

**CITY OF MILWAUKIE
CITY COUNCIL WORK SESSION
AUGUST 31, 1998**

The Council work session came to order at 5:35 p.m. in the Public Safety Building Community Meeting Room.

Present were Mayor Tomei and Councilors Kappa, King, Lancaster, and Marshall.

Staff Present: City Manager Bartlett, City Attorney Ramis, Assistant City Manager Richards, Public Works Director Brink, Neighborhood Services Coordinator Gregory, and Information Specialist Wheeler.

Review of Public Meetings, Public Records, and Election Laws

Ramis updated the Council on these issues and provided an overview of Oregon's public meetings law. The fundamental principles are that meetings and decisions need to take place in the open. Power has its limitations. Under the public meetings law, power is exercised before the electorate. Oregon has a strong belief in an informed and educated electorate.

The public is entitled to know the time and place of meetings, and those meetings must be accessible to anyone wishing to attend. The public meetings law applies to the governing body of a jurisdiction and any board, commission, committee or advisory group of an agency or local government. By appointing a group to advise it on any issue, the City Council automatically imposes the public meetings law on the board or committee. Neighborhood Associations may also be subject to this law depending how they are established. Subcommittees made up of Councilors, even if there are only two members, given a specific charge resulting in testimony would also be subject to the public meetings law. Council always needs to ask itself if a meeting is subject to the law.

Ramis said the next broad question is when the law applies. A governing body deliberating toward a decision triggers the law. There are three types of meetings with different requirements: regular session, special sessions, and emergency sessions. E-mail can be subject to both the open meetings and public records laws. It is clear that communication among three Councilors that advances something on the group's agenda is subject to the laws. Technology advances have made it possible to have a meeting without all participants being in the same room.

Councilor Lancaster said Ramis had mentioned a quorum deliberating toward an issue on the Council agenda, and asked if that would apply to issues not on the agenda but could be. **Ramis** was inclined to say that such discussions advancing a decision would be subject to the laws.

Mayor Tomei asked if one Councilor contacting two others independently was a public meeting. **Ramis** said as long as the conversations were only between two people, the public meetings law would not be violated. He was concerned, however, with the e-mail issue because it was not simultaneous.

Councilor Kappa commented if three Councilors accidentally meet and begin discussing issues, citizens might view that activity as a deliberation. **Ramis** said it is an appearance issue and subject to self-policing.

Ramis said onsite inspections of projects and programs, national or regional association meetings such as the League of Oregon Cities, and purely social gatherings are not considered public meetings. He discussed quorum requirements. These are established by the local governing body, and in Milwaukie a quorum is three Councilmembers.

The fundamental requirement of a public meeting is providing notice. Local jurisdictions normally provide notice of regular meetings a week in advance. Executive sessions may be announced at the regular session with statutory reference provided. Special meetings can be held with 24-hours' notice, and emergency meetings may be held when a genuine emergency exists. A jurisdiction may be challenged based on notification. An open meetings law violation allows the action taken to be voided if there is a successful challenge.

The second requirement of a public meeting is its location. It must be held within the boundary of the jurisdiction with the exception of a joint meeting with another governing body. Arrangements must be made if meetings are held in private places such as a residence or restaurant to accommodate additional observers. Meetings may not be held at any location that practices discriminatory policies. The meeting location has to be accessible to disabled persons and interpreters available within a 48-hour time period.

The Council may hold executive sessions in which the public is excluded, but the press may attend in a watchdog capacity and police the rules. The legislature recognizes there are some situations, such as employment issues, discipline, evaluations, labor relations, exempt public records, pending litigation, and property acquisition that cannot be done in front of the camera. No final actions may be taken in executive session; however, Council may give staff direction.

Ramis discussed the role of the press in executive sessions. The press cannot report on what was discussed during the executive session unless there were issues that fell outside of the scope of the announced purpose. The Council is in a fiduciary position for the City, and disclosure of confidential information is a violation of the Council rules and the Government Standards and Practices.

Voting needs to be done in public and recorded. The Council may vote in work session if it meets open meetings requirements. The City Council has to make its own policy decision on this. If voting takes place, it is a good idea to televise the session so the public can see what is being done.

The group discussed voting in work session with a notice on the agenda that a vote may be taken on non-legislative items.

Ramis said minutes are another fundamental part of the public meetings law and act as a record of actions taken. In addition to written minutes being prepared within a reasonable period of time, he also encouraged retaining the audio tape for a reasonable period of time. Executive session minutes may be either written or maintained on audio tape.

Bartlett said the City provides written minutes of executive session, and if audio tapes are made, they are maintained separately from tapes of other sessions.

Councilor Kappa asked if notes made by Councilors during executive sessions are part of the public record. **Ramis** said, if a topic is later open for disclosure, these notes would be part of the public record. He cautioned the Council to remember what they write or notes they pass during a meeting are public record.

The law is written to allow the public to be present, but it is the Council's decision about public participation. He discussed the distinction between public input and public comment. Input, he felt, was written communication. There are different requirements for land use hearings.

Mayor Tomei asked Ramis to address employment of a public officer. **Ramis** said in Milwaukie's case the public officers would be the City Manager, City Attorney, and Municipal Court Judge.

Mayor Tomei said the public could provide comments on the hiring and performance evaluations of the public officers.

Ramis discussed meeting conduct and the ability of the presiding officer to impose reasonable limitations including the length of time someone is allowed to make comments.

Enforcement of the public meetings law may include a lawsuit and attorney's fee. The Government Standards and Practices Commission may impose a civil penalty to be paid by the elected official rather than the agency. The Commission must be contacted for a formal written opinion to be protected from violation. A willful violation of the public meetings law would result in the individual Councilors being liable.

Ramis discussed election-related issues. State laws do not allow public funds to be expended for private purposes, and there is a risk that some could perceive an incumbent as using funds for election purposes.

Mayor Tomei was concerned about an upcoming newsletter with Councilor columns. **Ramis** strongly recommended the Council be careful because it is clearly an area of vulnerability. **Councilor King** suggested the column be postponed until after the election.

Councilor Marshall felt it would depend on the content and how it is written.

Councilor Kappa said it would depend on which Councilor was writing the article.

Councilor Lancaster said the purpose of the column is to provide facts on certain issues and ask for input. Would there be a problem if the Council were only presenting facts and not advocating a position? **Ramis** said generally it would be alright, but the Council would need to be careful about giving information on a ballot measure.

Councilor Kappa asked for clarification of the Council's ability to determine the level of public participation. **Ramis** said the Council can set limits pursuant to state statute as long as the limitations are reasonable.

Councilor Marshall discussed a situation in which a Councilor was being interviewed by the media and used someone's name. Is a Councilor free to do that? **Ramis** said a Councilor has immunity from defamation claims for what is said during a public hearing. When the hearing is over, so is the immunity. One needs to be circumspect about what is said to the press. The First Amendment protects a person's right to speak as long as reputation and property interests are not being damaged.

Councilor Lancaster noted Bartlett had once cautioned the Council on voicing its opinion against a certain type of construction in Milwaukie. How is the Council constrained in voicing its opinion? **Ramis** said the opinion can be expressed as long as the Councilor was not so biasing himself that he could not consider an application that might come before the City Council in the future. The applicant may question if the Councilor would be able to vote without being biased.

Councilor Kappa said a Councilor could remove himself from voting. **Ramis** added the rules say a Councilor must remove himself from both voting and participating in the debate if biased.

Bartlett added that a Councilor needs to be cautious and not bias oneself by saying something that could be challenged in a quasi-judicial matter or bid award.

The group agreed it would be important to discuss bias particularly in land use cases.

Council Rules

Bartlett asked if Council wished to address Kappa's suggestion of modifying Council Rules.

Councilor Marshall understood from the conversation that changes would not be needed since the meetings are advertised, open to the public, and televised.

Mayor Tomei felt the issue was already covered by the public meetings law. She referred to Municipal Code Section 2.04.300 which discussed Council's voting in any type of meeting. It is likely the Council will reach some kind of conclusion on items on the printed agenda.

Ramis suggested a note be printed on the agenda stating that a vote may be taken. If the City Council wished to prohibit voting in work sessions, there would have to be language added to the rules.

Councilor Kappa was concerned about public perception and letting the public know the City Council will vote on a regular basis in the work sessions.

Bartlett suggested something be printed on the agenda to the effect that these were items upon which the City Council could take action or could simply discuss.

Councilor Lancaster agreed with Kappa that important decisions with broad ramifications should not be voted on in work sessions.

The group agreed that major or legislative issues would be decided only in regular sessions.

Councilor Marshall suggested verbiage regarding consensus voting taking place. He did not want to vote on legislative actions in work sessions, but in other decision-making situations, it would be a good tool to move the Council forward.

Flaglot Development

Councilor Kappa said he would like to make a motion in the "Other Business" section of the regular session agenda to suspend all flaglot development in Milwaukie for a period of not less than six months nor more than one year. Flaglots are a piecemeal development that consumes property lot-by-lot without addressing the cumulative effect. It does not address the proposed Urban

Forestry Program and the need for open spaces. Flaglots do not allow for proper infill and street connectivity. He believed the Subdivision Ordinance, in its current form, was nothing more than a glorified flaglot ordinance lacking in vision and overlooking the need for better infill planning. Flaglots do not address the issues of all systems development charges. The Neighborhood District Associations (NDA) need to finish their visioning processes and provide their input to the City Council.

Ramis said there were two things to consider: (1) the policy choice of whether flaglots were good, bad, or neutral and how well the Subdivision Ordinance reflected the Comprehensive Plan; (2) the procedure issues and how to change the current policy. The City Council may initiate the code amendment process with hearings at Planning Commission and City Council with a 45-day notice to DLCDD. During the course of that, City staff would prepare an analysis of how the provisions comply with the Comprehensive Plan and state land use goals. The alternative to the formal process would be the proposed moratorium approach, but there would be some difficulties. The moratorium laws themselves are written to disfavor moratoriums and make it hard for local governments to impose them. There are evidentiary requirements showing the City could not solve the problem by other means. Typically, a moratorium is used if jurisdictions are out of water or are unable to handle effluent. A moratorium distinguishing one type of land use from another is much harder to defend. He was concerned about trying to solve the problem the hard way.

Councilor Kappa pointed out the Council established a moratorium on tree-cutting in the public right-of-way. **Bartlett** said there was a review process and methodology for tree cutting, so it is not technically a moratorium. Planning Director Heiser had begun a process with the Neighborhood Land Use Chairs that would result in a package of code amendments by February.

Councilor Kappa was concerned about losing more valuable land to flaglots between now and February. He urged looking at the situation block-by-block to get a picture of what was taking place in the community and how to direct development. Identify the need for open spaces, pedestrian and bike paths, street treatments, and other elements of community development.

Ramis said the developers have argued a complete plan and map was lacking, and they feel requirements have been imposed piecemeal.

Councilor Lancaster referred to the Planning Commission's January text change recommendation regarding a neighborhood design guide. He suggested a global moratorium on all construction until these design guides and maps were in place. If the City stays with the long, drawn-out process, developers will have taken every parcel in the City.

Councilor Marshall appreciated hearing this paradigm shift and the Council's taking a proactive approach. He asked what type of liabilities the City needed to consider with a moratorium on either flaglots or building as a whole.

Ramis said the state legislature has written the rules to make it difficult for a local government to defend a moratorium. The premise of SB 100 was to give the development industry certainty that it could expect to develop land based on zoning designations. The legislature allows moratoriums only under very narrow circumstances, and it is difficult for local jurisdictions to develop findings to support them.

Councilor Marshall asked what would transpire if the City Council voted to have a moratorium at its next meeting. **Ramis** said a LUBA case would likely be filed by either the homebuilders or DLCD itself. The City could be in litigation with the state which would be very expensive.

Bartlett saw two risks: (1) the costs of defending the LUBA case; and (2) denying land use to an individual who has already begun the application process. He felt following the process already begun by staff and being involved in a LUBA case would both take about the same amount of time.

Ramis said in a LUBA case a stay could be requested and the moratorium lifted. The moratorium strategy would draw a lot of negative attention. The method would not be built on consensus, and people would quickly take sides.

Councilor Lancaster asked how the Council could convey the message the City is tired of builders trashing the neighborhoods.

Ramis said the City can write its subdivision and zoning codes any way it wishes as long as it meets state requirements for housing opportunities. The City's message is in its code.

Councilor Kappa asked what staff could do in the very near future to start the process.

Bartlett said a design review is part of the just-published Riverfront Request for Qualifications. This was a element of the Council's goal setting. He felt there could be a full package by February 1999.

Councilor Kappa felt it was very confusing to implement and correlate the various plans and programs such as the Transportation System Plan, Urban Forestry Program, Comprehensive Plan, and Zoning Ordinance. He did not feel staff direction was clear.

Bartlett said the Planning Commission can be delegated the task of advising Council on eliminating inconsistencies and creating a cohesive package. He said Heiser could provide a report at the September 1 meeting on timelines. Realistically there are about 120 days for any land use item.

Councilor Marshall suggested the flaglot moratorium would send the message that Milwaukie is no longer open for that type of business. He was willing, with more discussion, to take the legal risks. The time was past to let the development community know that flaglots are not the direction in which the City wishes to continue.

Mayor Tomei agreed but that it be done in a way that would work for the City.

Councilor Lancaster said the moratorium could be withdrawn if necessary. He suggested continuing with those applications already in the process and start from this day forward.

Mayor Tomei agreed there was a need to address flaglots, connectivity, and overall community development, but she was concerned this was not the route.

Councilor King felt this moratorium action would not really benefit the City and would put valuable staff time into a LUBA defense instead of developing a good community design. She suggested that owners of large parcels be made aware of other ways to develop their properties.

Councilor Kappa said the code was the problem, and a LUBA case may or may not take place. It is a chance you take.

Councilor Marshall asked Ramis what the financial impacts might be. **Ramis** said the defense could be \$15,000 to \$20,000, and the City might also have to pay the other side's attorney fees at a similar amount. The financial exposure would be the \$30,000 to \$40,000, but this was not necessarily the worst case scenario.

Councilor Lancaster asked the timeframe for these expenses, and **Ramis** replied it was 120 days.

Councilor Lancaster asked the cost if the moratorium were withdrawn. **Ramis** said it would be less. He thought if a case were brought, the City could ask for mediation.

Mayor Tomei asked the ramifications of dropping the moratorium if someone objected. **Ramis** said that could be done and would cost much less.

Councilor Kappa felt that was a weak message.

Councilor Marshall said the City's decision must be sustainable and not be frivolous. The City needs a strong stance.

Mayor Tomei felt Ramis was saying the design of the City was not a serious enough issue for LUBA to uphold.

Ramis reviewed some findings Milwaukie would have to make: application of existing development ordinances or regulations and other applicable laws were inadequate to prevent irrevocable harm from development in certain areas; and the moratorium was sufficiently limited to ensure that the needed supply of affected housing types was not unreasonably restricted by adoption of the moratorium. Staff would have to create an analysis that showed there was remaining land to meet housing needs, and the action would not create a problem. The City would also have to state why alternative methods of attaining the same objective were unsatisfactory. Milwaukie would also have to show this type of housing shift would not have a negative impact on neighboring jurisdictions.

Bartlett said if the Council were intent upon adopting a moratorium, staff would need a minimum of 45 days to prepare this type of record. Some of the work has been done within the scope of the Functional Plan, but the findings to support a moratorium would have to be very specific.

Mayor Tomei asked how many flaglots are being developed monthly. **Bartlett** said he would get the information, but Heiser noted a lot of the permitting process was shutting down. He felt this was likely the precursor of the next real estate downturn. He estimated there would probably be less than three flaglot applications in the next four months.

The Council agreed to continue the discussion at the regular session and directed staff to provide additional information.

Community Development Block Grant Sidewalk Project Update

Brink provided an update on the sidewalk projects. The costs were less than estimated resulting in a surplus of \$71,000. Staff was seeking authorization to sign a change order that would provide curb and sidewalk on the north side of Washington Street from 37th and to 42nd Avenues and curb only between 40th to 42nd Avenues. The funds have already been budgeted.

Mayor Tomei asked if there had been neighborhood feedback. **Brink** said only two residents from the north side of the street attended the scheduled meeting, and they were in favor of the project.

Councilor Kappa had spoken with several residents who were unable to attend the meeting, and they were in favor of staff's proposal.

Councilor Lancaster asked who was responsible for maintaining the strip between the sidewalk and the street. **Brink** said after the City was done with the improvements including seeding the strips, they revert to the property owner. **Councilor Lancaster** felt it was important to communicate this to the residents.

The Council directed staff to continue with its recommendation to sign a change order to include additional curb and sidewalk improvements on the north side of Washington Street.

New City Newsletter

Gregory and **Wheeler** asked for Council direction on the first edition of the City's new newsletter. It would be direct mailed to all of the 97222 zip code and portions of 97267. The total printing would be 18,500 copies and include distribution through City facilities. **Wheeler** provided several mock ups and newsletters from other communities in the area.

Wheeler would be responsible for editorial control, and regular features would include a calendar of events. **Councilor Kappa** wanted the calendar to include all of the meetings the City Council attended.

Councilor Lancaster discussed software and layout options and provided several layouts he had developed. **Wheeler** would use Adobe PageMaker on the newsletter.

Councilor King felt it was important to include citizen surveys. **Gregory** said this could be accomplished by inserts or voice mail opinion polls.

Councilor Marshall took a certain amount of credit for this project, and at least 80% of the newsletter needed to be geared toward helping the Neighborhood District Associations (NDA) communicate with the residents and amongst themselves. He felt strongly that each NDA should have one page each month. He reminded the other Councilors that this was, at the start, to help the NDAs. If there is additional room, City Council and City administration could each have one or two pages.

Mayor Tomei said this would make it a ten-page newsletter.

Councilor Kappa was concerned about the cost, although he agreed the NDAs needed a vehicle for their news.

Councilor Lancaster said cost would help define what is absolutely necessary.

Councilor Kappa felt the City Council should discuss the Council page based on Ramis' earlier comments on election law violations.

Wheeler said the postage would be about \$25,000 annually. The group discussed the paper quality and number of pages. The paper and printing costs would cost from \$50,000 to \$90,000. The group discussed the feasibility of selling advertising to help cover the costs.

The group discussed the amount of space devoted to the NDAs. **Wheeler** said the amount of information from each NDA varies, and in some instances it might be difficult to fill a page.

Councilor Marshall did not want the NDAs to get lost and shoved off into one little corner of the newsletter. He wanted it clear that Wheeler would not write the stories.

Councilor Lancaster suggested a half page per NDA unless there was special issue such as the riverfront and fire station closure in the Historic Milwaukie NDA.

The group agreed the newsletter would begin with eight pages which would be direct mailed monthly. There would be a citizen contest to name the new newsletter. The mission statement would be retained. Staff would prepare a budget request after several editions and an evaluation after six or eight months.

The meeting ended 8:40 p.m.

Pat DuVal, Recorder