CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Milwaukie City Hall
10722 SE Main Street
TUESDAY, January 25, 2011
6:30 PM

COMMISSIONERS PRESENT
Jeff Klein, Chair
Nick Harris, Vice Chair
Lisa Batey
Mark Gamba
Chris Wilson (Arrived during the 5.1 staff report)

STAFF PRESENT
Katie Mangle, Planning Director
Susan Shanks, Senior Planner
Ryan Marquardt, Associate Planner
Damien Hall, City Attorney

COMMISSIONERS ABSENT
Scott Churchill

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
2.1 November 9, 2010
Commissioner Mark Gamba noted the Commission still had not done the tour with the Public Works Department.

Vice Chair Nick Harris moved to approve the November 9, 2010, Planning Commission minutes as presented. Commissioner Gamba seconded the motion, which passed unanimously.

2.2 December 14, 2010
Vice Chair Harris moved to approve the November 9, 2010, Planning Commission minutes as presented. Commissioner Lisa Batey seconded the motion, which passed unanimously.

3.0 Information Items
There were no information items.

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: Land Use and Development Review Tune-Up Code Amendments
Applicant: City of Milwaukie
File: ZA-10-02, CPA-10-03
Staff Person: Susan Shanks
Vice Chair Harris moved to initiate the public hearing on ZA-10-02 and CPA-10-03. Commissioner Gamba seconded the motion, which passed unanimously.

Chair Klein called the hearing to order and read the conduct of legislative hearing format into the record. No Commissioners abstained from the hearing.

Katie Mangle, Planning Director, announced that Ryan Marquardt, Associate Planner, was just outside of the Council Chamberswith maps and materials and available to answer questions about how the Code amendments might affect one's property.

Susan Shanks, Senior Planner, presented the staff report via PowerPoint, noting most of the Code amendments were to the Milwaukie Municipal Code (MMC) Title 19 Zoning.

- The Planning Commission had held many worksessions and this was the first public hearing on the project. If the Commission recommended adoption of the Code amendments to City Council, it would go onto the Council for a public hearing.
- Some amendments were being proposed to other Code sections to make sure that the proposed changes would be consistent with Title 19. The goal was to streamline and modernize the Code which had suffered from incremental changes over the past 60 years. It was outdated in that it did not reflect current Oregon State land use law or advancements in planning and technology.
- She reviewed the attachments and provided examples of the four types of changes being proposed: organizational changes, major changes to the review procedures chapter, the creation of a new land use application chapter, as well as some changes to the Comprehensive Plan (Comp Plan). The amendments did not address any land use standards, but how applications are processed and the approval criteria against which they are evaluated.
- More project information was available, including a project website that included a project overview, the project's schedule, links to all the draft documents, including the two public drafts, all the draft amendments, materials and meeting minutes, and reviewed the types of changes being made to each Code section. The website also included a project tour link that walked visitors through the project and the main changes to the Code. Copies of that presentation were available in the hallway.
- Staff recommended that the Commission recommend adoption of the proposed findings and amendments to Council with modifications. Two modifications were proposed in the staff report. Since the packets were distributed last week, three additional changes had been proposed based on comments from Commissioners and the public. Colored handouts were distributed to the Commission that noted the additional proposed changes, which she reviewed as follows:
  - Chapter 19.800 Nonconforming Uses and Development (goldenrod) – Add Provision 19.802.2.E to clearly indicate that this chapter does not apply to signs, which are addressed in a different title that applies to signs.
  - Chapter 19.900 Land Use Application (dark tan) – The majority of changes were on Page 2, where 19.902.4 Comprehensive Plan Map Amendments was added. Essentially, if a Comp Plan map amendment was small in nature, a quasi-judicial process was required and ultimately decided by Council. Quasi-judicial processes were subject to specific state law processing requirements and need to be processed within the 120-day clock.
    - The change was that for larger Comp Plan map amendments, the City Attorney would have the ability to determine whether it was legislative in nature and not subject to the clock. Some Comp Plan map amendments should be legislative, because the City was obligated to approve these amendments in the quasi-judicial process if the approval criteria was met, which might not be appropriate for large Comp Plan map changes.

    - Chapter 19.1000 Review Procedures (yellow) – Add 19.1001.6.C Notice Requirements, which clarified the consequences if the applicant did not post signage or post signage correctly, such as a delay in the hearing or decision, possibly requiring an extension of the 120-day clock and reposting the sign. Expectations about staff providing notice were also laid out, clarifying that if staff can demonstrate by affidavit that notice was mailed, someone at a meeting claiming not to have received notice would not invalidate the proceedings.
- Chapter 19.1000 (blue) – Amend 19.1003.2.C to state that the applicant may be required to actually submit photographs of temporary onsite story poles when an application is being evaluated against subjective criteria pertaining to height and/or mass. The Commissioners were emailed about the complexity of requiring story poles as part of the process, and not necessarily just photographs of the story poles. Further discussion was expected on this proposal.
- Chapter 19.1000 Review Procedures (green) – Reintroduced the major quasi-judicial process, now called Type IV. Type V reviews would be legislative reviews involving zoning and Comp Plan map changes that required going to Council. Some zone changes would still be Type III and come before the Commission.
    - Staff had believed that review processes could be limited to four procedures, but realized that many types of applications and proposals utilize the major quasi-judicial process. The proposal was not a change per se, but separating and renumbering what had been combined into the legislative process.

Commissioner Wilson arrived during the review of the handouts and was updated by Chair Klein.

Ms. Shanks responded to additional comments and questions from the Commission as follows:
- Community Service Uses (CSUs) and Conditional Uses (CUs) were in the Conditional Uses chapter because they were actually not overlays, which changed the zoning map and applied a zone, either a base zone or overlay zone, to a specific property. CSUs and CUs did not change the underlying zoning of the property but just allowed certain kinds of uses. CSUs are really a type of conditional use. In the base zones, certain uses are allowed outright and certain uses are allowed conditionally, but they just require review. So the process they go through was similar to CSUs, which used to be in the base zones.
- Staff currently posted notice signs for public hearings. The proposal put the onus on the applicant because the recommendation was to also require more and bigger signs. The City would provide the language for the sign, but the applicant would produce the sign and locate it on the site per staff's instructions. The applicant would be required to provide an affidavit stating that the sign was actually posted per the instructions. If discovered the sign was not posted, either for the required length of time or if the affidavit was not received, the proceedings could be delayed.
- This Code project did not make any substantive changes regarding Accessory Dwelling Units (ADUs), which would involve discussing housing typologies, what the community wanted to see as far as attached or detached ADUs, etc. She confirmed this would be the next Code project, the Residential Development Standards project.

Chair Klein noted there was a lot of information and he wanted everyone to understand how often this project had been before the Commission, how long they had been working on this, and what had been done to this point.
- **Ms. Shanks** replied that these Code amendments have been discussed since March of 2010. Since that time, staff had met with the Commission seven times. Three subcommittee meetings were held as well, of which Commissioners Gamba and Batey were a part. Staff

also presented all the Code amendment projects to Council, including this project in particular, on three occasions. Many public meetings were held on the Code amendments and staff has been working closely with the subcommittee members.

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

Dan Dhruva, Clear Channel Outdoor, 715 NE Everett St, Portland, came prepared to give a statement regarding a concern with the proposed amendments, specifically the definition of high impact commercial businesses; however, the revisions in the latest version addressed their concerns. He read a statement, which was entered into the record as Exhibit 6C. He reiterated the latest revisions of the proposed adoptions addressed their concern and thanked staff for the quick turnaround.

Christopher Burkett, 4512 SE Ryan Ct, Milwaukie, stated he had been working with the Planning Department staff on the Natural Resource Overlay project. His main concern was MMC 19.806, the amortization section, which he considered a slippery slope.

- Currently, once a property was approved, one was good to go. An amortization process, even though very specified and limited currently, could open the door for any number of changes down the road and needed to be very carefully considered.
- He liked to live on his property undisturbed without having to worry about what the next year's changes would be to the Code, what the City wanted to do to his property, or what the changes would be to the use of his property.
    - For example, if the amortization process were applied to an existing landscaped garden, down the road, one would be required to plant native species within a certain distance from a stream.
- He stated he was opposed in principle to allowing the amortization process to be integrated into the development review process as a regular option. Currently, if the City wanted to make a change, presumably there was some other way to do so.
- He clarified he was speaking from both a residential and commercial standpoint. He has a commercial building which was non-conforming but permitted; the City's old police station building on Harrison St.
- He confirmed that a commercial use existed on his building and explained that they had gone through a whole process of getting approval. Part of the issue was that the parking area was nonconforming, but it was less nonconforming than the previous use which was the police department, so it was allowed.
    - He was a photographer and the building was not open to the public, but it was still considered commercial.

Ms. Shanks believed his use could actually be conforming if it was in the R-1B zone which allowed businesses like professional offices. She offered to review the matter further with Mr. Burkett.

Chair Klein believed there could be more concerns about that section of the Code.

Mr. Burkett stated it was like the idea of photo radar where first it was introduced to protect children in school zones, and then before long there was a van parked down on McLoughlin Blvd.

Jean Baker, stated she was a 47-year resident of Milwaukie and was a planning process veteran. She had been part of city, county, state and federal planning boards that did everything

from comprehensive plans to the Portland Airport. Her name was on a common document with Milwaukie, Baker V.

- She stated that a lot of work had been done, and some was wonderful. She noted that the Tune-Up project was bigger than the original Comp Plan and Zoning Ordinance combined.
- She was concerned for citizens about the direction this was taking. Much was said about the intent for fairness and citizen involvement; however, the timeline for a citizen to get into it was shortened.
    - Some state regulations allowed 180 days for an applicant and 120 days for the City to get through their material; whereas a regular citizen or neighborhood group could get as little as 5 days. This could get cheated on and it would take a lot of process to prove that was the case.
- The notice posting was wonderful, but it was absurd to give it to the proponent to do. If she was to bet on who would get it done right and on time, she would bet on the City. A proponent might have some concerns about whether it was in their best interest to post. It was much better done in the City's hands and would provide a transparent process. Someone should also be around to keep an eye on the sign.
- The 10- or 14-day notice was silly. The information could not be absorbed in such a short time. Not many people would do it, but for those who were really concerned, more time was needed. A citizen should be given at least as much consideration as DLCD or Metro. A citizen should be given all the material they needed and not just on a loose timeline of 5 to 20 days.
- There were names of documents she had never heard of before. Metro had gotten into the planning process. Measure 56 was an example of one thing the public needed to be brought up to speed on.
- Short notices were an injury to the public interest. The public could not have something thrown at them and be expected to return with something intelligent in a few days, especially if there was going to be a hearing or an appeal where information could not be added. If one was limited in time to evaluate, one was limited in the facts they could find and present.
- The change in who one could appeal to was uncomfortable. Voluntary citizens should be utilized as much as possible. Appeals to citizen boards and citizen councils was reasonable. Neighborhood associations could join in the process.
- The review and appeal process injured the public interest in that it was abbreviated.
- The public notice was a problem. The loss of the newspaper was a great loss, and the newsletter would soon be gone as well. Not everyone had a computer or the Internet. It was difficult to raise citizen interest now.
- Notice of a hearing should not go to a Neighborhood District Association (NDA) with no standards for what to do with it. Nothing required that they take any action, consider it, or let anybody know. There was no process to work with the NDAs. The City would be wise to go out to those organizations, ask how they wanted to work together, and develop a process to make something happen for the community.
    - So much had changed in the culture; it was time to invent a new wheel. Merely saying "we have it, it is fair, we have notice, we intend to get everybody involved" was not good enough. There needed to be a real actual process in place.
- The Comp Plan looked like the ugly little sister in the planning process. .
- The Code should be overhauled once every couple of years, not in little chips. The Comp Plan could not be revised like zoning. This was not a reasonable approach. She could not imagine the City having a legitimate need to put Comp Plan material in the Zoning Ordinance.

- The proposal leans almost entirely on professionals. By taking the Council and Commission out of so much of it, it really hands it over to professional planners who may not work or live in the area.
    - She knows what happens when citizens turn the planning process loose to the extent proposed. She did not want to see the City continue to grow in the number of planners while decreasing in citizen participation. When she first began, there were three planners who always answered the telephone which was completely different than what was currently happening.
- She appreciated the work on the proposal and knew that things needed to be cleaned up and made more workable. At the same time, the direction away from citizen participation and input, and the involvement and assistance of NDAs, was concerning.

Chair Klein stated that staff would provide some direction regarding her concerns. He understood that many of Ms. Baker's questions related to the land use clock.

Ms. Baker said that shortening the notification distance from 400 to 300 ft and the time from 30 days to 20 days did not seem to be a legitimate change. The other changes that were an issue involved the 14, 10, or 5 day notice to put up the sign and a hearing takes place even if a sign was not put up.

- She assured these points were in the proposal. She used to write legislation and she seldom made mistakes. She hoped some single standard would emerge and a real effort made to give citizens time to get things together to be intelligent in public hearings.

Chair Klein asked if the concern was about having public input on this particular document presently before the Commission or future applications coming before the Commission.

Ms. Baker replied the concern was about the language for the proposed changes. If the proposal was adopted as presented, it would block citizens who want to participate. The core value in the proposed changes stated that fairness and participation was one of the goals. How that fairness would be implemented would need to be considered.

- **Ms. Shanks** clarified that the time frame for giving the public or NDAs opportunity to respond was not shortened or reduced from currently in the Code. Staff was only clarifying one inconsistency where one document or section stated to notify people within 10 days of a hearing and another said within 30 days. Staff chose 20 days as most other notices required 20 days. For NDA notices, the proposed Code amendments were written to provide as much time as the clock would probably allow. She offered to review the language with Ms. Baker to ensure against a typo.

Ms. Baker said that perhaps the timeline was not shortened or reduced; it might have always been that way, but it should not have been. The clock would probably allow exactly what DLCD currently allowed. It was reasonable to give the citizens more. If 180 days were given to a developer and 120 days for the City, why not give more days to the citizens; 45 days would be reasonable.

- **Ms. Shanks** replied that the ORS gave certain parameters, especially for quasi-judicial or administrative matters. For legislative matters, it was wide open. More language was being added in the current document requiring the City to broadly advertise all legislative matters, which staff had been doing, while also giving notice to DLCD. She clarified that the City did have working relations with the NDAs.

Ms. Baker replied that "broadly" needed to be defined. She asked why no working mechanism was in the Code project about the City's relationship with the NDAs.

- **Ms. Shanks** responded there were meant to be procedures in the Comp Plan and Zoning Code, but all sorts of relationships and City practices exist outside of that. For example, an NDA leadership meeting occurred monthly, but that has changed over time. The City had to be careful not to codify things that vary over time, because the requirement could not be met.
- She understood the concern about noticing for legislative amendments, because it was very broad. For all the other administrative, quasi-judicial types of applications, it was very specific, such as how the City communicates with the NDAs. Staff tried to do an annual NDA training about the land use review process. When a referral was done, staff's contact information was included so they could ask questions.

Ms. Baker replied that was not the same as saying that the City would work with the NDAs and they had to respond.

Commissioner Batey stated as a former chair, it was hard to get people to serve on the neighborhood Land Use Committees (LUCs). Even when staffed, applications that came in were sometimes looked at and sometimes not; sometimes they were commented on, sometimes they were not.

Ms. Shanks explained that on controversial projects, the City actively solicited citizen involvement, but could not force it. Staff over-referred projects when adjacent to other neighborhoods, even referring to the County NDAs.

Chair Klein clarified that *The Pilot* had not been discontinued, nor were there plans to do so. It was taken online for the month of January and its effectiveness was being considered. *The Pilot* was going back into print next month.

Ms. Baker stated that she would be in touch.

The Commission took a brief recess and reconvened at 8:06 p.m.

Chair Klein called for additional comments from staff.

Ms. Shanks appreciated Ms. Baker's comment that not everyone was on the Internet. Staff recognized this and tried to provide public information in a variety of mediums. The Code did not specify Internet only. She wanted to assure the public and the Commission that staff still wanted to have many ways to reach the public. No proposal was made to change the current City standard to mail paper notices, which is why something was mailed to every property owner in the city about this hearing, as well as the 300-ft to 400-ft notices.

- With regard to amortization, she clarified the proposed Code was specifically written for a very specific kind of defined, nonconforming, high-impact use and was not intended to broadly include any nonconforming use or to amortize uses in general. It was very specific to a very particular kind of use that exists in the city. As discussed in worksession, it was appropriate to have such a tool for those instances where a use was having a negative impact on the community.

Vice Chair Harris said he was curious about the use of the word "amortization" for this section. The heading should be "discontinuation of nonconforming use" and not "amortization," which was a financial term.

- **Damien Hall, City Attorney,** explained that in financial settings, amortization was a financial term. In planning settings, it was basically discontinuation or phasing out in various jurisdictions across the country. The concept of amortization was usually of a nonconforming use in planning in various codes. Amortization did mean different things in different contexts.
- **Commissioner Gamba** understood that it took into consideration the financial aspects of that use. If one had not yet recouped their investment, it would provide time to do so.

Chair Klein asked staff to outline a scenario of what the actual process would be for an amortization of a high impact nonconforming use.

- **Ms. Shanks** assured it would not be something staff would be able to just go do. Council would need to direct the Planning Director to do an evaluation of nonconforming uses in the city to first identify them. This particular Code amendment did not require identifying what uses were nonconforming in the city, much less which were high impact and nonconforming. The Planning Director would then return to Council at a public meeting to review the list and discuss whether or not items were listed appropriately.
    - There was perhaps a subjective component to the high impact part even though it was defined. Because of the stakes involved, it could be argued whether something was high impact or not.
- Next, the City would inform property owners determined to be high impact, nonconforming uses and have a hearing wherein the City would consider the appropriate amortization period.
    - That period would depend upon the kind of improvements at the site and investments the property owners made into the property. For some uses, the period might be 20 years; for others, 5 years, and would be determined on a case-by-case basis according to those investments and the type of use.
- The amortization schedule would be reviewed at the Commission level at a public hearing where it would be evaluated whether or not the use was appropriately listed on the inventory and whether the amortization period was appropriate.
- A recommendation would then be made to Council, another public hearing would be held, and then Council would adopt the amortization period by ordinance.
- It was a long process that would be very public in many ways with many opportunities for discussion.

Commissioner Batey asked if an inventory was absolutely required or could the Council request the review of a particular property that was a nuisance because of noise or odor, for example.

- **Ms. Shanks** replied that could be done. As drafted, the Council would direct the Planning Director to do the inventory of a particular zone, area, or site. They could be very specific about where they wanted the Planning Director to do the analysis.
- **Mr. Hall** stated that situation would not result in removal of one of the hearings. Even if it was in a very closely prescribed geographic area, or even an inventory of one which Council would have the discretion to do, an inventory would still be put together, albeit a simple one, and then it would still go back for a hearing.

Ms. Shanks noted that staff was still working to make sure all section references were correct and still wordsmithing when grammatical errors were found and modifying for sentence clarity

without changing the actual intent. Commissioner Gamba noted during the break that one additional word needed to be added to a sentence. If anyone wanted to know what was changed word-for-word between the different drafts as opposed to summaries of changes, a compare document could be done, so there could be a record of exactly what was changed.

Commissioner Gamba:

- Suggested that "sustainability" be added to the second paragraph of MMC Section 19.102 Purpose, on 5.1 Page 21 of the packet.
  - **Ms. Shanks** agreed it was appropriate to add "sustainability." The list was not intended to be all inclusive, but should represent existing policies in the Comp Plan, which did support sustainability in many different ways.
  - **Mr. Hall** confirmed "sustainability" would be added to the last sentence.
- Recommended adding "adversely" to the second sentence of MMC Section 19.905.1 to read, "***adversely*** change the character of an area or adversely impact" of 5.1 Page 47.
- Suggested staff consider adding a new condition to MMC Section 19.905.5 Conditions of Approval, 5.1 Page 48 stating, "***L. Require mitigation for the presumed carbon footprint****", "****calculated carbon footprint***" or something to that effect.

Chair Klein stated a clear measurement was needed for "carbon footprint," which extended to much more than just the initial use.

Commissioner Gamba suggested saying, "…***for the carbon footprint of the use being conditioned.***"

Chair Klein replied that a carbon footprint was currently hard to quantify.

Commissioner Gamba said it was not something required, but a tool in the City's box. He agreed with Vice Chair Harris that it could fit under MMC Section 19.905.5 B, but would need to be listed.

Chair Klein:

- Suggested "Require structures and site design features that minimize environmental impact such as those caused by noise, vibration, air pollution, glare, odor, ***carbon footprint***, and dust."
  - **Mr. Hall** recommended using "carbon emissions" instead.
- Noted many studies stated the carbon footprint of a Prius was more than that of a Hummer.

Commissioner Batey liked the idea of amending Item B. Using "carbon footprint" would require a definition and would become a much bigger change.

The Commission consented to add "carbon emissions" to MMC Section 19.905.5 B.

Commissioner Gamba:

- Recommended amending Section 19.1006.3.E Notice Sign, 5.1 Page 76, to state, "...and ***legible*** to pedestrians walking by the property."
  - **Ms. Shanks** agreed. The signs were not legible if posted more than 15 ft from the sidewalk, and people would have to trespass on the property to read it. The language would be rewritten so that the notice sign for other review types appears throughout the Code.

- She clarified the proposed Code stated that staff would provide information specifying sign size, minimum language, and font size, as well as the number of signs required. The applicant would then have to provide the affidavit that the instructions were satisfied; otherwise, consequences would result as discussed.
- The affidavit had not yet been developed, but requiring photos would probably be appropriate.

Chair Klein stated that he wanted consistency in the signage. He would not want someone to change the color or alter the sign. Right now, people knew what was going on when they saw the orange signs. He wanted to make sure that staff controlled what the sign looked like and could dictate that the applicant post the sign.

- **Ms. Shanks** agreed. On larger projects, the City might require a really big sign that varied from the standard. In most instances, consistency was key.
- **Ms. Mangle** noted a statement to that effect needed to be added, that staff would design the sign or provide specific design requirements according to City specifications or something similar.
- **Ms. Shanks** stated that right now the City only had instructions for posting. More language could be added that a form would be created that outlined the operating procedure.

Commissioner Gamba agreed with Ms. Baker regarding MMC 19.1009.3 through 19.1009.6, 5.1 Pages 86 and 87. He was curious why there were two kinds of hearings and why new evidence could not be introduced. The average citizen was not a lawyer or developer, and may realize during a hearing that they should have brought certain evidence, but they would not be able to appeal. The timeline was an additional factor. He believed new evidence should be able to be introduced.

Chair Klein reminded that a Commission rule allowed an audience member to request a continuation in order to review the information.

Commissioner Gamba noted that a person could get home and then remember something that should have been brought up.

Ms. Mangle stated this was a great point for discussion because there were many different sides to the issue. This project was trying to streamline the process in meaningful ways and put responsibility on the Commission and Council as appropriate. There was a history of appeals from Commission to Council where essentially everything was treated as a complete do over. Often, new evidence had not resulted in a different decision from Council. In some cases, so much new information was provided at Council that they were essentially reviewing a completely different application than what was presented to the Commission. The intent was not to shut down the process to people who were still trying to find better ways to make their point.

Commissioner Batey noted there were cases in which a continuance was granted when requested, though that did not address someone remembering something when they got home.

Commissioner Gamba stated that until he was a Commissioner, he would not have known that they needed to ask for a continuance.

Commissioner Batey explained that the attorney or staff had advised that continuance was an option, sensing there was more that people had to say. She completely supported limited hearing on appeal.

Commissioner Gamba said he could understand setting limits, but not restricting new evidence from being introduced.

- **Ms. Shanks** asked Mr. Hall to explain the options available regarding limitations on appeals which were built on a tiered effect; others were more extreme.
- **Mr. Hall** stated that currently this unrestricted de novo was the do over. No matter what happened at Commission, any new arguments or new evidence could be presented on appeal to the Council, which caused issues for the City. The Commission may or may not get all the pertinent information. A smart applicant might believe they have a better chance with the people on the Council and take it easy at the Commission.
  - The middle ground was the de novo on the record which meant that on the appeal, new arguments could be made, but the record was basically sealed; no new evidence was allowed. If an applicant did not present all the evidence to the Commission, they were denied the opportunity to bring in new evidence, which was a lot easier for the Council as far as being decision-makers. If applicants came in with new material, pictures, etc., and Council has to review it, which takes a lot time and resources.
  - Another option was on the record, which meant one could only use the arguments made and only use the evidence originally presented at Planning Commission.
- He noted that Commissioners could the applicant if they were struggling and could not see a clear route to approval, such as telling them they could ask for 7 days.

Chair Klein stated that the way it stood currently benefitted the applicant as well as the people being impacted. The applicant must come with everything and had the opportunity to

- Applicants with less than thorough applications before the Commission were told to go back and get more information, and if not, they would be denied. Some hearings had continued for two or three meetings so citizens could also look at the information that came back. This protected the citizens, providing them opportunity to see what was submitted.
- On the other hand, the applicant was trying to get a project approved and completed. They had a right to be able to put something through the system. They ran the risk of not being approved by the Commission if certain things were presented.
- The game could not be changed when it went to Council and circumvent months of process that had occurred. Applicants have appealed applications approved by the Commission to Council.
- Applications must have the information. Once deemed complete, it had to go to the Commission. When it went to Council, only that which was brought up at Commission should be considered.
- If a citizen needed more time and had a question on something, the City had to afford them that opportunity to review it and then return and ask the appropriate questions and be able to get the appropriate facts.

Commissioner Gamba agreed these were great points; however, they needed to consider that the Commission could change. The group 20 years from now might not be helpful or consider that citizens were not lawyers and would not coach the citizens.

Chair Klein noted that other things needed to be taken into consideration, such as the 120-day land use clock to get the application through. At some point, people needed to step forward and start paying attention.

- He agreed that during the process of one hearing, people could learn a lot and then wish they had brought something in. Hopefully the Commission takes their comments seriously

and begins asking questions as well. The Commission could consider that information further and either hold the hearing open or deem it acceptable.

Commissioner Batey asked if the Commission denied something that was being appealed to Council, could the Council remand it back to the Planning Commission.

- **Ms. Mangle** replied that was not specifically addressed in the Code, but it would be an issue with the land use clock. Typically, everything is pushed through with just enough time to allow for an appeal to Council. The applicant would have to waive their rights on the decision to allow for enough time to hold another hearing at the Commission.

Commissioner Gamba clarified he was concerned for both citizens and applicants. He was concerned about other residents or property owners who disagree with a Commission decision not being able to appeal because they did not raise the right issues and would not be able to introduce new evidence. He was also concerned about a homeowner who did not know what needed to be presented to convince the Commission that their request was doing was a good idea, but had learned what needed to be shown through the process.

Chair Klein:

- Cited the conduct of hearing format comments which are read at the beginning of each hearing, adding everything needed to be brought to the table upfront.
  - **Ms. Shanks** clarified that the de novo on the record appeal to Council required a reason for the appeal request. At the appeal, the whole of the record could be considered and argued on any one point, whether or not it was their point.
  - She confirmed new evidence could not be introduced. A neighbor could not show up with new information about a tree removal, for example.
  - **Commissioner Gamba** believed not allowing new evidence made the appeal process completely toothless.
- Asked if an application was appealed to the Land Use Board of Appeals (LUBA), and a neighbor, who did not testify at any of the preceding hearings, did not agree with the project, at that point what would LUBA tell them?
  - **Mr. Hall** explained the neighbor would have no standing at LUBA. Prior participation was needed to have standing to appeal to LUBA. On the record limitation provides a strong incentive for applicants to give the Commission all the information available, so the Commission could make the full decision with everything disclosed up front.
  - He explained that if a neighbor did not prepare for a hearing, but opposed an application approval they could request a continuation. Neighbors usually did not have serious evidence, but rather only arguments regarding impact, etc.
  - **Ms. Mangle** stated they could argue and focus on the lack of evidence in the record regarding the tree, as an example, resulting in the criteria not being met.
  - **Ms. Shanks** added that typically the problem was an applicant doing an end-run at the Commission, either by not being prepared or doing so purposely. Although the concern was valid, it did not really happen as portrayed. She noted that Type I and Type II applications decided by the Planning Director and appealed to Commission would not be restricted. Type III applications have their day in court with the Commission and then in a more limited way with Council as proposed.
- Noted that did not mean the process could not be taken advantage of in the future. While sympathetic to the concern, a process was in place and the evidence had to come forward.
- Understood that if someone came forward and raised the issue that an applicant did not consider X, Y, and Z, they would be allowed to bring in photographs of the issue to Council.

    - **Mr. Hall** clarified that photographs would be considered evidence. How to draw the line or restrict it was would be up to City Council.
- Posited if it was noted that a tree removal was not addressed in the application and the Commission decided to disregard the concern and move forward with approval or denial, nothing prevented Council from making sure that was being addressed in the next phase of the appeal process because they would have the same responsibilities as the Commission.
    - **Ms. Mangle** stated one way to think about it philosophically was if it was a limited appeal to the record, which included the papers, photos, public comments, and the applicant's material, the Commission's job was to review it and make a decision. If it was limited to the record, the same assemblage would be given to Council to see if the Commission made the right decision.
    - This was different philosophically than allowing for additional information to be added to the assemblage of the record. The City wanted the best projects and the best decisions where everybody was considering the totality of the material. The approaches were different, and the Commission needed to decide which one to put in the Code.

Commissioner Gamba stated if they were just re-judging the same information and that information was incomplete, justice was not being served, only serving the process.

- **Mr. Hall** stated the proposed approach mirrored the U.S. justice system more than what currently existed in the Code.

Commissioner Batey stated she was not concerned about it from the justice angle. When people really struggled and had an issue, it caused the Commission to struggle and have an issue and they received a continuance. She was fine with the language as presented, but it was really Council's decision. This approach was consistent with other things in the package, such as moving some of the land use to Type III, in that it took some of the burden off Council and concentrated it more at the Commission level.

- **Ms. Shanks** shared that at the last worksession, Council was fine with a limited appeal to them on decisions already made by the Commission, but had questions about whether Type I and Type II applications appealed to the Commission should stop there. They were considering that they go on to Council.

Chair Klein commented that the Commission had to come prepared, along with the applicant and those providing public testimony.

Ms. Baker suggested instructions be given at the first hearing, so that if one believed that important evidence was missing, a continuance could be granted and the decision made at a subsequent hearing.

Chair Klein responded that those instructions were already on the back of the agenda, Item 11 Meeting Continuance, and also referenced at the beginning of meetings as well. He read from the script, "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, Planning Commission will either continue the public hearing to a date certain or leave the record open for at least 7 days for additional written evidence, argument or testimony. The Planning Commission may ask the applicant to consider granting the extension of the 120-day time period for making a decision if a delay making a decision could impact the ability of the City to take final action on applications including the resolution of all local appeals."

Commissioner Batey suggested addressing the concern by improving the script, rather than allowing new evidence submission on appeal.

Chair Klein cited what was read at the beginning of meetings, "Agendas and additional copies of the staff report are available on the table in the hall. If you have not picked up an agenda, please do so. It contains important information about the process."

Ms. Mangle suggested adding, "including the fact that a continuation can be requested."

Commissioner Gamba suggested the statement "if a continuation was not requested, any new evidence would not be admissible on appeal," which was an important key phrase.

Chair Klein summarized that instead of adding language in the Code, the wording could be added to the back of the agenda.

Commissioner Gamba:

- Asked if anything in the Code specified what was put on the agenda. Nothing in the Code would prevent a future Commission from removing that language from the agenda.
    - **Mr. Hall** responded that this was more a spectrum of how many times people got a new shot at something. Regarding "good" versus "bad" people regarded a spectrum too. If the City were run by bad people in the future, they could also change the Code without telling anyone. The call was whether the Commission wanted to give people two opportunities at the local level to present new evidence, or give them one chance to present evidence and then another chance to make their best argument. Once done at the local level, they could not present more evidence to LUBA or other further appeals available.
- Believed people should have two opportunities to present evidence locally.

Chair Klein called for a straw poll: should new evidence be allowed to be brought forth as an application moves forward to City Council after a Planning Commission decision?

Commissioners Wilson and Gamba voted Yes; Commissioners Klein, Harris, and Batey voted No.

Ms. Mangle stated she would present the issue to Council with a minority report as was done when decisions were not unanimous.

Commissioner Gamba believed "private interest" should be defined as stated in MMC 19.1010.5 Participation by Interested Officers or Employees, 5.1 Page 90, "The officer or employee of the City who has financial or other private interest in…". "Private interest" appeared several times in the proposal and was very vague.

- **Mr. Hall** agreed it was vague. He explained it was meant to mirror the ethics of government officials in state law. Basically, the standard was that one could not participate if one had any financial interest in the outcome of a development or proposal, whether personally or that of a family member or a business associate.
- Staff clarified that "officers" referred to appointed committees, the Commission, Council and possibly NDAs; "employees" referred to staff. The next section, MMC 19.1010.6, involved committee members and was specific to the Design & Landmarks Committee (DLC).

- **Mr. Hall** stated the actual issue was for the Commission to determine what the standard should be. The standard in MMC 19.1010.5 as proposed was stricter and broader than the state standard in who had to recuse themselves. If the Commission wanted to extend beyond the financial interest of self, business partners and immediate family members, the City had the authority to do so; it could not be made less strict than the State standard.

Chair Klein understood the decision to recuse was placed on the individual Commissioner. It could be pursued with the State ethics board if there was a question about a Commissioner's participation. The Commission made sure that a private interest was not being taken advantage of.

Commissioner Gamba:
- Noted the language did not specify "financial interest." He clarified he did not want "private interest" removed; only made less vague.
  - **Mr. Hall** explained that if a separate standard from the State existed, someone could challenge to LUBA that this section was violated because of a private interest, because it was not clear what "private interest" meant.
  - **Commissioner Batey** believed City attorneys that had advised the Commission in the past about conflict of interest were considering the State standard, not the City's Code language.
- Suggested copying the State's language or at the very least make the proposed language specific.
  - **Ms. Mangle** agreed. Staff would address the issue.

Commissioner Batey stated that she had some wordsmithing things she would work on with Ms. Shanks. She liked staff's language regarding story poles on the blue handout. She agreed with the point that the photos counted as opposed to the poles themselves. Though photos could make poles look drastically different, the City could specify where the photo was taken from.

Commissioner Gamba stated the lens would still be an issue. He suggested that the poles be up for a sufficient length of time to allow for the Commission to go look at them. Another option would be coming up with a standard for staff to go out to take photographs.

Chair Klein asked if there was a way to require story poles when a project came within a percentage of some sort of impact.

Commissioner Gamba did not believe story poles should always be required, but they should be a tool that could be required.

Staff noted that Mr. Hall was apprised of the situation and staff had inquired how story poles would work with the process and parameters required by State law, and how the story pole results could be included into the record. Because the poles would not be part of the material, photos would be substituted, but discussion of them could be in the record as well. What was the best way to get an actual feel for what the project looked like and translate that into the record should the Commission not be able to look at the project or story poles themselves?

Mr. Hall stated there were a few ways to do it. The applicant and Commissioners could take pictures, and anyone at the hearing who took pictures could submit them into the record. The Commissioners could go look at the project and describe it in the open hearing.

- The timing regarding when the poles had to go up was not really legally constrained. The issue was what the Commission wanted the requirement to be. The submission requirements list to get the application deemed complete was not approval criteria but completeness criteria. The Commission needed to decide if they wanted to be able to deny the application based on just a lack of story poles. They should look at the standards for each type of application they wanted story poles applied to. A lot of the time, an applicant did not necessarily have to immediately commit to a certain massing or to what exactly the structure would be.

Ms. Mangle agreed that it was very dependent on the zone and type of application required. Each application would be different. The Commission needed to decide what was needed to be satisfied to meet the criteria. Sometimes that would mean directing the applicant to return with better information or to build story poles.

Commissioner Gamba asked if the Commission could require something not mentioned in the Code.

- **Ms. Mangle** replied that if the criteria were such that the Commission needed to understand the height and massing, for example, and the Commission did not know based on what was submitted, they could request a massing study. There were definitely certain applications where that information was needed to determine whether or not it met the criteria.

Commissioner Batey noted there had been applications where the Commission wished they had the ability to ask for that. Although it was implied that the Commission had the ability to ask for such information, the Commission had not ever felt like they could. While she agreed extensive detail did not need to be included, it was important to include the concept somewhere in the Code to curtail dispute by the applicant.

- **Ms. Mangle** stated applicants would still push back and complain. She noted staff was hesitant to put too much in the Code when the logistics of how it would work were not understood.

Commissioner Gamba stated it would make sense to put the story poles up at the same time the public notice signs were posted. The public would then be able to see what the project looked like when they received notice of the project. The poles could then come down the day after the hearing.

- **Chair Klein** was concerned about public safety issues with a 45-foot pole on the site for 20 days.
- **Ms. Mangle** added they also needed to decide on which applications the story poles would be required.

- Believed staff would have to use discretion about when to require the story poles.
  - **Ms. Mangle** noted the proposed language stated the City could require the story poles when deemed necessary.
- Added that he would include the logistics to prevent someone from putting up story poles, taking a quick picture, and pulling the story poles down.

Commissioner Batey suggested amending the last sentence of MMC 19.1003.2.C, as noted on the blue handout, to state, “For applications where the subjective aspects of the height and

mass of the proposed development will be evaluated, ~~photographs of~~ temporary on-site "story pole" installations that simulate the proposed development***, and photographic documentation thereof,*** may be required."

- **Ms. Shanks** noted staff was always pushing the applicant and this would be more of a struggle because it was not just something on a piece of paper. She agreed something like this was needed to really understand some projects.
- Staff was trying to update the submission requirements form and have this language mirror that to state what the City needed to have adequate public review of a proposal. The decision makers and public need to understand what was being done to ensure the approval criteria were being met, otherwise the proposal would be denied.

Chair Klein said he never felt like the Commission had the power to require an applicant to do story poles, even though they could request more information. He suggested that if something did not look right when first reviewing the packet, the issue should be raised at that time. If height was an issue, for example, a Commissioner could request a photo and to put up the story poles. Four Commissioners viewing the site at the same time would break ORS meeting laws. He added that there were buildings where he would not have felt comfortable leaving story poles out on site.

Commissioner Gamba reiterated that the poles should be put up when public notice is sent, and removed the day after the hearing. He noted that Colorado had bigger storms than Oregon, and they put story poles up at every project. It was not just a pole sticking out of the ground but more similar to the framework of a house using 2x4s.

Chair Klein stated that with the knowledge that the Commission could ask for more information, if height was a potential issue that could be noted as a potential red flag in the packets.

- **Ms. Shanks** noted that since the applicant's materials were sent to the Commission earlier now, the Commission could notify staff if they came across certain issues.

Commissioner Gamba believed Commissioner Batey's slight change in the wording would solve the problem.

Commissioner Batey stated her other issue was the lapsing of nonconforming uses. In the current Code, if a nonconforming use was not used for 6 months, it lapsed, and the Code proposed to extend that to 1 year. She had concern the City might lose some flexibility to get rid of some unwanted nonconforming uses.

- **Ms. Mangle** stated this was something staff proposed to make it consistent with what the Commission had discussed about conditional uses.
- **Ms. Shanks** reminded the Commission had a big discussion about conditional uses and had settled on 2 years. Staff proposed changing it from 6 to 12 months for nonconforming uses because the nonconforming structure rebuilding rights were for 1 year. So if a nonconforming use in a nonconforming structure burned down accidentally, they had a year to rebuild their nonconforming structure, but they would not be allowed to reestablish the nonconforming use after 6 months, which did not seem right. The other reason staff believed it would be good to extend the time was because of downtown nonconforming uses and what it took to get a new tenants. The two sides to the issue involved wanting to get rid of some nonconforming uses and the economic issues regarding vacancies.
- Some nonconforming uses outside of downtown included Wichita Feed & Hardware, which was a commercial use in the manufacturing zone. There were many residential

uses in the manufacturing zone along Johnson Creek Blvd that were nonconforming. Milwaukie Florist on Lake Rd was a nonconforming business in a residential zone. There are some duplexes and multifamily housing scattered throughout the city that were nonconforming uses. The majority of businesses were downtown or in the North Industrial Manufacturing Zone. Amadeus Manor Restaurant was also nonconforming.
    - **Ms. Mangle** clarified that most churches were not nonconforming uses.
    - **Ms. Shanks** added churches spanned the whole continuum, but only a few would be nonconforming, because they predated the Zoning Code and had no improvements. Otherwise they become a conditional use or CSU, and therefore no longer nonconforming.
- Agreed with the 1-year timeframe after the clarification.

Chair Klein:
- Asked if the changes could be summarized and a motion made or if the issue should be carried over and have staff make the changes and return.
    - **Ms. Shanks** stated it depended on the Commission's comfort level in terms of latitude. She recorded all the specific wordsmithing discussed and it sounded like the Commission agreed with everything other than some specific wording suggested by Commissioner Gamba, which were specific and small enough to be easily captured. She believed she had gotten complete direction from the Commission. However, if the Commission wanted to see the final, that was fine as well.
    - **Ms. Mangle** said she wanted to hear more from Ms. Baker. There were a lot of issues raised, and she was not sure she understood a lot of the specificities. She deferred to the Commission about whether they wanted to hear the results of that discussion or if they wanted staff to work with Ms. Baker as they refined the proposal going to Council.
- Did not have a problem continuing it for 2 weeks and then having a quick vote on it. Commissioner Churchill would be present at that time, and they needed to decide what would be appropriate for his dialogue to be included.
    - **Ms. Mangle** responded that the digital recording of the meeting could be provided to him.
    - **Mr. Hall** added that unless a decision or tentative decision was made in deliberations, the discussion could continue when the matter was reopened and Commissioner Churchill could provide input.
- Noted that the public testimony portion was not yet closed.
    - **Mr. Hall** reminded it was legislative. If the Commission wanted to hear from people who attended next week, that was on the table. It could also be closed to public testimony.
    - **Ms. Shanks** noted that returning in 2 weeks only allowed one week to prepare the packet materials. Staff could bring the final document and note just the changes rather than presenting a full packet, if the Commission agreed. This would also allow staff more time to work with Ms. Baker.

Following a brief discussion, the Commission consented to staff posting the material online the Friday before the meeting and then bringing material to the hearing.

Ms. Baker asked for a continuation.

Vice Chair Harris moved to continue the public hearing on ZA-10-02 and CPA-10-03 to date certain February 8, 2011. Commissioner Batey seconded the motion, which passed unanimously.

6.0 Worksession Items

6.1 Summary: Discussion of annual work plan preparation & review of bylaws
Staff Person: Katie Mangle

Ms. Mangle stated that last year the annual Planning Commission/City Council meeting did not occur due to the City Manager and City Councilor turnover. This year's joint meeting was scheduled for March 1, 2011. To prepare for that meeting, the Commission needed to discuss the annual work plan and review the bylaws, which would be addressed another time.

- She distributed a copy of the 2009 work plan, noting most of the plan had been completed. Reviewing the operating Planning Department work plan, which was different than the Planning Commission work plan, might also be helpful. The Commissioners could see if they wanted to add or change anything. She encouraged the Commissioners to consider what work, if any, they might want to do as individuals to help the City address any specific issues that concerned them.
- She explained that the Urban Renewal Plan was noted in light gray which indicated no funding was involved. Council had asked staff to consider urban renewal, but offered no clear direction about actually pursuing it yet.
- Conducting public hearings would remain the Commission's first priority as that was the Commission's charge. The Residential Development Standards project would be the next project and then hopefully review of the commercial areas. These projects should not be characterized as just Code projects, but are new and long-range planning projects that would lead to Code changes.

Commissioner Gamba confirmed the Code change would involve zone changes for the commercial zones. He asked if the concept of 20-minute neighborhoods could be discussed, being able to put commercial entities into areas currently zoned nothing but residential. For example, a small grocery could be allowed along Lake Rd, which is an artery, but it had no commercial zoning.

- **Ms. Mangle** believed all that needed to be done was to make sure the existing commercially-zoned areas were empowered to be of better service to the neighborhoods. There was already a lot of commercial infrastructure well within the 20-minute radius. Also existing commercial areas had many unnecessary limitations. The question was how to utilize the commercial areas.
- She asked the Commission to consider broader projects. She would begin drafting the 2011 work plan and asked for input from the Commission about the work plan and bylaws, which would be discussed at the next meeting.

7.0 Planning Department Other Business/Updates

Ms. Mangle announced that all the microphones in the chambers were being updated.

8.0 Planning Commission Discussion Items

Commissioner Batey stated she wanted to include the Sign Code in the work plan. She encouraged people to look at the gas station sign at the new Fred Meyer on McLoughlin Blvd. Most gas stations along McLoughlin Blvd actually had monument signs rather than pole signs.

- She noted the new electronic billboard sign that was installed in the North Industrial Zone. She would like to have a wider discussion about the Sign Code with Council at the joint meeting in March.

Commissioner Gamba added that a lot of people were talking about that billboard sign.

Chair Klein noted the Sign Code lacked teeth last time, but perhaps with a new Council that

would change.

Ms. Mangle provided background on the billboard sign, noting it was expected to be illuminated.

9.0 Forecast for Future Meetings:

February 8, 2011	1. Worksession: Residential Development Standards project
February 22, 2011	1. Worksession: North Clackamas Park North Side Master Plan *tentative*
March 1, 2011	1. Meeting with City Council 5:30 pm

Ms. Mangle reviewed the forecast for future meetings with these comments:

- Staff was ready for a worksession on the illuminated signs on McLoughlin Blvd for February 8. Staff received draft Code from the '76 Station owner for consideration. More issues would probably be raised than resolved.
- The Commission would not be addressing the Residential Development Standards on February 8. Steering committee meetings would begin in late February and she invited anyone's participation.
- North Clackamas Parks and Recreation District would be discussing the North Side Master Plan on February 22; that was no longer tentative.

Chair Klein noted that the recent article in *The Clackamas Review* about him saying holes could be driven in the Code did not accurately represent his comments. His goal was that as Code was rewritten, it would make it easier for all users involved, whether an applicant or the neighbors or anyone in the public, that the Code be simplified so it did not necessarily contradict itself. He emphasized his comments were in no way meant to have the tone portrayed in the article. The interview was initially about one topic, but was turned to an entirely different subject. He apologized for the manner in which the article was written.

Meeting adjourned at 9:50 p.m.

Respectfully submitted,

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

Lisa M. Batey

Lisa Batey, Chair