



# CITY OF MILWAUKIE

## AGENDA

January 24, 2023

### PLANNING COMMISSION

milwaukieoregon.gov

**Hybrid Meeting Format:** the Planning Commission will hold this meeting both in person at City Hall and through Zoom video. The public is invited to watch the meeting in person at City Hall, online through the City of Milwaukie YouTube page ([https://www.youtube.com/channel/UCRFbfqe3OnDWLQKSB\\_m9cAw](https://www.youtube.com/channel/UCRFbfqe3OnDWLQKSB_m9cAw)), or on Comcast Channel 30 within city limits.

If you wish to provide comments, the city encourages written comments via email at [planning@milwaukieoregon.gov](mailto:planning@milwaukieoregon.gov). Written comments should be submitted before the Planning Commission meeting begins to ensure that they can be provided to the Planning Commissioners ahead of time.

To speak during the meeting, visit the meeting webpage (<https://www.milwaukieoregon.gov/planning/planning-commission-2>) and follow the Zoom webinar login instructions.

#### 1.0 Call to Order – Procedural Matters — 6:30 PM

1.1 Native Lands Acknowledgment

#### 2.0 Planning Commission Minutes – Motion Needed

2.1 (none)

#### 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 Community Involvement Advisory Committee (CIAC)

#### 6.0 Hearing Items

6.1 Conditional Use for a Vacation Rental in the R-MD (continued from January 10, 2023)

Summary: Conditional Use for a Vacation Rental

Applicant: Crystalyn Keating

Address: 11611 SE 33<sup>rd</sup> Ave

File: CU-2022-006

Staff: Senior Planner Vera Kolas

6.2 Downtown Design Review Code Amendments (continued from October 25, 2022)

Summary: Downtown Design Review Code Amendments

Applicant: City of Milwaukie

Address: Downtown Mixed Use (DMU) Zone

File: ZA-2022-003

Staff: Senior Planner Brett Kolver

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

##### Forecast for Future Meetings

February 14, 2023      Hearing Items: Code Friendly Equitable Communities Code Amendments  
Code Fix: Housekeeping

## 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 register to provide spoken comment at this meeting or for background information on agenda items please send an email to [planning@milwaukieoregon.gov](mailto:planning@milwaukieoregon.gov).
2. **PLANNING COMMISSION and CITY COUNCIL MINUTES.** City Council and Planning Commission minutes can be found on the City website at [www.milwaukieoregon.gov/meetings](http://www.milwaukieoregon.gov/meetings).
3. **FORECAST FOR FUTURE MEETINGS.** These items are tentatively scheduled but may be rescheduled prior to the meeting date. Please contact staff with any questions you may have.
4. **TIME 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 an agenda item to a future date or finish the item.

### Public Hearing Procedure

Those who wish to testify should attend the Zoom meeting posted on the city website, state their name and city of residence for the record, and remain available until the Chairperson has asked if there are any questions from the Commissioners. Speakers are asked to submit their contact information to staff via email so they may establish standing.

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.** Comments or questions from interested persons and testimony from those in support or opposition of the application.
5. **QUESTIONS FROM COMMISSIONERS.** The commission will have the opportunity to ask for clarification from staff, the applicant, or those who have already testified.
6. **REBUTTAL TESTIMONY FROM APPLICANT.** After all public testimony, the commission will take rebuttal testimony from the applicant.
7. **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.
8. **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.
9. **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.

### **Meeting Accessibility Services and Americans with Disabilities Act (ADA) Notice**

The city is committed to providing equal access to public meetings. To request listening and mobility assistance services contact the Office of the City Recorder at least 48 hours before the meeting by email at [ocr@milwaukieoregon.gov](mailto:ocr@milwaukieoregon.gov) or phone at 503-786-7502. To request Spanish language translation services email [espanol@milwaukieoregon.gov](mailto:espanol@milwaukieoregon.gov) at least 48 hours before the meeting. Staff will do their best to respond in a timely manner and to accommodate requests. Most Council meetings are broadcast live on the city's YouTube channel and Comcast Channel 30 in city limits.

### **Servicios de Accesibilidad para Reuniones y Aviso de la Ley de Estadounidenses con Discapacidades (ADA)**

La ciudad se compromete a proporcionar igualdad de acceso para reuniones públicas. Para solicitar servicios de asistencia auditiva y de movilidad, favor de comunicarse a la Oficina del Registro de la Ciudad con un mínimo de 48 horas antes de la reunión por correo electrónico a [ocr@milwaukieoregon.gov](mailto:ocr@milwaukieoregon.gov) o llame al 503-786-7502. Para solicitar servicios de traducción al español, envíe un correo electrónico a [espanol@milwaukieoregon.gov](mailto:espanol@milwaukieoregon.gov) al menos 48 horas antes de la reunión. El personal hará todo lo posible para responder de manera oportuna y atender las solicitudes. La mayoría de las reuniones del Consejo de la Ciudad se transmiten en vivo en el canal de YouTube de la ciudad y el Canal 30 de Comcast dentro de los límites de la ciudad.

#### **Milwaukie Planning Commission:**

Jacob Sherman, Chair  
Joshua Freeman, Vice Chair  
Aaron Carpenter  
Amy Erdt  
Joseph Edge  
Greg Hemer  
Lauren Loosveldt

#### **Planning Department Staff:**

Laura Weigel, Planning Manager  
Vera Kolias, Senior Planner  
Brett Kelder, Senior Planner  
Adam Heroux, Associate Planner  
Ryan Dyar, Assistant Planner  
Petra Johnson, Administrative Specialist II



# CITY OF MILWAUKIE

**To:** Planning Commission  
**Through:** Laura Weigel, Planning Manager  
**From:** Vera Kolas, Senior Planner  
**Date:** January 17, 2023, for January 24, 2023, Continued Public Hearing  
**Subject:** **File:** CU-2022-006  
**Applicant/Owner:** Crystalyn Keating  
**Address:** 11611 SE 33<sup>rd</sup> Ave  
**Legal Description (Map & Tax Lot):** 11E36DB03600  
**NDA:** Lake Road

---

## **ACTION REQUESTED**

Approve application CU-2022-006 and adopt the recommended Findings and Conditions of Approval found in Attachments 1 and 2. This action would allow for the single-detached dwelling on the site to be used as a Vacation Rental.

This is a continued public hearing at the request of an abutter to the subject property. Additional time to review the proposal was requested as well as an opportunity to meet with the applicant.

For detailed analysis of the proposal, please refer to the staff report and attachments from the [January 10, 2023](#) public hearing. The video of the meeting is available [here](#).

## **CONCLUSIONS**

**Staff recommendation to the Planning Commission is as follows:**

1. Approve the Conditional Use for 11611 SE 33<sup>rd</sup> Ave. This will result in the ability to use the home as a Vacation Rental.
2. Adopt the attached Findings in Attachment 1 and the Conditions of Approval in Attachment 2.

## **CODE AUTHORITY AND DECISION-MAKING PROCESS**

The proposal is subject to the following provisions of the Milwaukie Municipal Code (MMC).

- MMC Section 19.301 Moderate-Density Residential (R-MD)
- MMC Section 19.905 Conditional Use
- MMC Section 19.1006 Type III Review

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

The Commission has four decision-making options as follows:

- A. Approve the application subject to the recommended Findings with no conditions of approval.
- B. Approve the application with modified Findings and Conditions of Approval. Such modifications need to be read into the record.
- C. Deny the application upon finding that it does not meet approval criteria.
- D. Continue the hearing.

The final decision on this application, which includes any appeals to the City Council, must be made by April 4, 2023, in accordance with the Oregon Revised Statutes and the Milwaukie Zoning Ordinance. The applicant can waive the time period in which the application must be decided.

## ATTACHMENTS

Attachments are provided as indicated by the checked boxes. All material is available for viewing upon request.

|  | Public Copies            | E-Packet                            |
|--|--------------------------|-------------------------------------|
| 1. Recommended Findings in Support of Approval | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| 2. Conditions of Approval                      | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Key:

Public Copies = materials posted online to application website (<https://www.milwaukieoregon.gov/planning/cu-2022-006>).

E-Packet = meeting packet materials available one week before the meeting, posted online at <https://www.milwaukieoregon.gov/planning/planning-commission-2>.

**EXHIBIT 1**  
**Findings in Support of Approval**  
**File #CU-2022-006, 11611 SE 33<sup>rd</sup> Ave, Vacation Rental**

Sections of the Milwaukie Municipal Code not addressed in these findings are found to be inapplicable to the decision on this application.

1. The applicant, Crystalyn Keating, has applied for approval of a Conditional Use for a Vacation Rental at 11611 SE 33<sup>rd</sup> Ave. This site is in the R-MD Zone. The land use application file number is CU-2022-006.
2. The applicant is proposing to use the single-detached dwelling on the property as a Vacation Rental.
3. The proposal is subject to the following provisions of the Milwaukie Municipal Code (MMC):
  - MMC Subsection 19.301 Moderate Density Residential Zone (R-MD)
  - MMC Subsection 19.905 Conditional Uses
  - MMC Subsection 19.1006 Type III Review
4. The application has been processed and public notice provided in accordance with MMC Section 19.1006 Type III Review. A public hearing was held on January 10, 2023, as required by law.
5. MMC 19.301 Moderate Density Residential Zone
  - a. MMC 19.301.2 establishes allowed uses for the Moderate Density Residential Zone. Vacation rentals are allowed in the R-MD zone per approval through the Conditional Use process.

*The applicant does not reside at the property and is proposing to use the single-detached dwelling on the site as a vacation rental. The applicant has applied for Conditional Use approval.*

*The Planning Commission finds that this standard is met.*

6. MMC 19.905 Conditional Uses

MMC 19.905 establishes a process for evaluating certain uses that may be appropriately located in some zoning districts, if appropriate for the specific site on which they are proposed. Although conditional uses may provide needed services or functions in the community, they are subject to conditional use review because they may adversely change the character of an area or adversely impact the environment, public facilities, or adjacent properties. The conditional use review process allows for the establishment of conditional uses when they have minimal impacts or when identified impacts can be mitigated through conditions of approval. The review process also allows for denial when concerns cannot be resolved or impacts cannot be mitigated.

Approval of a conditional use does not constitute a zone change and is granted only for the specific use requested. Approval is subject to such modifications, conditions, and restrictions as may be deemed appropriate by the review authority.

MMC Subsection 19.905.2.A provides that the provisions of Section 19.905 apply to uses identified as a conditional use in the base zone in Chapter 19.300. MMC Subsection 19.905.3.A provides that the establishment of a new conditional use must be evaluated through a Type III review per Section 19.1006.

- a. MMC 19.905.4.A establishes approval criteria for approving a new conditional use.

The applicant is proposing to establish a new conditional use with a vacation rental for the home. It meets the approval criteria as follows:

- 1) The characteristics of the lot are suitable for the proposed use considering size, shape, location, topography, existing improvements, and natural features.

*The existing home is 1,178 sq ft in size and located on a 5,000-sq ft lot. The lot is fenced on three sides and the home includes a two-car attached garage and sufficient driveway space for two additional cars.*

*The physical characteristic of the property will not change. No improvements are proposed to the lot or the home. The Vacation Rental use will not change the residential character of the lot or building.*

*The Planning Commission finds that this criterion is met.*

- 2) The operating and physical characteristics of the proposed use will be reasonably compatible with, and have minimal impact on, nearby uses.

*The physical characteristic of the property will not change. No improvements are proposed to the home. The applicant intends to use the home as a vacation rental.*

*The operating characteristics and residential character of the home will remain unchanged. The house rules include measures to ensure compatibility with nearby uses. The private off-street parking area accommodates four parked cars limiting any potential negative impacts to parking on the public street.*

*The Planning Commission finds that this criterion is met.*

- 3) All identified impacts will be mitigated to the extent practicable.

*The house rules, which will be sent to guests and will be posted in the house include quiet hours, a no-smoking policy, maximum occupancy of the home, and as discussed above, ample off-street parking. The applicant's management company is available 24 hours a day and has staff who lives in the area and can conveniently address any problems.*

*As discussed below, the applicant will be required to notify properties within 300 ft of the subject parcel of the vacation rental. The notification will include the*

*contact information for the property owners, any property managers, and the City of Milwaukie Police non-emergency line.*

*The Planning Commission finds that this criterion is met.*

- 4) The proposed use will not have unmitigated nuisance impacts, such as from noise, odor, and/or vibrations, greater than usually generated by uses allowed outright at the proposed location.

*The residential character of the site will stay the same and will continue to have no greater unmitigated nuisance impacts than what is currently allowed outright. The visitors to the Vacation Rental would be using the unit as a residential property; consequently, impacts should be similar in nature to what is permitted by right. As stated above, the applicant also has strict quiet hours and no smoking inside or outside policies in the house rules. Moreover, the applicant has demonstrated that these policies will be enforced through monitoring technology and that the applicant has the capacity to address concerns in a timely fashion.*

*The Planning Commission finds that this criterion is met.*

- 5) The proposed use will comply with all applicable development standards and requirements of the base zone, any overlay zones or special areas, and the standards in Section 19.905.

*There are no proposed changes to the existing house or lot. As it currently exists, the home is an existing single-detached dwelling in the R-MD zone on a 5,000 sq ft lot. There are no overlay zones or special areas, and the standards are met in Section 19.905 as demonstrated in the findings.*

*The Planning Commission finds that this criterion is met.*

- 6) The proposed use is consistent with applicable Comprehensive Plan policies related to the proposed use.

*The following goal under the housing section of the Comprehensive Plan is found to be applicable to the proposal. Goal 7.2 [Housing] Affordability and Policy 7.2.9 in the Comprehensive Plan speak directly to vacation rentals*

- Goal 7.2 [Housing] Affordability

*Provide opportunities to develop housing that is affordable at a range of income levels.*

- Policy 7.2.9: Monitor and regulate vacation rentals to reduce their impact on the availability and long-term affordability of housing.

*Section 7 of the Comprehensive Plan, Housing Goals and Policies, speaks to monitoring and regulating vacation rentals to reduce their impact on the availability and long-term affordability of housing. By requiring vacation*

*rentals to obtain a conditional-use permit in the Moderate Density Residential Zone, the City can monitor the prevalence of vacation rentals, and if appropriate, adopt additional regulations to further the goal of housing affordability. There are currently five approved vacation rentals in the city.*

*The Planning Commission finds that through the acquisition of a conditional-use permit, the proposed use is consistent with the Comprehensive Plan and the criterion is met.*

- 7) Adequate public transportation facilities and public utilities will be available to serve the proposed use prior to occupancy pursuant to Chapter 19.700.

*There are adequate public transportation facilities and public utilities for the site. Renters for the proposed use will generally have a personal/rented vehicle that they can park on the property. The applicants have an off-street parking area that can accommodate four vehicles and prevents the need for any renters to park on the public street.*

*The Planning Commission finds that this criterion is met.*

*The Planning Commission finds that the approval criteria for a conditional use are met with this proposal.*

b. MMC Subsection 19.905.9 Standards Governing Conditional Uses

As per MMC 19.905.9, a conditional use must comply with the standards of the base zone, and any overlay zones or special areas, in which it is located, except as these standards have been modified by the Planning Commission when authorizing the conditional use and as otherwise modified by the standards in this subsection.

MMC Subsection 19.905.9.H establishes the following specific requirements for vacation rentals:

- 1) Prior to initial occupancy, the Building Official must verify that building code and fire code standards are satisfied.
- 2) With annual filing of MMC Title 5 Business Tax, the operator must send a notice to neighbors within 300 ft that includes the following information:
  - a. Property owner contact information;
  - b. Vacation rental operator and/or property manager contact information; and
  - c. City of Milwaukie Police nonemergency telephone number.

*Compliance with the requirements established by MMC 19.905.9.H is an ongoing obligation for the applicants.*



*As proposed, the Planning Commission finds that the proposed vacation rental meets the applicable standards of MMC 19.905.9.*

*The Planning Commission finds that the proposed vacation rental meets the applicable standards of MMC 19.905 and is approvable as a conditional use.*

7. The application was referred to the following departments and agencies on December 7, 2022:

- Milwaukie Community Development Director
- Milwaukie Engineering Department
- Milwaukie Building Official
- Clackamas County Fire District #1
- Lake Road Neighborhood District Association Chairperson and Land Use Committee

A public notice was mailed to all residents and property owners within 300 ft of the site.

Paul Hawkins from the Lake Road NDA submitted a comment stating no objections to the proposal.

**EXHIBIT 2**  
**Conditions of Approval**  
**File # CU-2022-006, 11611 SE 33<sup>rd</sup> Ave, Vacation Rental**

**Conditions**

1. As per MMC Subsection 19.905.9.H, the following requirements must be met:
  - a. Prior to initial occupancy, the Building Official must verify that building code and fire code standards are satisfied.
  - b. With annual filing of MMC Title 5 Business Tax, the operator must send a notice to neighbors within 300 ft that includes the following information:
    - (1) Property owner contact information;
    - (2) Vacation rental operator and/or property manager contact information; and
    - (3) City of Milwaukie Police non-emergency telephone number.

2. Conditional Use Permit

As per MMC Subsection 19.905.6, the City will issue a conditional use permit upon the approval of this application to establish a conditional use. The conditional use permit will include the following information:

- a. A description of the use that has been approved by the City.
- b. Restrictions and/or conditions of approval placed upon the use.
- c. Ongoing responsibilities required for the operation of the conditional use.
- d. Allowance for the transfer of rights and responsibilities upon change in ownership of either the use or the property containing the use.
- e. Procedures for review, revisions, and suspension of the conditional use permit.

The applicant must record the conditional use permit with the Clackamas County Recorder's Office and provide a copy to the City prior to commencing operations allowed by the conditional use permit.



# CITY OF MILWAUKIE

**To:** Planning Commission  
**Through:** Laura Weigel, Planning Manager  
**From:** Brett Kelter, Senior Planner  
**Date:** January 17, 2023, for January 24, 2023, Public Hearing  
**Subject:** Code Amendments for Downtown Design Review

---

## **ACTION REQUESTED**

Staff is requesting that the Planning Commission recommend that City Council approve proposed amendments to the zoning code regarding the downtown design review process.

## **BACKGROUND INFORMATION**

### **Prior Discussion**

At the [October 25 public hearing](#), the Commission indicated general support for the proposed amendments overall. However, a majority of commissioners expressed an interest in pursuing a requirement to incorporate public art into new, private development in the downtown zone. The public hearing was continued to a date certain of January 24, 2023.

## **ANALYSIS**

The Commission requested that staff:

- Develop clear and objective standards that require public art in private development; and
- Analyze possible options for meeting a new public art requirement by either allowing an applicant to agree to enter a separate (discretionary) review process with the City's Arts Committee or paying a fee in lieu of providing public art.

The term "public art" was used repeatedly in the Commission's discussion to refer to an art feature that a private developer would incorporate into their new building. While it is not clear if the Commission's intent is for the required art to be owned by the public, the expectation seems to be that the art would be permanently accessible for public viewing at its location on private property. A requirement to donate art to the City could be challenged as a taking based on established legal precedent. For purposes of this discussion, we operate with the assumption

that any required art would remain under private ownership and would be incorporated into the building in such a way that it would remain accessible by the public indefinitely.

After the October 25 hearing, staff attempted to craft a new design element for public art, with the same structure of purpose statement, standards, and guidelines as exist for the other 14 proposed elements. The effort highlighted the discretionary challenges that are inherent in art-related issues as identified in earlier discussions with the Commission, and it uncovered additional issues that are not easily resolved. The City Attorney indicated that significant legal problems persist even if the art intended for public viewing remains under private ownership. Requiring the use of private property for a public purpose without the payment of just compensation is a violation of both the state and federal constitutions. The City's current mural program offers an alternative example of how to integrate art on private property visible from the public realm while respecting private property rights. Participation in the voluntary program requires a property owner to provide an easement upon which a mural vetted by the Arts Committee is placed. The required easement contains terms that outline the ownership, maintenance, care, and ultimate disposition of the artwork. The very language used in discussing this topic (i.e., "public art") underscores the intended public purpose at stake.

Additionally, more pragmatic concerns are also problematic. In the context of a clear and objective public art requirement as proposed, the City would have no authority over the form, composition, or content of the art. Absent input or oversight into the content and quality of the artwork, the City would have no ability ensure the requirement is meaningfully and equitably applied. In practice, this would likely lead to applicants choosing the cheapest and least invasive means of satisfying the requirement. Furthermore, the City would appear to have no ability beyond the nuisance code to require the property owner to maintain the art and no authority over the property owner should the art be changed, altered, destroyed, vandalized, or otherwise dispensed with at any time in the future. Notwithstanding any legal issues, such a requirement would appear to forever link a private development with providing the required public art despite there not being an agreement memorializing any of terms outlined above. Formalizing such a requirement to provide additional authority over the property owner and the art itself would impermissibly entangle the public's interest in the subject private property.

Staff also recognized that additional analysis would be needed to determine if the standards for a new public art requirement would result in unintended consequences that conflict with any of the other proposed design elements, such as wall structure, façade transparency, windows, etc. In the last several years that the Design and Landmarks Committee (DLC) has worked on this project, the group did not discuss or explore the topic of public art. It would be unwise to haphazardly establish a new public art element without vetting it through the DLC (and perhaps the Arts Committee as well) to confirm that the integrity of the other design elements would remain intact or otherwise not be impacted.

With all this in mind, the following questions from October 25 warrant some response as they relate to the basic legalities and mechanics of existing rules and programs for public art.

- **Do other cities in Oregon have clear and objective standards for a public art requirement?**

No. Staff researched whether any other jurisdictions in Oregon have clear and objective standards for requiring art in private development. Staff looked at the zoning codes for 16 Oregon cities: Portland, Eugene, Oregon City, Ashland, Lincoln City, Lake Oswego, Wilsonville, Hillsboro, Tigard, Gresham, Newberg, Joseph, Astoria, Enterprise, Pendleton, and Baker City. None of these jurisdictions require art for private development. Only Wilsonville has any art-related requirements, which are as follows:

- The design of buildings and landscapes shall provide opportunities for public art at a minimum of one location per block.  
*(Wilsonville Municipal Code Subsection 4.125.16.A.(7), Village Center Plaza Design Standards, Village Zone)*
- Public art that is proposed or provided must meet satisfy the following requirements:
  - i. The art must be designed and produced by a professional artist.
  - ii. The art must relate in terms of scale, material, form, and content to immediate and adjacent buildings and architecture, landscaping, or other settings so as to complement the site and its surroundings.
  - iii. The art must demonstrate excellence in craftsmanship, originality in conception, and integrity of materials.
  - iv. Minimal maintenance must be adequate for preserving the long-term integrity and enjoyment of the art, as evidenced by a maintenance plan submitted with the public art proposal.
  - v. Art in private construction projects must be maintained by the property owner in a manner acceptable to the City in accordance with a maintenance plan submitted with the art proposal.
  - vi. The art must meet all applicable building code requirements.
  - vii. The art must be accompanied by an identifying plaque that features the artist's name, artwork title, and date of completion. This plaque must be made of a durable material and be installed permanently near the art.

*(Wilsonville Municipal Code Subsection 4.130.06.K.(1).(e), Plaza Areas, Design and Development Standards for Town Center Zone)*

These Wilsonville provisions are specific to plaza areas in the Village and Town Center zones and are intended for use in a discretionary review process. There is nothing clear and objective about “provide opportunities for public art,” “demonstrate excellence in craftsmanship,” “be adequate,” or “in a manner acceptable to the City.”

- **Can an applicant meet a new public art standard by agreeing to go through a separate discretionary review process focused on art?**

No. Where an applicant is going through an otherwise clear and objective process for downtown design review, it is not legal for the City submit one portion of the project (i.e., public art) to a separate discretionary review. If the downtown design review process is going to include a public art component, there needs to be both clear standards for a non-discretionary review of art (Type I) and directional guidelines for a discretionary review

(Type III). Breaking out the public art piece for a separate discretionary review is not an option.

- **Could the City accept a fee in lieu of installed art?**

Notwithstanding the potential legal problems associated with requiring a private developer to pay for public art as part of the development review process, the use of a fee in lieu (FILO) program for public art would require the development of a program, appropriate measurement and monitoring standards, and the formal adoption of a fee. While doubtful, for an applicant to have the option of paying a FILO, the City would need to explore whether establishing measurable and proportionate criteria for public art is possible. In addition, the City Council would need to establish a formal public art program that could direct how and where FILO funds would be spent. Please note that the legalities of such a program remain suspect due to the difficulties inherent in placing an equitable value on something as subjective as art. Other jurisdictions appear to tie the value to a percentage of total construction costs, but such an approach would likely run afoul of Oregon law as discussed below.

- **Can the Construction Excise Tax be used for public art?**

No. The City has a construction excise tax (CET) program that imposes a tax on development. In Oregon, the CET comes with substantial limitations. The CET program is specifically authorized by Oregon statute. Oregon Revised Statutes (ORS) 320.176 limits the amount that can be raised by local jurisdictions by the CET, based on the type of construction (residential, non-residential) and sets a cap of \$25,000 per project. Art is not an allowed use of CET revenues in Oregon. As per ORS 320.195, CET money must be spent on administrative costs (up to 4%), affordable housing, homeownership opportunities, and developer incentives related to affordable housing.

- **Is a “Percent for Art” program an option?**

In Oregon, staff found that “Percent for Art” programs exist in Portland, Lake Oswego, Oregon City, Eugene, and Ashland. These programs focus on providing art in public places and are limited to public projects funded with public dollars; they do not apply to private development. These programs work by reserving a certain percentage (usually around 1%) of capital project funding above a certain threshold (usually starting at \$25,000 or \$50,000) to be used for art. Typically, a commission or council is established to administer the funds and approve required art.

Milwaukie’s program can be found in MMC Chapter 20.06 and reserves 1.5% of the total cost of a qualifying City project for acquisition of art in public places. But absent statutory authorization as found with the CET program discussed above, Oregon law makes the imposition of a similar tax on private development problematic.

## **Summary**

Staff understands and appreciates the Commission’s passion and interest in promoting the placement of public art downtown. The City’s existing mural program is an example of how to build a voluntary process whereby private developers agree to locate art on their properties.

But including a public art requirement in a non-discretionary review process triggers substantial concern over legal limitations placed on the use of private property for a public purpose and limits the City’s ability to ensure that new art is compatible with community interests. A more effective approach may be to create a broader public art program, perhaps within the context of a City Council goal, that is decoupled from the downtown design review process and uses pooled private and public resources to accomplish the public art goals of the City. Such a program will require direction by City Council and should not hold up the adoption of these amendments as originally proposed.

Staff encourages the Commission to move the amendments forward as originally proposed, with a recommendation that Council consider the creation of a formal public art program overseen by the already-existing Arts Committee.

### RECOMMENDATION OPTIONS

As with any Type V legislative process, the Planning Commission is charged with making a recommendation to City Council for action on the proposal. Staff proposes the following two options:

1. Recommend approval of the downtown design review code amendments as originally proposed (i.e., without a public art element). (*The Commission may include a recommendation that Council develop a separate program for public art.*)
2. Recommend denial of the amendments as proposed.

Staff recommends **Option 1** (recommendation to approve as proposed, without a public art element), mindful of the work done to date to improve the existing downtown design review process.

If the Commission does not feel comfortable recommending approval of the amendments without a public art element, the Commission should recommend denial of the proposed design guidelines, indicate its recommendation that a public art program is desired, and move the decision forward to City Council (**Option 2**).

### ATTACHMENTS

Attachments are provided as indicated by the checked boxes. All material is available for viewing upon request.

|           | Public Copies            | E-Packet                 |
|-----------|--------------------------|--------------------------|
| 1. (None) | <input type="checkbox"/> | <input type="checkbox"/> |

Key:

Public Copies = materials posted online to application website (<https://www.milwaukieoregon.gov/planning/za-2022-003>)

E-Packet = meeting packet materials available one week before the meeting, posted online at <https://www.milwaukieoregon.gov/bc-pc/planning-commission-2>