predictable flexibility. Staff had used these terms when discussing the goals of the Code update projects, so it was interesting to see similar language in the author's discussion. The terms related to words in the Zoning Code but especially to the practices undertaken during land use review.
    - Attachment 3 Code History Memo by Li Alligood

- When undertaking Code update projects, staff reviews the history of the Code sections being updated to understand what previous issues were addressed and the goals of previous updates/revisions. The memo summarized the history of the particular sections under review for the Code update project. It showed how little these Code sections were touched over time, which was why the review needed to occur.

Discussion from the Commission about the project and Code issues to address was as follows:

- The purpose of Conditional Uses (CU) was questioned because anything should be able to be on a site; desirable uses could overlap. CUs and Community Service Uses (CSUs) had to be ratcheted down, particularly CSUs, because open-ended time limits did not work.
- Projects should have sunsets, requiring the applicant to go through the process again if a project is not built within a certain time.
  - Sunsets on CUs have caused issues. Timelines were needed, as well as a clear definition of percentage of completed building and the process for returning to the Commission.
    - Putting a sunset on the SweetPea Daycare, a CSU, was a very good decision.
    - The relationship between CUs and CSUs and how they are treated differently was one issue staff would address to determine if both were really needed, what overlaps existed, etc.
- More time limits were also needed on projects because after so many years, the area is completely different.
  - An applicant could not have 2 years to build a mini-storage, but an infinite time period was allowed to build the high school sign.
  - Other jurisdictions have time limits associated with certain kinds of applications.
- Having no time limit is also problematic for many reasons.
  - Staff also suffers the consequences of no time limits on projects. Building permits were recently finished on the Ukrainian Bible Church, which was a land use hearing years ago.
  - If an approved project was dragged out over a long period of time, the applicant could deal with new staff with no previous knowledge about how to implement the wishes of the Commission or City Council.
- Residential properties were addressed differently. Staff had no jurisdiction over them and as long as they were properly boarded up according to the Building Code, the project could continue.
- Solar access protection was marked for deletion because the chapter was written for large subdivisions. The chapter consisted of a model code that was very long, technical, and confusing. Milwaukie did not have large subdivisions, so that chapter was not relevant for the City.
  - A more practical tool could be found to address Milwaukie's issues.
  - Perhaps solar access was better related to the massing standards.
  - Solar access regarded small single-family conditions where a 30-ft height limit might exist, but block solar access for passive and active design. There was a need for the protection.
  - While the chapter was proposed for deletion, staff was not necessarily proposing to eliminate that kind of design consideration altogether. Staff hoped to put what was salvageable from the chapter into Title 17 Land Division as it was more appropriate during division of property and considering lot configuration to maximize solar access for individual properties.
- The aircraft landing facility section was in the Code because 42nd Ave used to be a landing strip.

- If proposed, a helipad at Providence Milwaukie Hospital would be a use; the aircraft landing facilities section would not apply because it was about a zone. The Zoning Map did not show an Aircraft Landing Zone, although it was part of the Code. A helipad would be a CSU permit and staff could come up with an appropriate tool for addressing it. The City would not be likely rezoned for an Aircraft Landing Zone.

Ms. Mangle said that as done with the Parking Code updates, a website would be created for this project providing another way to track the project's progress.

7.0 Planning Department Other Business/Updates – None

8.0 Planning Commission Discussion Items

Chair Klein reported that 150 people attended the Milwaukie Run for Daze last weekend, including several Commissioners and Ms. Mangle. The breakfast went well, and the Chief of Police was very well received. Approximately $2,000 to $2,500 was raised for the Milwaukie Daze Festival.

Commissioner Bresaw said that she met the owners of the big house on the corner of Verne Ave, who said they were fully occupied and that the adults living there had mental disabilities. They received funds from the State for caring for people, but not specifically for elderly citizens. The owners had another house in Happy Valley.

Commissioner Batey asked if the school district was coming back regarding the Lake Rd mobile building application.

- **Ms. Mangle** responded that staff did not know, but heard the school district was not planning to return, although the district had not withdrawn the application. The Commission did not like the mobile units, so the school district returned with stick-built buildings. The hearing was then continued due to grading, height, and some questions from the Commission. Then the district had budget problems, which likely related more to the delay than the project itself. She did tell the applicant that they could finish the permitting process and then decide whether to build it or not.
- The Northside Clackamas Park Master Plan application was in and would be coming to the Commission and City Council this summer. The Master Plan would be proposed for adoption by the City into the Comprehensive Plan.

Ms. Shanks reported that two, very well attended open houses were recently held in the Northeast Sewer Extension project area. Staff had already received 3 annexation applications because people needed to annex before they connect to City sewer. The project had definitely turned a corner and a much more positive response was being heard about connecting to sewer and going through annexation.

- Upon learning how quickly neighbors received a notice of annexation, she explained that an applicant did a pre-application conference months ago. It was a vacant lot and the owner wanted to build a house but could not do so without sewer. The property butted up against Johnson Creek so a new septic system was not allowed. He was in process of doing the expedited annexation process and hoped to build a house over the summer and be ready to connect to sewer in November.
- Staff created an assisted annexation program to make it easier for people to go through the process. All were considered expedited annexations, which would go to City Council for approval. The Commission might see some non-expedited annexations because there were some non-conforming uses and zoning change requests.

Ms. Mangle clarified that staff had not heard anything about the annexation at the south end of Island Station.

- She updated that the Lake Road Improvement Project was in the right-of-way acquisition phase. She did not know when construction would start, but properties along Lake Rd had been notified. She was uncertain whether contracting had been done yet, but she would look into it.

9.0 Forecast for Future Meetings:

June 8, 2010	1. Joint Session with Advisory Group: Natural Resources Project
June 22, 2010	1. Public Hearing: WG-10-01 19th Ave replat & duplex *tentative*

Ms. Mangle reviewed the upcoming future meetings with these added comments:

- She would remind the Commission by email that the June 8th meeting would be at the Public Safety Building with the Natural Resources Overlay Advisory Group. The meeting was designed as the handoff between the two groups. She hoped to have a casual, facilitated conversation where the Commission and Advisory Group could exchange ideas and ask and respond to questions. Commission worksessions for the Natural Resources Overlay project maps and Code would begin soon. The Commissioners would receive a staff report before the meeting and possibly the new draft of the Code. However, the meeting was about the bigger issues, not the Code itself.
- She asked if the Commission had any points they wished addressed in particular.

Commissioner Bresaw said it would be nice to encourage the owners along Spring Creek to remove the concrete to return it to its natural state. Maybe there was a way to make it easier or provide some funding to help them.

- **Ms. Mangle** agreed that could be discussed. One big issue for Milwaukie's version of the project was being very clear about how restoration projects were handled. The Natural Resources Code was not the only tool available and was not how the City encouraged people to do certain things, but regarded what else the City should be doing.

Meeting adjourned at 8:50 p.m.

Respectfully submitted,

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

Jeff Klein, Chair

AGENDA

MILWAUKIE PLANNING COMMISSION
Tuesday May 25, 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

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: Riverfront Park *cont'd from 5/11/10*
Applicant/Owner: City of Milwaukie
File: DR-09-01
Staff Person: Ryan Marquardt

6.0 Worksession Items

6.1 Summary: Review Procedures Code Amendment project briefing
Staff Person: Susan Shanks

7.0 Planning Department Other Business/Updates

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

9.0 Forecast for Future Meetings:

June 8, 2010	1. Joint Session with Advisory Group: Natural Resources Project
June 22, 2010	1. Public Hearing: WG-10-01 19th Ave replat & duplex *tentative*

Milwaukie Planning Commission Statement

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

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

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

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

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

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

Public Hearing Procedure

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

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

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

3. **APPLICANT'S PRESENTATION.**

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

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

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

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

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

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

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

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

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

Milwaukie Planning Commission:

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

Planning Department Staff:

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

MILWAUKIE
Dogwood City of the West

To: **Planning Commission**

Through: **Katie Mangle, Planning Director**

From: **Ryan Marquardt, Associate Planner**

Date: **May 18, 2010, for May 25, 2010, Public Hearing**

Subject: **Files: DR-09-01, TPR-09-03, WG-09-01, WQR-09-01, VR-09-03**

Applicant: City of Milwaukie, represented by JoAnn Herrigel, Community Services Director

Owner(s): City of Milwaukie; N. Clackamas Parks and Recreation District; Clackamas County Service District #1

Address: Milwaukie Riverfront Park

Legal Description (Map & Taxlot): 1S1E35AA: 02200, 02300, 02400, 02500, 02600, 02700, 02800, 03901, 04400, 04700, 04800, 04900, 04700, 04800, 04900, 05000; 1S1E35AC: 00900, 01000, 01001

NDA: Historic Milwaukie and Island Station

ACTION REQUESTED

Approve application DR-09-01 and adopt the recommended Findings and Conditions of Approval found in Attachments 1 and 2 of the staff report for the May 11, 2010 hearing, with the revisions proposed in this staff report. This action would allow for the redevelopment of Milwaukie Riverfront Park ("park").

BACKGROUND INFORMATION

The Planning Commission held a hearing on May 11, 2010 to consider the land use applications that would allow redevelopment of the Milwaukie Riverfront Park. The Commission continued the hearing to May 25, 2010 to obtain more information from staff and the applicant. The Planning Commission requested the following information:

1. Information from staff about boat and trailer queuing in the proposed left turn pocket for north-bound traffic on McLoughlin Blvd.
2. Information from the applicant regarding non-motorized boat access to the Willamette River. The Commission was concerned about the lack of a dedicated space in the park for launching non-motorized boats. The applicant will provide information to staff on the items in the first bullet point.

1. Boat and Trailer Queuing for the North-bound McLoughlin Left Turn Pocket

The applicant has proposed a new left turn pocket for north bound traffic on McLoughlin Blvd to turn into the proposed new park access point. ODOT's comments on the application affirm that this turn pocket is warranted, and that the pocket needs to be constructed to ODOT standards. The plan for the proposed turn pocket is illustrated on the 8th page of Tab 6 in the application materials binder. The proposed left turn pocket is 11 ft wide with a length of 140 ft. The turn pocket width tapers down from the 11 ft width and merges into the normal north-bound travel lane over a distance of approximately 60 ft.

The northbound left turn pocket would accommodate a queue of 7 standard (20 ft long) vehicles or 3 50-ft vehicles towing a trailer.

The Planning Commission raised a question regarding how the width of the turn pocket would be accommodated in the cross section for McLoughlin Blvd. The plans indicate that the curb on the west side of McLoughlin Blvd would shift up to 4 ft to the west. The guard rail on the east side of McLoughlin Blvd would remain in its existing location. The widening would accommodate a 6 ft wide bike lane and two 11 ft wide lanes on the northbound and southbound sides of the road and the 11 ft wide northbound left turn pocket.

2. Accommodation of Non-Motorized Boat Launch

In response to the Commission's request, the applicant is reviewing previous iterations of the park redevelopment plans to determine the type and location of non-motorized boat launch that was originally proposed. They are also looking into correspondence between the applicant and other regulatory agencies regarding non-motorized boat launches, specifically regarding any comments that discouraged the inclusion of a non-motorized boat launch. Lastly, the applicant will contact the US Army Corps of Engineers to discuss the inclusion of a non-motorized boat launch and what impacts the inclusion of such a boat launch would have on the application and the review process.

This information will be forwarded to the Planning Commissioners on May 21, 2010 in a supplemental packet.

Proposed Modification to Findings

During deliberation at the May 11, 2010 hearing, the Planning Commission discussed the approvability of the land use applications for the park if a launch area for non-motorized boats were not included in the plans. The Commission also discussed adding conditions of approval to address the issue.

Staff's recommendation is to modify the findings and conditions of approval to address access for non-motorized boats. Staff proposes that Finding 7.C.ii be amended to:

> "MMC 19.320.6.B requires consideration of the compatibility with the scenic, natural, historic, economic, and recreational character of the river. The proposed project would improve the site's compatibility with each of these elements than the existing conditions. The project would increase the number of vantage points to the river, restore much of the riverbank, reference Milwaukie's historical connection to the Willamette River, spur activity and tourism near the river, and increase access for recreational users. <u>The Planning Commission finds that the project should give greater access for recreation by non-motorized water craft to meet this criterion. As conditioned, the project complies with this criterion."</u>

Staff proposes that Finding 7.C.vi be amended to:

> "MMC 19.320.6.F requires consideration of emphasis on water-oriented and recreation uses. The proposed transient dock and boat launch are significant pieces of the project that facilitate water-oriented uses. The Planning Commission finds that the project should give greater access for recreation by non-motorized water craft to meet this criterion. The park paths, festival lawn, amphitheater, and plaza are designed to accommodate multiple forms of active and passive recreation. As conditioned, the project complies with this criterion."

Staff proposes that the following condition of approval be added:

> "3. The plans for development of the project shall include the following information and show the following modifications: …
>
> L. The plans shall include a dedicated non-motorized boat launch area. If other agencies reviewing the project plans will not permit a dedicated non-motorized boat launch, the applicant shall submit a narrative with the development plans explaining what actions were taken to incorporate a non-motorized boat launch into the project."

The Planning Commission has identified a legitimate recreational need to be accommodated in the park project. The Willamette Greenway criteria speak to accommodating the needs of various types of users, and are appropriate criteria on which to base the findings and conditions related to non-motorized boat access.

However, staff also recognizes that the City does not have sole authority over the areas of the park in and along the waterline. The final decision on what can be permitted along the river belongs with the agencies reviewing the US Army Corps of Engineer's Joint Permit Application for the park. The condition of approval contains flexibility because staff does not believe it would be prudent to unconditionally require features along the waterline that may not be approvable by other permitting agencies.

MILWAUKIE
Dogwood City of the West

To: **Planning Commission**

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

From: **Ryan Marquardt, Associate Planner**

Date: **May 21, 2010, for May 25, 2010, Public Hearing**

Subject: **Files: DR-09-01, TPR-09-03, WG-09-01, WQR-09-01, VR-09-03**

Pursuant to the discussion by the Planning Commission at the May 11, 2010 hearing, the applicant for Riverfront Park has provided responses to questions by Commissioners regarding non-motorized boat launching in the proposed park project. Staff believes that the options presented by the applicant for inclusion of a non-motorized boat launch fit well with the revised recommended findings and condition of approval presented in the staff report dated May 18, 2010.

ATTACHMENTS

1. Letter from applicant, dated May 20, 2010
2. Park development plan indicating proposed non-motorized boat launch locations

ATTACHMENT 1

May 20, 2010

Ryan Marquardt
Milwaukie Planning Department
6101 SE Johnson Creek Blvd.
Milwaukie, OR 97267

Dear Ryan:

Below is my response to the question about non motorized boat access raised by the Milwaukie planning Commission at the May 11 Planning Commission hearing on Milwaukie Riverfront Park.

- **Document the "discouragement" of the non-motorized boat access at the Riverfront.**

1. **What type and location of launch was originally proposed?**
   A gravel access ramp for non-motorized boats was located at the north of the parking lot proposed for the motorized boat launch. The non-motorized launch was to a 6 foot wide gravel path from the parking lot o the water.

2. **Which agency (or agencies) discouraged the proposed launch?**
   At the pre application meeting in July 2008, a representative of National Marine Fisheries (NMFS) stated that providing multiple human access points to the Willamette River along the length of the park would increase regulatory scrutiny. The non-motorized launch, as originally proposed, added additional human access to the riparian area below the ordinary high water level and decreased the vegetative area in the Water Quality Resource Area on the site.

3. **What formal correspondence have we had (if any) this matter?**
   The applicant does not have any written correspondence between the City and NMFS on this issue. The project team discussed the agency's concern and determined that removal of the proposed launch would increase the chances that the project's Joint Permit Application would be favorably reviewed. The team remains confident that the existing boat launch, boarding dock and the transient dock provide adequate accommodation for non-motorized boat launching.

4. **How might the current application to Corps of Engineers be modified to address non-motorized boat access?**

   Based on previous Riverfront project reviews by the Corps, the design team believes that the Corps of Engineers would require a formal design modification for the Riverfront Park submittal if the proposed changes would significantly impact the project's environmental impact. That is, if the footprint of the project, or materials proposed, were changed such that the impact on sensitive species or habitat would be significant, the Corps would require a new design and analysis to be submitted.

   Reintegrating a dedicated launch for non-motorized boats, north of the proposed motorized boat launch, would be a significant change to the original Joint Permit application.

5. **What would the ramification to the project of this application modification be?**
   James Holm, of the Corps of Engineers, is the reviewer of the City's Joint Permit Application for the Milwaukie Riverfront Park. The applicant was unable to reach Mr. Holm before the time of this submittal. However, the team believes, based on experience with similar submittals, that if additional riparian edge disturbance was proposed now, as part of the Riverfront Park design, to accommodate non-motorized boat access, the original application would have to be denied, revised and resubmitted. The applicant estimates that such an action would add at least two years to the projects' approval process, postponing grant applications and project construction for that same amount of time. (The current Riverfront Park application was submitted to the Corps in February 2009 and a response to the application is anticipated no sooner than December 2010.)

   Alternatives considered for accommodating non-motorized boaters:

   Three design modifications are being considered by the applicant to accommodate non-motorized boaters. To our knowledge, none of these would require a modification of the application to the Joint Permit Application to the Corps of Engineers.

   - **Do not modify the plan in any way and allow use of the boat ramp, boarding dock and transient dock by both motorized and non-motorized boaters.**

   - **Modify the height of all or part of one of the forks of the transient dock to accommodate non-motorized boats.** The current height of the transient dock is 18" above the water. Lowering part of or all of one fork of this dock to 6"above the water level would make kayak, canoe and dragon boat access much easier. This type of dock is currently used by non-motorized boaters on the east side of the Willamette River just north of OMSI, in Portland. The access ramp to this Portland dock is, in fact, steeper than the ramp proposed for Milwaukie Riverfront Park (3:1 vs 4:1 as proposed in Milwaukie.) The

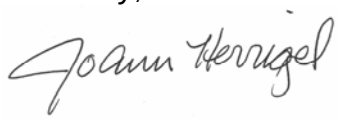
distance a kayaker is required to travel from a vehicle to the water is also shorter in the proposed Milwaukie design than it is in the existing Portland facility.

- **Add a gravel overlay to the boulders currently proposed to the south of the motorized boat access dock.** The addition of a layer of gravel to the area to the south of the motorized boat launch dock would accommodate kayaks, canoes and dragon boats without requiring significant changes to the Riverfront Park design.

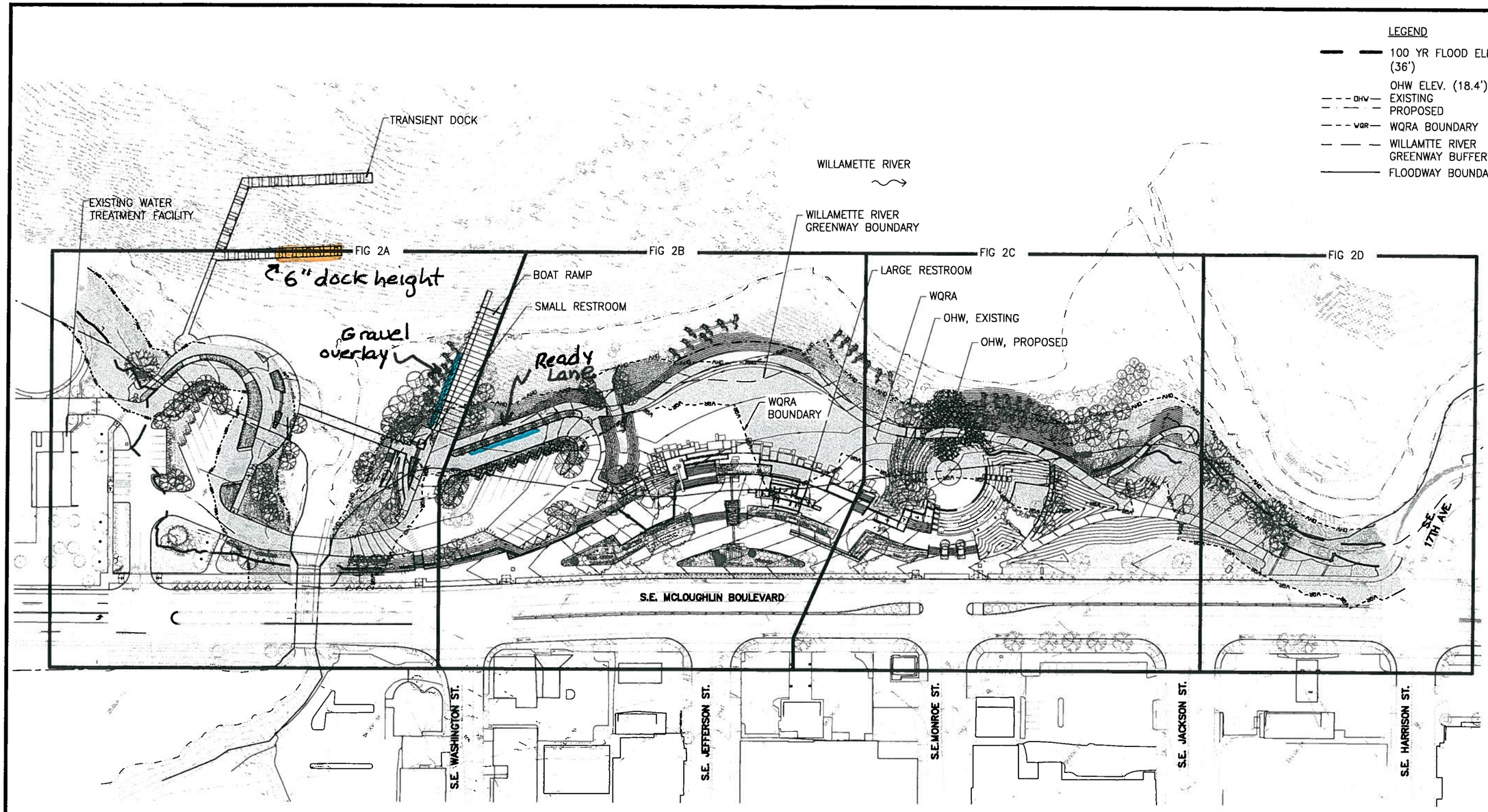
  This option would require a small parking and staging area, called a "ready lane", on the river side travel lane of the parking lot which would allow users to park and unload and stage their paddle craft and then go park their car in the parking area. They would return and launch their boats upstream (south) of the dock on the gravel launch area. Alternatively, they could walk their craft down the dock and place it in the water. This separation would minimize potential conflict between users at time of launch and retrieval.

We regret that we were unable to contact Mr. Holm before this time and hope to bring further information to the Planning Commission on May 25th to share with the Commissioners.

Sincerely,



JoAnn Herrigel
Community Services Director



DAVID EVANS ASSOCIATES
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2100 SW River Parkway
Portland OR 97201
Phone: 503.223.6663
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CITY OF MILWAUKIE

DEPARTMENT	SIGNATURE	APPROVAL DATE
CITY LANDSCAPE ARCHITECT		
COMMUNITY DEVELOPMENT		
PUBLIC WORKS		

PROJECT
MILWAUKIE RIVERFRONT PARK
PARK IMPROVEMENT PROJECT
S.E. HARRISON STREET - KELLOGG CREEK

SHEET TITLE
DEVELOPMENT SITE PLAN

NO.	DATE	REVISION	BY

PRELIMINARY:
NOT FOR CONSTRUCTION

SCALE:	1" = 60'
DATE:	2/8/2010
DRN.	BAR
CK.	BXM

Fig 2

JOB NO. MAEX00000018

Drawing File: P:\VA\MAEX00000018\04000AD\DWG\Sheets\PERMIT DRAWINGS\DESIGN REVIEW PACKAGE\Fig2_Proposed_MAEX00018.dwg Date/Time: May 06, 2010 - 2:24pm User: bxr

MILWAUKIE
Dogwood City of the West

To: **Planning Commission**

From: **Katie Mangle, Planning Director**
Susan P. Shanks, Senior Planner

Date: **May 18, 2010 for May 25, 2010 Worksession**

Subject: **Review Procedures Code Amendment Project – Briefing #1**

ACTION REQUESTED

None. This is a briefing for informational purposes only.

BACKGROUND INFORMATION

The Planning Commission and City Council have directed staff to engage in a multi-year effort to significantly modernize and improve the effectiveness of Milwaukie's development review regulations and procedures (see Attachment 1 for an overview of this effort). The next phase of this effort is a new grant-funded code amendment project that will tackle the City's fundamental rules regarding development review procedures. The same grant will also fund an overhaul of the City's residential standards, which will be discussed in a separate work session later this year.

A. History of Prior Actions and Discussions

- **March 2010**: Staff provided the Commission with a copy of the intergovernmental agreement between the City and the State of Oregon that commits the City to prepare draft code amendments based on priorities that were identified in the 2009 Smart Growth Code Assessment Final Report.
- **October 2009**: Staff presented the 2009 Smart Growth Code Assessment Final Report to Council. Council concurred with the code amendment priorities identified in the report and requested that staff move forward with the next phase of the project.
- **September 2009**: Design and Landmarks Committee held a worksession to discuss the residential design standards element of the code assessment project.
- **August 2009:** Planning Commission reviewed and provided concurrence on the Action Plan presented in the 2009 Smart Growth Code Assessment Final Report.

- **August 2009**: Planning Commission held a worksession to discuss the consultant's code assessment findings prepared during Phase I of the Smart Growth Code Assistance project.
- **July 2009**: Planning Commission held a worksession to discuss the consultant's code assessment findings prepared during Phase I of the Smart Growth Code Assistance project.

B. Review Procedures

Updating the City's review procedures is expected to result in three primary outcomes:

- A modern zoning code that is consistent with Oregon state law. See Attachment 1 for some interesting background reading on what makes for a good zoning code.
- A code that is easier to use. This may include the addition of a new Development Review chapter to improve organization, fill procedural gaps, and consolidate regulations into one place for ease of use.
- Reasonable and clear approval criteria, appropriate level of review, and a more flexible approach to variances and nonconforming situations. The goal would be to create efficient review procedures that reduce unnecessary process and expense (for both City staff and applicants), and that results in desired development that is consistent with the Comprehensive Plan.

Review procedures provide the basic framework for how the City conducts development permit and land use review. They determine what kinds of projects trigger land use review, who receives notices about hearings and decisions, when the City has to make a land use decision, and who makes the final decision (e.g. Planning Director, Design and Landmarks Committee, Planning Commission, or City Council).

The City currently has five types of land use review levels, namely: Type I, Type II, Minor Quasi-judicial, Major Quasi-judicial, and Legislative. A Type I level of review, for example, is supposed to be based on objective standards, requires no public notice, and is decided by the Planning Director. Minor quasi-judicial review, on the other hand, involves discretionary standards, requires public notice, a public hearing, and a decision by the Planning Commission.

The bulk of the City's review procedures are contained in Chapter 19.1000 of Title 19, but several other sections of code contain review procedures. One of the goals of this project is to consolidate the City's procedures into one place. Another goal is to evaluate and possibly change the level of review associated with specific land use applications. Questions that staff will be pondering and on which we may solicit your input, are as follows:

- Are we working with the right list of land use applications?
- What is the right level of review for each type of land use application?
- Can we reduce the level of review for some applications if we develop more objective or different approval criteria?
- What kinds of land use actions legally require land use review? How much flexibility is there to include or exclude certain kinds of land use actions from the formal land use review process?

Before embarking on any code amendment project, Planning staff researches past code audits and policy decisions to understand how the code has evolved over time and what kinds of

alternatives were considered in the past. See Attachment 3 for staff's research on the history of code sections relevant to this project.

C. Next Steps

Staff has tentatively scheduled a briefing to discuss the first draft of the new procedures chapter on July 13, 2010.

ATTACHMENTS

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

1. May 2010 Code Summary and Assessment Table
2. Chapter 4 from *A Better Way to Zone* by Donald L. Elliott. (Staff recommends this book as a great overview of what zoning is, how it originally evolved as a way to solve problems, and how it can change to address the needs of 21st century cities.)
3. April 2010 Review Procedures Code History Memo

ATTACHMENT 1

OVERVIEW AND ASSESSMENT OF PLANNING CODE

Assessment based on how well the Code implements the Comprehensive Plan

May 2010

CHAPTER	SECTION	NAME	SUMMARY	CODE ASSESSMENT Candidate for . . . Better Organization and Streamlining	Best Practice Updates	Policy Changes	Legal Updates (incl. Metro compliance)	Deletion (of code section and policies)	Maintenance	Code Project In Process	Code Project Completed	Notes
TITLE 14 SIGNS												
			Contains permitting procedures and standards for signs in the right-of-way and on private property with respect to size, type, number, illumination, height, location, and duration.		●	●					**2006**	Update in 2006 to meet constitutional requirements to not regulate sign content. Future project to address commercial signage.
TITLE 16 ENVIRONMENT												
16.32		**Tree Cutting**	Contains procedures and approval criteria for the removal and pruning of trees in the right-of-way.		●	●						Future project to improve criteria and procedures.
TITLE 17 LAND DIVISION												
			Contains procedures, approval criteria,and lot design standards for all property boundary changes that are not annexations (i.e. property line adjustments, partitions, subdivision, and replats). Coordinates with Title 16 Environment, Title 18 Flood Hazard Regulations, and Title 19 Zoning.	●	●	●					**2003**	Future project to improve criteria and procedures.
TITLE 19 ZONING												
19.100		**Introductory Provision**	Contains the title's purpose and definitions.						●			
19.200		**Basic Provision**	Contains general information about zones and zoning map.						●			
19.300	300	**Use Zones**	Use zones regulate lot size and density and dictate where different types of land uses are outright allowed, conditionally allowed, or prohibited. Each use zone contains development standards that define a lot's buildable envelope with respect to height, setbacks, etc. Overlay zones regulate how allowed uses can develop in certain areas. They apply in addition to and often modify a use zone's development standards.	●	●	●						
	301	R-10 Residential	Use zone (low density residential)	●	●	●				✪		Focus of pending 2010-11 Residential Standards project.
	302	R-7 Residential	Use zone (low density residential)	●	●	●				✪		
	303	R-5 Residential	Use zone (medium density residential)	●	●	●				✪		
	304	R-3 Residential	Use zone (medium density residential)	●	●	●				✪		
	305	R-2.5 Residential	Use zone (high density residential)	●	●	●				✪		
	306	R-2 Residential	Use zone (high density residential)	●	●	●				✪		
	307	R-1-B Residential-Business Office-Commerical	Use zone (mixed use)	●	●	●						Future project to overhaul commercial zones and add design standards.
	308	R-1 Residential	Use zone (high density residential)	●	●	●				✪		Focus of pending 2010-11 Residential Standards project.
	309	R-O-C Residential-Office-Commercial	Use zone (mixed use)	●	●	●						Future project to overhaul commercial zones and add design standards.
	310	C-N Neighborhood Commercial	Use zone	●	●	●						
	311	C-L Limited Commercial	Use zone	●	●	●						
	312	DS, DC, DO, DR, DOS Downtown Zones (Downtown Storefront, Commercial, Office, Residential, and Open Space)	Use zone (mixed use and open space)	●	●	●				✪		Pending code project to coordinate with long range downtown planning efforts.
	313	C-G General Commercial	Use zone	●	●	●						Future project to overhaul commercial zones and add design standards.

CHAPTER	SECTION	NAME	SUMMARY	CODE ASSESSMENT						Code Project In Process	Code Project Completed	Notes
				Candidate for . . .								
				Better Organization and Streamlining	Best Practice Updates	Policy Changes	Legal Updates (incl. Metro compliance)	Deletion (of code section and policies)	Maintenance			
	314	M Manufacturing	Use zone	●	●	●					2009	Minor update in 2009 to comply with Metro Title 4. Future project to improve design standards and clarify purpose and allowed uses. The latter is dependent upon long range planning efforts.
	315	C-CS Community Shopping Commercial	Use zone	●	●	●						Future project to overhaul commercial zones and add design standards.
	316	L-F Aircraft Landing Facility	Overlay zone					●				2010 Review Procedures project will address.
	317	(Reserved)						●				2010 Review Procedures project will address.
	318	MU Mixed Use Overlay	Overlay zone		●	●						Pending code project to coordinate with downtown planning efforts.
	319	PD Planned Development	Type of use zone involving a rezone		●							
	320	WG Willamette Greenway	Overlay zone		●							
	321	CSU Community Service Use	Type of use not associated with a specific use zone		●						2006	
	322	WQR Water Quality Resource	Overlay zone		●	●	●			✪		Major update in progress to incorporate Metro Title 13 Habitat Conservation Areas.
	323	HP Historic Preservation Overlay	Overlay zone		●	●	●					Future project to meet state eligibility requirements for HP grant funding.
	324	BI Business Industrial	Use zone	●	●	●						Future project to evaluate allowed uses and improve design standards.
19.400		**Supplementary Development Regulations**	Contains supplementary development regulations and standards (e.g. home occupation, accessory structure, and single-family dwelling design standards). Applies in addition to use zone development standards.	●	●	●	●					2010 Review Procedures project will address some, but not all, of this section's issues.
19.500		**Off-Street Parking and Loading**	Contains site development regulations specific to the provision of off-street parking. Applies in addition to use zone development standards.	●					●	✪		Adoption of new amendments imminent.
19.600		**Conditional Uses**	Contains procedures, approval criteria, and development standards for approving conditional uses. Applies in addition to use zone development standards.	●	●	●				✪		Focus of 2010 Review Procedures project.
19.700		**Variances, Exceptions, and Home Improvement Exceptions**	Contains procedures and approval criteria for varying development standards and allowed uses in any use or overlay zone.	●	●	●				✪		
19.800		**Nonconforming Uses**	Contains procedures and approval criteria for approving the continuation and/or alteration of nonconforming uses and structures. Contains procedures and review criteria for determining the legal status of nonforming uses and structures.	●	●	●				✪		
19.900		**Amendments**	Describes the different types of zoning map and zoning code amendment actions and the procedures and approval crtiteria associated with each.	●	●	●				✪		
19.1000		**Adminstrative Provisions**	Describes the different levels of land use review (i.e. Type I, Type II, Minor Quasi-judicial, Major Quasi-judicial, and Legislative) and the procedural requirements associated with each (e.g. neighbor notification, hearing date requirements, appeal rights, etc.)	●	●	●	●			✪		
19.1100		**Miscellaneous Provisions**	Contains legal provisions for applying Title 19.						●			
19.1200		**Remedies**	Describes the penalties for violating Title 19.						●			
19.1300		**Solar Access Protection**	Contains site development regulations to protect residential solar access. Applies in addition to use zone development standards.					●				2010 Review Procedures project will address.
19.1400		**Public Facility Improvements**	Contains street and utility improvement requirements. Applies to development with impacts on public facilities.	●					●		2009	
19.1500		**Boundary Changes**	Contains annexation petition requirements, procedures, and approval criteria.						●			

CHAPTER 4

Governing Well

DISCUSSIONS ABOUT WHAT IS RIGHT AND wrong about zoning often describe issues in terms of a zero-sum game between government and property owners. Articles on the subject sometimes describe every win for the government as a loss for property owners, and vice versa. Not only is this misleading, but it misconstrues the fundamental nature of the government's interest in zoning. Most large, mature cities have professional planning staff who may have their own strong opinions about what makes a good city, but they take their marching orders from elected leaders. And those elected officials generally take their orders from the voters. As a result, local government usually has several distinct interests in zoning: an interest in carrying out the "will of the people," an interest in achieving its planning goals for a "good city," and a generalized interest in "good governance."

At a minimum, discussions of zoning should recognize three major groups of players: (1) the applicant for a development approval, sometimes with staff planners in support of their request; (2) other property owners (usually neighbors), sometimes with staff planners in support of their position; and (3) the local government, which should be trying to achieve its goals for good planning and governance but is sometimes relegated to finding a compromise between other competing interests regardless of those goals. All three perspectives are usually in play when zoning ordinances are drafted and applied. For every story about an applicant who thinks the city has sided with NIMBYs against her property rights, there is a story

about a resident who thinks the city has sided with property developers over the interests of her neighborhood—and *also* a story about a planning director who feels the council has sacrificed the long-term health of the city on the altar of short-term political expediency. It all depends on your perspective.

When the applicant for a zoning change is the government itself, of course, roles 1 and 3 get combined. But the law still requires that the city council treat the application as it would any other—that is, that it try to remain objective regardless of the fact that city staff prepared the application.

The point of this chapter is that—in the press of political concerns, limited budgets, and the "tyranny of the immediate"—property owners and local governments sometimes lose sight of the need for good governance over the long term. The "government-versus-property-rights" rhetoric or the "developer-versus-the-neighborhood" sound bites drown out the voices calling for systems that produce better decisions over time. That third perspective gets lost in the shuffle, which is dangerous. America owes part of its stability and prosperity to systems of local government that are perceived as relatively fair, prompt, and efficient over the long run—regardless of whether voters like the outcome in a specific dispute. While she was planning director for Denver, the late Jennifer Moulton used to say, "Democracy means having your say, not getting your way, and most citizens understand that."

Our failure to focus on the issue of governance is partly the result of adjustments made to Euclidean zoning throughout the twentieth century (see chapter 1) and partly the result of media and public focus on short-term concerns over long-term systems. We have a system of zoning that can and does change over time, but it tends to adjust through incremental changes and sometimes loses sight of some big picture goals like effectiveness, understandability, and efficiency.

In addition, media coverage of planning and zoning often focuses on "hot button" issues. It is much easier to cover a vociferous neighborhood-versus-developer dispute at city council, or to describe the planning vision articulated by the mayor at a press conference, than it is to cover how well the zoning system is doing its job. After spending two years improving the performance of a city zoning ordinance and then summarizing the improvements in a one-page press release, it is often an uphill struggle to get any type of press coverage at all. Good governance is usually not newsworthy—even though bad governance is.

So what are the elements of good governance? Volumes have been written on this topic (see the Suggested Reading List at the end of this book), so we will only

touch briefly on the subject here. To begin with, of course, good governance means acting within the bounds of the law; the city's actions must be legal. The boundaries of land use law are discussed in chapter 5, so we'll take that as a given for now.

In addition, systems of governance should be "transparent" except when the law requires that specific decisions (e.g., personnel matters, lawsuit strategy) be conducted in private. Decisions should be based on the law and on adopted procedures and criteria, and what appears to be happening in the public hearing should be what is really happening (i.e., the result was not predetermined in a backroom deal). But American government is among the most transparent in the world, and transparency requires nothing different for zoning than it requires for other government actions. The same can be said for accountability. Of course it's important, but America's local governments generally do that pretty well, and the principle of accountability doesn't require anything different for zoning than it does for other activities.

We will not therefore review legality, transparency, or accountability as aspects of good governance that affect zoning specifically. Instead, we will review six goals of good governance that are particularly important to zoning. Those six goals are effectiveness, responsiveness, fairness, efficiency, understandability, and predictable flexibility.

Effectiveness

With more tools in the toolbox, government's ability to control land development has clearly increased since 1916. There is no doubt that PUDs, performance zoning, and form-based zoning give governments a wider range of levers on the future. Some cities have gone further to adopt design review procedures, environmental protection standards, and regulations on the rate and timing of growth, each of which increases the level of control.

Once zoning provisions are adopted, city governments generally assume that they are actually being used and are achieving their intended results. But that is not always true. In the early 1990s, Denver had twenty-one different density bonus provisions that applied to its downtown. To reward builders who did what it wanted, the city had twenty-one different ways of allowing them to build buildings bigger than they otherwise could. But only one of those bonuses—a reward for creating open plazas—was actually being used regularly. The city had granted bonuses totaling more than

two million square feet of floor area in return for construction of plazas. Three other bonus provisions had been used once or twice, and the remaining seventeen provisions had never been used. The provisions weren't effective because they clearly were not helping steer the future in the directions Denver wanted. So the city repealed some and recalibrated others to make the reward more attractive to builders.

The question of effectiveness can also arise in the context of environmental controls. During planning for the redevelopment of the Denver Stapleton airport site, the Stapleton Redevelopment Corporation commissioned a study of best practices in environmental planning. One important topic was stormwater runoff. About a third of the Stapleton site was planned for trails and open space, and allowing urban runoff to pollute the streams would harm the biodiversity of the area, compromise the quality of stream corridors as wildlife habitat, and reduce resident enjoyment of streams and trails. Reviewing best practices from around the United States resulted in a very long list of possible actions, only some of which could be addressed effectively through zoning. Many ways to reduce stormwater runoff from potentially polluted sources can best be addressed through controls on agricultural practices and on commercial and industrial operations—as opposed to controls on how their sites are developed.

In the end, that early study recommended that zoning efforts concentrate on two "physical" solutions that could be verified easily by city staff. The first was to require parking lot runoff to be filtered through swales before entering streams, and the second was to require that some commercial and industrial products be under cover when stored outdoors. Part of making zoning effective is deciding which good ideas do not belong in the ordinance, either because their contribution to the goal is minimal or because administration would be complex, intrusive, or expensive. The city's available financial and staffing resources should always be considered when determining the effectiveness of a potential zoning effort. If the city does not have the trained staff or money available to implement a proposed solution, and if it does not seriously intend to budget the money necessary to hire, train, and retain those staff, even the best zoning tool will be ineffective. As redevelopment of the Stapleton site has since burgeoned into one of America's largest new communities, zoning and stormwater regulation on the site have evolved to a much more sophisticated level—but the initial recommendation of two key zoning controls was appropriate for its time.

Many questions about zoning's effectiveness involve the amount of "line drawing" involved. Zoning inherently requires making distinctions among different pieces of land, or areas of the city, or land uses, all of which can be questioned. Zoning novices often question the city's right to draw zoning lines that allow certain building heights and uses on one side of an alley and different heights and uses on the other, but the courts crossed that bridge long ago. As long as the city's determinations have a reasonable basis related to some legitimate government interest, its line drawing will almost always be upheld. The more interesting question is not whether city governments can make these kinds of distinctions but which distinctions are effective in achieving its planning goals. Advocates of performance zoning, PUDs, and form-based zoning have all argued that zoning ordinances make unnecessary distinctions and draw the wrong lines—that is, that Euclidean zoning treats properties or land uses differently in ways that do not promote the good of the city as a whole. Euclidean zoning does have a tendency to breed more distinctions over time (see chapter 1), so it is often helpful to question whether the lines we drew in the past are still useful.

Hint for the future: While cities have proven fairly adept at adding tailored zoning provisions to address discrete community challenges, they have been relatively poor at removing outdated or ineffective tools. The need for distinctions between almost-similar uses or zones should be subject to careful scrutiny. Future zoning should have mechanisms to eliminate regulations that have not proven themselves effective over time and to ensure that its zoning rules are within the capacity of available time, staff, and resources. As development technologies and market desires change, many previously effective provisions can become ineffective, and there needs to be a process for spotting and removing them.

Responsiveness

The whole point of democracy is that elected officials are supposed to reflect the will of the people, subject only to legal constraints and their own judgment about what is in the best interests of the city. There is no doubt that city government is supposed to be responsive, but it is not that simple. Harder questions arise over issues of time and place. The "time" question is whether to be responsive to short-term or long-term interests; the "place"

question is whether to be responsive to the interests of one neighborhood or of the city as a whole. Responding to the immediate wishes of some citizens in a specific neighborhood may undercut programs that promote the long-term good of many others. This is a fundamental tension in zoning: any pattern of land uses and regulations designed to promote the overall prosperity and stability of the city will regularly create impacts that are hard on some property owners, because their property values decline, because they cannot do what they want with their property, or because their surroundings change in ways they don't like.

On a basic level, this issue has been resolved. Both the federal and state courts have concluded that city councils usually have the power to decide whether the hardship is justified (within some limits, which we will discuss in chapter 5). But the fact that the trade-offs inherent in zoning are legally defensible doesn't comfort elected officials who are about to make a land use decision they think is in the best interest of the city, even though it is opposed by a roomful of angry citizens. One challenge for future zoning ordinances is how and when to be responsive to short-term interests while promoting long-term goals.

Zoning also has to address the "place" element of responsiveness. Citizens who can easily see the merit in a rezoning or development approval for land located across town change their minds when the proposed development is in their neighborhood. NIMBYism was already discussed in chapter 3, but it reappears here as a problem of governance. Elected officials need to respond both to the citizens living close to the proposed development and to other residents who know that the city (and even the neighborhood in question) may need the proposed development. The bane of planners' existence is "LULUs," or locally unwanted land uses—facilities that need to be provided somewhere even though no one wants to see them close to their homes or shops.

Hint for the future: Zoning has evolved toward increased responsiveness to those closest in time and place to the proposed changes, but it needs to better respond to the interests of the rest of the citizens and the needs of the future. The increasing competitiveness of the global economy, the need for better protection of the environment, and the need for more sustainable development will require that cities increase the efficiency of land uses and transportation systems, and that will require a shift of regulatory emphasis away from short-term and toward long-term interests. One way of doing this is by periodically updating the ordinance to reflect the changing desires of citizens rather than by politicizing individual development approvals.

Fairness

When I went to law school, I was surprised to learn how many different ways there are to look at fairness. Each side in a public policy dispute can usually cite some way in which fairness requires that he or she win the dispute. Not only is it popular to have fairness on your side, but it is usually pretty easy to do. Much turns on your definition of what fairness requires. The U.S. constitution defines some aspects of fairness, but our system of government leaves wide latitude for states to define what fairness means within their borders. States with Home Rule systems of government (discussed in chapter 5) often leave similar latitude for cities to make their own decisions about what is fair in city matters. So the surprising answer to "What does fairness mean in zoning" is often "What do the voters and elected officials want it to mean?" To look at fairness in zoning, we need to separate the topic into three parts: results similarity, social equity, and procedural fairness.

"Results similarity" means making similar decisions in similar cases. This is a generalized concern that has surprisingly little impact on zoning. Governments typically try to make similar decisions in similar cases, but generations of judges have repeatedly held that land is not fungible—that is, two pieces of land are rarely so similar that the government must treat them the same way. The adoption of PUDs as a zoning tool and the decline in reported cases about "spot zoning" reflect this reality.

In theory, Euclidean zoning districts treat all property within the zone the same way, but in practice they treat different types of property differently depending on environmental conditions, lot sizes, and other factors. Most of the zoning reforms described in chapter 1 enabled government to take into account more and more factors specific to the land, its location, and the values of the elected representatives—all of which make it almost impossible to prove that your land is legally similar to another piece of land that has been zoned differently. History shows that applicants, neighboring citizens, and judges do not really expect that zoning will result in very similar decisions, and results similarity is now almost a dead-end in zoning governance. Although "spot zoning" cases still come up from time to time, and plaintiffs do sometimes win them, those wins are relatively rare.[1] Results similarity is no longer a good yardstick of whether zoning governance is equitable.

Social equity is the second idea of "fairness" that can be attached to many different aspects of zoning. Over the past several years, planners have begun to talk about environmental equity—or the need to make sure that unwanted or polluting land uses are not located primarily in poor neighborhoods. Similarly, although the dominant approach is to limit adult uses to certain zone districts within the city, the various adult use industries (and sometimes the residents of the areas where they are allowed) have argued that this is unfair and that these uses should be distributed rather than concentrated in one area. As a third example, under the federal Fair Housing Act Amendments, some types of group living must be treated as residential uses of land even though they are operated as commercial businesses. As a result, they must generally be allowed in at least some residential zone districts in many cities, but some argue that fairness requires that group living facilities be allowed in all residential districts.

Although strong feelings lie behind these and other social equity arguments, I am not sure that good governance *requires* that zoning ordinances embrace them. Instead, I think good governance requires that the city council conduct an open and inclusive process to determine how these uses will be treated, that they comply with state and federal law, and that they base their decisions on data regarding the impacts of these uses wherever possible.

One reason for the success of group housing advocates has been their ability to find evidence that many types of group housing have few, if any, adverse impacts on neighbors. And although cities have long cited general studies showing that adult uses produce negative neighborhood impacts in the form of litter, loitering, and crime rates, the industries behind these uses have raised the level of discussion by producing studies showing that some uses (for example, bookstores with only a limited amount of adult material and that are not identified by signage as adult bookstores) produce few of those impacts. Most claims that zoning is socially unfair are really claims that decisions about unpopular uses and facilities are made based on criteria other than their real impacts. If that is true, then decision-making processes that focus on documented impacts will result in greater social equity.

Unlike results similarity and social equity, though, the idea of procedural fairness remains an important concept in zoning governance. Citizens expect, and state laws usually require, that similar applications be subject to the same types of review and approval procedures. Those procedures are often spelled out in great detail, including the criteria by which the decision must be made. The focus on procedural fairness, rather than on results similarity, is shown in the litigation strategies of those disappointed by zoning decisions. The first step in most legal challenges is to find a procedural step that was missed or muffed, allowing the challenger to knock out the resulting decision rather than to attack the decision itself. Only if the procedures were constitutionally sound and the statutory requirements were scrupulously followed do plaintiffs challenge the substance of the decision, because governments have wide latitude on that front. When Loudon County, Virginia, adopted a 2003 zoning amendment dramatically reducing the number of homes that could be built in rural areas, it provoked more than two hundred lawsuits. Although plaintiffs were really upset about the substance of the amendment, they went after the procedure used to adopt it, and they were successful. In 2005, the Virginia Supreme Court ruled that the adoption process was flawed and that the revised zoning was therefore invalid.[2]

Although most city governments do a fairly good job of processing similar applications in similar ways, they often fall short on another aspect of procedural fairness: ensuring that unwritten factors do not influence administrative decisions. Most zoning decisions fall within three categories: (1) "ministerial," if the decision is determined only by compliance with objective standards; (2) "discretionary administrative," if they require the staff to use its judgment within boundaries established by city council; or (3) "discretionary legislative," if they are made by the city council within the bounds of the police power.

Rezonings are almost always discretionary legislative decisions, and applicants realize that there is no guarantee that the city council will decide in their favor. That is why the decision was sent to the elected or appointed officials—because it involves legislative judgment as to what is best for the city, and the city council is rarely constrained to make a particular decision. Politics can and does influence this process and applicants who apply for these types of decisions know (or should know) that the answer to their request may be "no."

However, most other zoning decisions are not discretionary legislative decisions. Many are ministerial decisions made by planning staff or an appointed board based on specific criteria. The criterion is usually that the application must comply with the standards in the zoning ordinance. That is how we grant building permits, sign permits, and fence permits. If the application meets the standards in the ordinance, you get a permit; if not, then no permit. For ministerial decisions, the standards are adequately detailed to determine the outcome.

But a wide middle range of administrative zoning decisions are not completely determined by written criteria; they are discretionary administrative decisions. Whether a particular driveway layout will permit adequate access by fire trucks often requires a little judgment by the fire staff. Whether the proposed buffering will adequately protect neighbors from noise impacts also requires some experience and judgment. More seriously, when the fire access regulations conflict with the landscaping regulations, it takes judgment to reconcile them, and most owners would prefer that type of compromise to an outright denial.

Some state zoning enabling acts read as if planning staff are not to exercise any discretion at all—that is, as if all zoning decisions by staff must be completely ministerial. But in practice no ordinance can spell out how every conflict between regulations is to be resolved, so staff has to have some room for judgment. In most ordinances, it is the planning director or zoning administrator who is allowed to make judgments, but in practice, they are also allowed to delegate powers to their employees. Staff numbers make the judgments, but the director remains politically accountable for their decisions. This is not bad—rather, it is good governance. Those who believe a big city zoning ordinance can be administered without making some judgment calls in the process are fooling themselves. Many administrative decisions cannot be ministerial, and trying to make them so would produce a very cumbersome zoning system.

But it is bad governance when politics is allowed to sway administrative decisions. This can happen from various sources. Applicants can pressure (or worse) the director to approve a controversial project, neighbors can pressure (or worse) the director to deny a project that meets the zoning standards, or city council members may have an axe to grind on either side. A planner once told me he got a call from his city manager telling him to "lose the application in a drawer for a while" and not tell his immediate boss about the call or the drawer. Procedural fairness in this case means avoiding undue influence on decisions that are supposed to be made based on professional judgment.

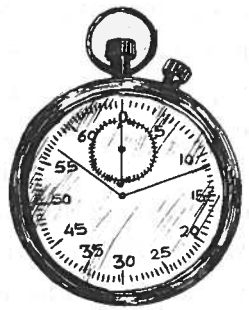
Some cities that scrupulously follow written procedures are lax when it comes to insulating their staff and director from improper influence. Others allow written letters to be sent to staff regarding a particular application—ostensibly to point out factors that staff may not be aware of—but then require that those letters be a matter of public record, that they be circulated to other interested parties, and that the written decision indicate whether the staff member relied on any of those

letters when making the final decision. This is slicing things pretty thin—the disappointed party may feel that another opportunity for rebuttal should have been offered—but it does allow for judicial review of the decision and for the staff and director to be held legally and politically accountable for their judgments.

For zoning, the most important benchmark of equity is procedural fairness, and that needs to be defined to include limits on outside influence over administrative decisions. Most ordinances do this in writing, but many cities don't do it so well in practice.

Hint for the future: Future zoning should ensure that similar applications are required to complete similar review procedures and should better insulate administrative and quasi-judicial decisions from improper influence. This is particularly true in the later stages of development approval, after preliminary approvals have been given and investments in reliance on those approvals have been made. In addition, all factors considered in making nonministerial decisions need to be noted in writing so that they can be referred to on appeal.

Efficiency



The evolution of zoning has led to more complex rules, and the resulting regulations often require more time and money to operate. PUDs commonly take a long time to negotiate and also require more staff time to review files to respond to future questions or amendments. It can take time and money to design good performance zoning standards and to measure compliance with them. Form-based zoners would claim that any added time and money spent to understand and comply with a typology of permitted building types and forms is offset by savings from a more flexible approach to uses inside the building. That may be true, but it is too soon to tell whether there is a net time savings.

Efficiency is usually discussed in terms of time and money. But in the case of zoning administration, the time element is more important than the financial costs of actually administering the ordinance. Within any mature city, planning and zoning costs represent a relatively small share of the total municipal budget; zoning administration is an even smaller share. Administrative fees (as opposed

to development impact fees) are usually calculated to offset the actual staff expense of reviewing applications, so the application fees themselves are seldom controversial. But if more complex regulations cause cities to spend more time reviewing and approving applications, the efficiency losses to businesses and citizens can be significant. Delaying an approval hearing by one month usually means one more loan payment to be covered before the land can be used as the applicant intends, and an increased risk of losing tenants who are waiting for the improvements to be completed. Multiply those losses by the number of pending applications and it adds up.

In many cities, an increasing percentage of applications cannot be approved by zoning counter staff; they have to be referred to planning staff or design review boards for further review, which usually increases the time required between application and permit. In fact, in some cities the ratio has flipped from a situation where the majority of applications could be approved at the zoning counter to one where more than 50 percent of applications now require consultation with planning, environmental, or design staff before the permit can be issued.

Fortunately, technology has offset some of the decreased efficiency in zoning operations. Aerial photography, computerized maps, and for GIS systems have made it easier to put information in the hands of applicants and opponents of proposed development, as well as planning staff. In May 2004, the American Planning Association reported that e-governance was significantly affecting the administrative costs of planning and zoning. Whereas paper permit applications cost an average of $5 to process, e-permits (permits applied for and issued over the Web) cost an average of $1.65. An estimated 50 percent of local government construction permits are ministerial permits that could be issued this way, but the dollar value of construction authorized by those permits is only 10 percent of the total dollar value of the U.S. construction industry.[3] Much of the remaining 90 percent (or $1.17 trillion in construction) still requires approval through permits that require some degree of discretionary judgment. Technological approaches to the review of applications for those permits have been struggling against increasingly complicated ordinances.

In addition to the time and money required for applicants to get approvals, there are the economic losses to both applicants and neighboring property owners when land use applications experience "surprise endings" late in the process. When an owner receives a special use permit for a gas station subject only to

relocation of the driveway by 10 feet (which the owner can do) but the city then inserts a new requirement for design review by a neighborhood design panel, which turns down the project, the government has affected the efficiency of the system by inserting uncertainty. Many states have adopted "vested rights" laws to address this aspect of zoning inefficiency, and these laws will be discussed in chapter 5.

Incidentally, the fact that a zoning decision may decrease some property values is not a sign that the system is "inefficient." Increases and decreases in property values are inherent in the concept of zoning, and courts have been consistently clear that zoning is not legally required to protect the value of each individual property unless there is a state law imposing that requirement. "Highest and best use" of property is and always has been a concept used in real estate appraisal, but it has never been an element of zoning law.

Hint for the future: Future zoning should eliminate unnecessary line drawing among types of uses, zones, and developments that do not differ significantly in community impacts, in order to reduce administrative time required to make and defend those decisions. Review and approval procedures should be simplified as much as possible, and technology should used to put more site-specific facts in the hands of counter staff and citizens. Reviews for compliance with technical standards should be taken out of the public hearing process.

Understandability

One unintended result of the evolution of Euclidean tools is that zoning has become harder and harder to understand. Early in my career, I received advice from an eminent attorney who told me that if I just memorized the Denver Platte River Valley zone district ordinance, I would have mastered something so complex that I would never want for work. Wrapped within one zone district were seventeen subareas, each with its own development rules and a process by which neighbors had to come together to adopt a subplan before the "real" zoning kicked in. I didn't take the advice, but I later drafted something almost as complex myself.

But zoning ordinances should not be understandable only to lawyers or zoning staff (who usually make the best of a bad situation and learn to live with it); they should be understandable to average homeowners, at least those who have completed high school. Few citizens ever read a zoning ordinance cover to cover, of course, nor should they. The test of understandability is not whether you can hold a picture of the entire ordinance in your mind and see how all the pieces work together, but whether people of average intelligence can find the answers to their questions when they need to. Better yet, two people should be able to look at the ordinances and find the same answers to the same questions. That alone is fairly hard in most ordinances.

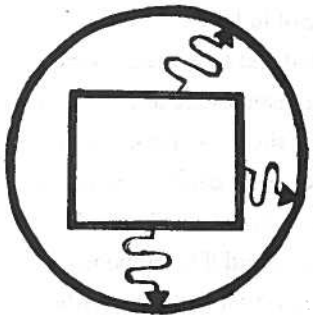
Zoning ordinances are difficult to understand because they include some or all of the following:

- Long lists of zoning districts, some of which differ from others in only minor ways.
- Long lists of possible uses, many of which differ from one another in only minor ways and some of which sometimes overlap so that it is not clear what label will be applied to a specific activity.
- Numerous approval procedures, some of which may not be written down or may be administered in ways other than what is written. Often, this is the result of a planning director making a good faith effort to resolve two conflicting requirements, but that rationale and solution are not disclosed to the reader.
- The accretion of new regulations over time and the failure to integrate new material with other, similar material in the ordinance. New regulations about a single type of facility—for example, telecommunications antennae—are often tacked on as a new chapter, even though some of the content addresses permitted structures (which is covered somewhere else in the zoning ordinance), other parts of the text address permitted uses (also covered elsewhere), and still other provisions address review procedures (which are also covered elsewhere).
- Internal inconsistencies among different provisions of the ordinance, leading to the practical impossibility of meeting all the requirements. This is because no one can actually anticipate all of the ways various requirements will combine with different uses on land parcels of different shapes, sizes, and locations—which is the basic reason why zoning cannot be drafted to eliminate the use of judgment.
- Political compromises that require complicated text to address a very narrow range of problems. Over time, zoning disputes are often resolved by crafting an amendment that "splits the baby" between interest groups. A provision allowing the practice, or disallowing it, would be very short. But many compromises sound more like "If X happens, the rule is A; if B happens, the rule is Y; and if C happens, we'll hold a hearing and make a decision based on the following criteria." It takes a much longer paragraph to describe a compromise than a simple yes or no.
- Separation of zoning-related topics in different chapters of the municipal code (outside the zoning chapter) without good cross-references. For example, some cities put sign controls, parking requirements, and landscaping regulations somewhere else in the city code but fail to provide cross-references showing the zoning reader where to find those materials.
- Failure to explain what you can do if your proposal does not meet the standards in the ordinance, which is one of the most common questions from citizens. There are usually several ways to proceed (e.g., a variance, a special use approval, or a rezoning), but unless the ordinance explains that, opponents think the project cannot be approved and the applicant has to find the way forward through a conversation with staff (which, of course, potential opponents are not privy to).
- Use of planning and zoning jargon rather than plain English.

Understandability is one area where Euclidean hybrid zoning often fails miserably—leading to the impression that only experts can understand zoning.

Hint for the future: Future zoning will simplify land uses and the menu of available zoning districts, and will eliminate ineffective development standards, to improve the understandability of printed versions of a zoning ordinance. The bigger breakthrough will come through the expanding use of Web-based zoning tools that respond to discrete questions and do not require citizens to understand the overall structure of all the zoning provisions.

Predictable Flexibility



The previous five governance topics have been pretty standard—governance 101. Now I'd like to add one that is unique to zoning and not quite so obvious. Good zoning governance requires that there be a good balance between flexibility and predictability in the system. This is an area where the level of discussion needs to be raised several rungs to be more productive.

When a steering committee of luminaries first meets with a consultant to review the city's zoning ordinance, they often say: "All we want is predictability—and flexibility." At one level, this is nonsense. A zoning system cannot be both predictable and flexible on the same point at the same time. My experience is that the speakers really want predictability in some cases and flexibility in other cases. But it is difficult to agree on workable principles about when things should be predictable and when they should be flexible.

For example, on Monday homeowner Mary wants predictability when it is clear that the proposed apartment building on the corner does not meet the minimum setbacks by a foot (she wants it denied), whereas apartment builder Jennifer would like a little flexibility (she wants it approved because the site makes that last foot very expensive to achieve). On Tuesday, Jennifer wears her homeowner hat and wants predictability when it becomes clear that Tom's proposed store expansion on the corner of her block is two parking spaces short of its requirement (she wants it denied). On my most cynical days, I think people want predictability when it favors their interests and flexibility when that favors their interests. In other words, their allegiance is to neither flexibility nor predictability as a guiding principle.

On a deeper level, though, there is wisdom in the desire for both predictability and flexibility, and much of the history of zoning has been an effort to balance and rebalance those two goals. Euclidean zoning was designed to promote predictability. PUDs were designed to give flexibility in design, although if all the details are locked down, the PUD approvals may result in much more predictability about what the future will look like. Performance zoning was also designed for flexibility in approach but predictability in impacts. Form-based

zoning aims at more flexibility in uses and more predictability in design. The dance between flexibility and predictability is, in fact, the most constant theme in the history of zoning. And still, on any given day, both citizens and developers (and citizens when they are developers) complain that the results are either too unpredictable or too inflexible.

Good governance requires that we get beyond the words themselves to a better idea of what kinds of things should be predictable and what kinds of things should be flexible. By analogy, this is like designing a "fuzzy logic" transmission for a car. For years, even the best automatic transmissions "hunted" for the right gear when they were climbing slopes. In third gear, the engine was working pretty hard, so the transmission would upshift to fourth, but in fourth the engine didn't have enough torque to maintain momentum up the hill, so it would kick back down to third. This annoyed drivers, who wished the car would just make up its mind. Over time, designers added more gears to transmissions, which solved the problem but made the transmission more complex. A second solution was fuzzy logic, which used a computer chip to recognize when the transmission was hunting and told it to stop, usually by shifting down to third gear and staying there despite the hard work. Drivers were just happy it had stopped hunting. In short, fuzzy logic defined a predictable point (i.e., when the transmission was hunting) and made the transmission flexible with regard to shift points—it bent the usual rules about when to shift, but it did so in a predictable way.

Good governance requires the same approach. It must be grounded in predictability, because knowing what the government will probably do in a certain circumstance is fundamental to both property rights and due process. But it must allow flexibility at defined points in that framework. For example, some Canadian and Indian systems use "tolerance" bylaws to define a range of flexibility (sometimes 5 or 10 percent) around certain standards. Some of those ordinances limit their flexibility to individual properties (like a variance), so that an individual is not required to apply for a variance or prove unique hardship over a 6-inch setback encroachment but a developer cannot design an entire subdivision with 6-inch encroachments.

Hint for the future: Future zoning should recognize the need for judgment in applying zoning regulations, and cities should structure their staffing to make those judgments. Cities should also allow defined degrees of flexibility in

applying regulations, clearly define the range of flexibility available to staff and appointed boards, and establish criteria to apply in using that flexibility. In some cases, development standards could vary in predictable ways based on the state of surrounding properties. Predictable flexibility will be particularly important for nonconforming properties and for redevelopment in mature areas.

CHAPTER 5

The Legal Framework for Change

TOMES HAVE BEEN WRITTEN ON THE LAW of zoning,[1] but this is not going to be one of them. To design a better way to zone, we don't need to review all of zoning law—just the framework of constitutional protections that the new system has to respect. There are five basic sources of law related to zoning:

- the U.S. Constitution;
- federal acts adopted by Congress;
- the fifty state constitutions;
- statutes adopted by the fifty state legislatures; and
- the common law that emerges through court decisions.

This chapter reviews only the federal Constitution and laws that affect zoning in all cities, as well as some related common law. We are concerned with both what the federal Constitution and congressional acts say and what they do *not* say, because all those areas of federal "silence" are areas for potential improvements.

Of course, in pursuing a better way to zone, each city also has to comply with its state's constitution, but this book cannot consider each of them individually. Fortunately, many state constitutions have provisions roughly similar to the U.S. Constitution in key areas that affect zoning, especially due process and regulatory "takings" of property. On other topics, such as vagueness and

MILWAUKIE
Dogwood City of the West

To: **Mary Dorman & Serah Breakstone, Angelo Planning Group**

From: **Li Alligood & Susan Shanks, City of Milwaukie Planning Staff**

Through: **Katie Mangle, City of Milwaukie Planning Director**

Date: **April 7, 2010**

Subject: **Task 1 City Deliverable – Code History Memo**

The purpose of this memo is to provide an historical overview and current assessment of specific chapters in Title19 of the Milwaukie Municipal Code (MMC or the Code), namely Chapters 19.600 Conditional Uses; 19.700 Variances, Exceptions, and Home Improvement Exceptions; 19.800 Nonconforming Uses; 19.900 Amendments; and 19.1000 Administrative Provisions. This memo includes a brief history of the development of these chapters that highlights key dates and policy decisions. It also includes staff's recommendation for which code provisions to retain based on staff research and current community knowledge. A more detailed spreadsheet identifying specific problems with individual code sections is attached.

CODE HISTORY

Zoning Ordinance

The City's Zoning Ordinance has undergone four complete revisions since its adoption in 1946.[1] With the notable exception of the 1968 ordinance, each revision retained the previous code direction and expanded or clarified provisions within it.

- **1946:** The City's first zoning ordinance was four pages long. It established four use zones and included provisions for Nonconforming Uses and Amendments.
- **1968:** Repealed the 1946 ordinance and added 12 use zones, supplementary regulations, and off-street parking and loading provisions; broadened the Nonconforming Use standards; added provisions for Conditional Uses, Variances and Exceptions, and Administrative Provisions; and revised Amendment provisions. [2]
- **1975:** Repealed the 1968 ordinance.[3] It included minimal revisions to the Conditional Use and Nonconforming Use chapters, and to the Variance criteria.
- **1979:** Repealed the 1975 ordinance and all amendments to that ordinance. It added the Transition Area Review process; expanded the criteria and scope of Conditional Use permits; revised the Variance criteria adopted in 1977; and revised provisions of Nonconforming Use review.[4]

[1] Ordinance 481, adopted June 24, 1946
[2] Ordinance 1183, adopted October 17, 1968
[3] Ordinance 1316, adopted July 7, 1975
[4] Ordinance 1438,adopted November 5, 1979

In addition to the complete code overhauls noted above, the Code was substantially revised in 1977[5] before being repealed and replaced in 1979. The 1977 revisions shifted many commercial zone uses from permitted to conditional uses and completely revised the Variance criteria. Revisions to the Code have occurred in piecemeal fashion since 1979 through the City's amendment process. Significant amendments to individual code chapters are noted below.

The City has also done several audits of the Code since 1979, only some of which have resulted in code amendments. A summary of these code audit projects are as follows:

- **1997:** Obstacles Removal to Smart Development project,[6] funded by a grant from the Transportation and Growth Management (TGM) program. The project was part of TGM's "Smart Development" and "Quick Response" programs, and evaluated local zoning ordinances against smart development guidelines established by the Oregon Department of Land Conservation and Development (DLCD). The City contracted with Lennertz Coyle & Associates, who conducted an analysis of the zoning and proposed revisions to commercial and residential development standards. Due to significant turnover in staff and leadership, none of the proposed amendments were adopted.
- **2003:** Staff-initiated remedial code project intended to simplify the code to improve readability, accessibility, and avoid future disagreements about interpretation. The proposed revisions focused on procedures contained in Chapters 19.600 - 900: Conditional Uses; Variances; Nonconforming Uses; and Amendments. In 2003, the City hired Mary Dorman to review the code for improvements. She identified a number of ways the sections listed above should be clarified and approved. Due to staff workload and turnover, most of these proposed amendments were not adopted.
- **2009:** The State of Oregon's Transportation and Growth Management (TGM) program awarded Milwaukie a grant to fund a phased code review and revision project. The City contracted with Angelo Planning Group to review Sections 600-1000: Conditional Uses; Variances; Nonconforming Uses; Amendments; and Administrative Procedures. The City recently received a TGM grant to implement suggested revisions.

<u>Individual Chapters</u>

Chapter 19.600 Conditional Uses

The Conditional Use chapter regulates types of development that are necessary but appropriate within prescribed circumstances, including surface mining, high impact commercial use, and senior and retirement housing.

The 1968 zoning ordinance established the Conditional Use chapter. The 1979 zoning ordinance expanded the chapter and established 5 approval criteria for conditional uses, which remain unchanged in the current ordinance. Additionally, provisions for Planning Commission reconsideration of a conditional use in response to complaints; revocation of a conditional use permit; and review of a conditional use upon change in ownership, use, or tenant were added.

In response to ORS and Metro Functional Plan compliance requirements, several use zones were added to the ordinance in the 1970s and 1980s. A 1976 ordinance adopted the Willamette Greenway Zone (WG), which is subject to the provisions of the conditional use chapters.[7] In 1984, the Community Service Overlay (CSO) was adopted, and many of the community service uses (primarily those with a public benefit, such as schools and churches) were moved from the

[5] Ordinance 1358, adopted March 7, 1977
[6] City documents identify this audit as the Zoning Ordinance Review and Removal of Obstacles (ZORRO) Project.
[7] Ordinance 1341, adopted June 7, 1976

Conditional Use chapter to the new CSO subsection in MMC Subsection 19.321.[8]

Several minor changes to this chapter were made in 1994, to comply with Fair Housing policies,[9] and in 1999, as part of a package of Metro Functional Plan compliance amendments.[10]

Chapter 19.700 Variance, Exceptions, and Home Improvement Exceptions

This chapter allows development to vary from the uses or development standards of the underlying zone. Variances are used to vary development standards or other provisions of the Code, e.g. time limits, not related to uses, and Exceptions are used to allow uses not outright or conditionally allowed in the underlying zone. Home Improvement Exceptions (HIE) are a kind of variance only available to single-family residential structures. The HIE process allows homeowners to vary the development standards for yard and lot coverage.

The first variance and use exception provisions were adopted with the 1968 Zoning Ordinance as Article 7 Variances and Exceptions. The initial variance approval criteria were fairly subjective and, despite numerous amendments, have remained problematic. The use exception approval criteria have remained unchanged since their inception.

In 1977, the Variance provisions were amended to provide more Planning Commission discretion in granting variances; one of the criterion required Commissioners to determine if the difficulty of the site was self-created.[11] Per a memo written by Maggie Collins, former Community Development Director, the 1977 process "was intended to balance the benefit to the property owner against harm to the community, and did not necessarily encourage consistency or establishment of clear precedent."[12]

The 1979 ordinance granted the Planning Director authority to authorize administrative variances of up to 25% through a Type II Administrative Review; more than 25% variance required minor quasi-judicial review.

The Variance approval criteria were updated in 1994 in order to create clear and objective standards for variance decision-making.[13] At that time, the current language of Section 19.702 was adopted.

In response to a large number of flag lot and variance applications, a 1998 amendment reduced administrative variances from 25% to 10%, thereby ensuring minor quasi-judicial review of significant variance requests.[14] The same amendment added an HIE provision with Type II review rather than a minor quasi-judicial review, intended to lessen the burden on applicants. The HIE provisions remain unchanged in the current zoning ordinance.

Chapter 19.800 Nonconforming Uses

Legal nonconforming uses are uses that were legally established under the applicable regulations and became nonconforming when new regulations are adopted. Legal nonconforming uses can be continued and maintained, but cannot be altered without review. Illegal nonconforming uses are those that were established illegally and continue to be illegal. When a nonconforming use is discontinued for a period of time, 6 months in the City of Milwaukie, whatever use replaces it must conform with the zone in which it is located.

[8] Ordinance 1564, adopted August 7, 1984
[9] Ordinance 1763 adopted May 17, 1994 (ZA-94-04); Ordinance 1773 adopted October 1, 1994 (ZA-94-06)
[10] Ordinance 1854 adopted April 6, 1999 (ZA-98-02A)
[11] Ordinance 1358, adopted March 7, 1977
[12] Memo from Maggie Collins to the Planning Commission, February 13, 1996
[13] Ordinance 1756, adopted March 15, 1994 (ZA-09-01)
[14] Ordinance 1849, adopted November 17, 1998 (ZA-98-01)

Provisions for nonconforming uses were first adopted with the 1946 zoning ordinance. The earlier provisions did not address nonconforming structures, except to note that if a nonconforming building was destroyed by fire, its replacement was required to conform to the provisions of the zoning ordinance. Likewise, if a nonconforming use was discontinued for a period of 1 year or more, the new use was required to conform to the zoning ordinance.

The 1968 zoning ordinance expanded those provisions, including the addition of provisions for nonconforming structures; the reduction of the allowed period of discontinuation of a use from 1 year to 6 months; and provisions for the rebuilding of nonconforming structures that were destroyed by accident or natural hazard.

The 1975 zoning ordinance provided provisions for Planning Commission determination that a structure is only suitable for another nonconforming use no more detrimental to surrounding properties than the one to be replaced. This language remains unchanged in the current zoning ordinance.

The 1979 zoning ordinance granted authority to the Community Development Director to approve the extension or alteration of a nonconforming structure through Type II administrative review.

A 2002 amendment directed, in part, at improving administrative efficiency and the quality of application submittals added Subsection 19.809 Planning Director's Determination, which provided for an administrative determination of nonconforming status.[15] A second 2002 amendment adopted the Water Quality Resources chapter and revised the Destruction of a Nonconforming Use provision that allowed more time, i.e. up to 18 months, for replacement or repair of nonconforming structures that were damaged by accident or natural hazard.[16]

Chapter 19.900 Amendments

Planning Commission, City Council, or property owners can initiate amendments to the zoning ordinance. Amendments can be made to the text of the Code or Comprehensive Plan or to the Zoning Map, such as when a property owner applies for a zone change. There are different provisions for each type of amendment.

Provisions for amendments were included in the 1946 zoning ordinance, and required initiation of amendments by City Council, Planning Commission, or by petition of the owners of more than 50 percent of the land in any of the area. Although Planning Commission review was required, City Council could override Planning Commission denial with a vote to approve by 2/3 of the members. The 1968 zoning ordinance revised the provisions to allow initiation of amendments by City Council, the Planning Commission, or by application of a property owner, and required the Planning Commission to submit a report to the City Council within 40 days of the hearing.

The City underwent periodic review of the Comprehensive Plan in 1979.In response to a DLCD memo regarding needed revisions to the Comprehensive Plan and Zoning Ordinance for compliance with Statewide Planning Goals 2 (Housing) and 10 (Willamette Greenway), a 1980 ordinance adopted criteria guiding zoning map amendments. Two criteria were adopted: 1) The proposed rezoning must be to the maximum Comprehensive Plan designation, unless proof is provided that development at full intensity is not possible due to physical conditions; and 2) Public facilities must be available to serve the land uses allowed by the proposed designation.[17]

The City underwent its second period review of the Comprehensive Plan in 1988. Due to a lawsuit resulting from City Council denial of a 1989 zone change application and the receipt of another notice from DLCD regarding the need to provide clear and objective standards for

[15] Ordinance 1907, adopted August 20, 2002
[16] Ordinance 1912, adopted December 17, 2002
[17] Ordinance 1465, adopted June 16, 1980.

implementation ordinances, this chapter was replaced wholesale in 1990.[18] The new chapter replaced the previous approval criteria with four new approval criteria for zoning map amendments, including analysis regarding the intent of the proposed zone. These criteria remain intact in the current zoning ordinance.

Minor changes have been made to this chapter since 1990, primarily in order to bring the zoning ordinance into compliance with Title 8 of the Metro Functional Plan[19].

Chapter 19.1000 Administrative Provisions

The administrative provisions grant the authority to apply, interpret, and enforce Title19 of the Code, and provide requirements for the processing of applications and public notification. Many of these activities are regulated by the ORS, and each City is responsible for compliance.

The 1946 zoning ordinance authorized the zoning officer, to be designated by City Council, to enforce the provisions it contained. Administrative provisions were adopted with the 1968 zoning ordinance, which granted the power of enforcement to the City Manager and added minimal public notification requirements. This chapter has been updated several times over the years, primarily to revise formatting, update references, or comply with changing ORS notification requirements.

Minor updates occurred in 1987 to streamline procedures, remove some quasi-judicial review obligations from the Planning Commission, and bring notification requirements into compliance with the ORS.[20] A significant revision of this chapter occurred in 1989. Time limit and appeal language was updated to comply with the ORS and several new sections were added to more clearly define the various review procedures and notification requirements. [21]

A 2002 amendment directed, in part, at improving administrative efficiency and the quality of application submittals granted the authority to apply, interpret, and enforce the provisions of the zoning ordinance to the Planning Director, and provided for an administrative Planning Director's Interpretation process to resolve unclear and ambiguous terms, phrases, and provisions within the code.[22] The completeness review process was revised to comply with the ORS, and a provision was added to require final zoning inspections before final occupancy for new structures.

Due to a lengthy land use review process involving multiple submissions of a previously denied application, Subsection 19.1004 was adopted in 2005 to limit the resubmission of the same application when it had been denied and not appealed.[23] Key provisions of that amendment included: Planning Director determinations are final unless appealed; and denied applications may be resubmitted only if one or more of four criteria are met.

CODE ASSESSMENT

In general, the Code provides for different levels of review for most types of land use actions depending upon the complexity or potential impact of the proposal. Currently, staff is the decision-maker for proposals requiring Type I and II review, Planning Commission is the decision-maker for proposals requiring minor quasi-judicial review, and City Council is the decision-maker for proposals requiring major quasi-judicial and legislative review. This approach is supported by the ORS and allows for efficient use of City resources and an appropriate level of community involvement in the land use review process. Staff believes that having different

[18] Ordinance 1686, adopted July 17, 1990
[19] Ordinance 1854, adopted April 6, 1999 (ZA-98-02A)
[20] Ordinance 1620, adopted March 17, 1987
[21] Ordinance 1667, adopted November 7, 1989
[22] Ordinance 1907, adopted August 20, 2002
[23] Ordinance 1954, adopted December 21, 2005 (ZA-05-01)

levels of review for different types of proposals is appropriate and should be continued.

Examples:

- Alterations to nonconforming uses and structures are reviewed through Type II or minor quasi-judicial processes, depending upon the amount of discretion required.

- Major and discretionary variance requests must be processed through minor quasi-judicial review, but minor variances to objective, i.e. numerical, development standards can be processed through Type II review.

- Establishment or major modification of a Community Service Use (CSU) must be approved through minor quasi-judicial review, but minor modifications to an existing CSU can be processed through Type I review.

Additional code provisions that staff recommends keeping are as follows:

19.800 Nonconforming Uses

- The current code allows rebuilding a nonconforming structure within a certain time period if it is destroyed by accident or natural hazard. This policy provides leniency that is appreciated by City residents and is in keeping with the customer-service orientation of City staff.
- The “use exception” provision of this chapter (Subsection 19.806.2) is particularly useful when reviewing uses in the Downtown Zones, where existing buildings may not reasonably accommodate permitted uses.
- The Planning Director’s Determination (DD) is a valuable tool for staff and property owners and is requested with some regularity. Staff suggests that the DD provision be retained and expanded to allow Director’s Determinations in a broader range of situations.

19.1000 Administrative Provisions

- The Planning Director’s Interpretation (DI) process has been a valuable tool for the interpretation and consistent application of the zoning ordinance.
- MMC Subsection 19.1004 was adopted in response to a lengthy land use review process involving multiple submissions of a previously denied application and has prevented a recurrence of that situation.

ATTACHMENTS

Attachment 1 – Problem ID Spreadsheet