CITY OF MILWAUKIE
PLANNING COMMISSION
MINUTES
Milwaukie City Hall
10722 SE Main Street
TUESDAY, April 26, 2011
6:30 PM

COMMISSIONERS PRESENT
Lisa Batey, Chair
Chris Wilson
Mark Gamba
Russ Stoll
Nick Harris, Vice Chair
(*Arrived during the worksession)*

STAFF PRESENT
Katie Mangle, Planning Director
Kenny Asher, Community Development and Public Works Director
Brett Kelver, Associate Planner
Ryan Marquardt, Associate Planner
Jason Rice, Associate Engineer
Damien Hall, City Attorney

COMMISSIONERS ABSENT
Scott Churchill

1.0 Call to Order – Procedural Matters
Chair Batey called the meeting to order at 6:36 p.m. and read the conduct of meeting format into the record.

2.0 Planning Commission Minutes
2.1 February 8, 2011
2.2 February 22, 2011
Chair Batey postponed approval of the Planning Commission meeting minutes.

3.0 Information Items
Katie Mangle, Planning Director, announced that Vice Chair Harris would be arriving shortly.

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 Worksession Items
5.1 Summary: Wastewater Master Plan (20 minutes)
Staff Person: Ryan Marquardt, Jason Rice
Ryan Marquardt, **Associate Planner**, stated that the Planning Commission and City Council would eventually be asked to adopt the Wastewater Master Plan (Master Plan) into the City's Comprehensive Plan as an ancillary document, providing more specific detail about the wastewater services. He explained the relationship between the Comprehensive Plan and adopted master plans.

Jason Rice, **Associate Engineer,** presented the staff report via PowerPoint. He provided the background of the existing Master Plan and explained the need for the update. Key points of the project involved identifying and documenting the existing utility system as well as projects the City must do to remain current. These projects would then be built into the budget, which was a key aspect in having an adopted master plan. He reviewed the existing wastewater system and key projects needed for updating the system. He described the process involved for replacing existing clay pipes found throughout the city. No dramatic expansions were planned. The area

between Milwaukie and I-205 would be sewered following the Northeast Sewer Extension so no additional capacity was needed if the City chose to annex further out into that area.

Mr. Marquardt stated that staff hoped to return before the Commission on May 24th for a hearing to adopt the Master Plan and to ask the Commission for a recommendation to adopt the Master Plan into the Comprehensive Plan. The Master Plan would go onto the Council for the second meeting in June. The purpose of this worksession was to give the Commission a chance to ask questions and become comfortable with the document before staff returned in May. Adopting the Master Plan would enable the Engineering and Public Works Departments to budget and plan for capital improvements for maintaining the City's sewer system.

Mr. Marquardt and **Mr. Rice** responded to comments and questions from the Commission as follows:

- System Development Charges (SDCs) are generally associated with expansion. Milwaukie's expansion is limited, but the other component of SDCs regards expansions on the existing system. For example, if a lot was subdivided so that 2 homes were now on the system originally installed for one home. The new home would have somewhat of a buy in to the existing system, but also a component that buys additional capacity. These 2 components are calculated so when development occurred, the City would know how much to charge. The City plans for expansion in certain areas of town; however, at this point only one project really added capacity for which an SDC cost was calculated.
- The Harrison St project would replace the 24-in pipe with another 24-in pipe. The project to expand capacity was on Filbert St; that pipe was taking a lot of the sewage from the Brookside basin, and the main was becoming undersized. The project would extend the force main from 42nd Ave to 32nd Ave where capacity exists.
- The sewer pipe siphon under Johnson Creek was made of ductile iron with a concrete lining on the inside. If this needed replacing in the future, it could not be replaced with same the bursting method proposed on McLoughlin Ave. Consideration was being given to adding a lift station by the ODS Building and pumping it, and maybe attaching a pipe to the 17th Ave bridge to remove that pipe from the park. At this point, the pipe was only 35 years old and did not need to be replaced, but that option was being explored to remove the pipe from underneath the creek.

Chair Batey commented that having this matter come before the Commission was odd, because the Citizen's Utility Advisory Board (CUAB) and Council were already involved. Because of the policy questions to address, she asked that the CUAB minutes and minutes from the Council briefing regarding the Master Plan be provided in the hearing packet as well as any web links to the video of the relevant Council meetings.

Mr. Marquardt responded that while the Master Plan was more technical and without many policy issues, that was not always the case for all master plan documents. It was appropriate that the Commission review all master plans as the body that looked at long-range growth and planning within the city.

6.0 Public Hearings

6.1 Summary: Johnson Creek Confluence Restoration Project
Applicant: Johnson Creek Watershed Council (JCWC)/City of Milwaukie
Address: Johnson Creek and 17th Ave to mouth of Willamette River
File: WQR-11-01
Staff Person: Ryan Marquardt

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

Mr. Marquardt cited the applicable approval criteria of the Milwaukie Municipal Code as found in 6.1 Page 6 of the packet, which was entered into the record.

Chair Batey asked if any Commissioners had visited the site prior to the hearing. Commissioners Stoll, Wilson, and Gamba had visited the site. None had spoken to anyone at the site, nor had they noted anything different than what was indicated in the staff report for the application.

Commissioner Stoll read a statement into the record as follows, "I am a dedicated volunteer with the Johnson Creek Watershed Council. In fact, this year, I have been nominated for a Riffle, but I have no financial relationship to the Johnson Creek Watershed Council and therefore have no conflict of interest that would prevent me from participating in this decision. As much as I support the Council and other watershed restoration efforts, my first responsibility here is to the City of Milwaukie and its citizens and what is best for our riverfront. Accordingly, I am not biased, and I am able to make an impartial decision based solely on application of the facts in the record to the applicable criteria."

No other Commissioners declared any conflict of interest or ex parte contact and no members of the audience challenged any Commissioners' participation.

Mr. Marquardt presented the staff report via PowerPoint. The application regarded a habitat restoration plan for the confluence area where Johnson Creek met the Willamette River. Staff recommended adoption of the plan with the recommended findings and conditions provided in the Commission's packet. No correspondence had been received nor objections noted. He noted the letter from ESA Adolfson dated February 28, 2011, was distributed to the Commission and was supposed to be part of Attachment 4. The letter regarded that firm's full review of the project. He clarified that the access plan to build a gravel road from 17th Ave for the equipment had been dropped, but deferred to the Applicant for further details.

Chair Batey called for the Applicant's presentation.

Robin Jenkinson, Restoration Coordinator, Johnson Creek Watershed Council (JCWC), Project Manager, Johnson Creek Confluence Habitat Enhancement, gave the applicant's presentation displaying several historical photos and maps of the site via PowerPoint, noting features that had changed over time. She reviewed the proposed project with these key comments:

- The placement of large wood structures or engineered logjams would provide cover and shelter for the threatened salmon species that used the confluence area. Such areas are very ecologically diverse and complex given the variety of creatures using it during different times of the year.
    - Conceptual designs shown were at about 60%; the exact locations of the logjams would be determined once the structures went through final design after running the hydraulic models.
    - The project would enhance the habitat for all the fish using the Willamette River. She described the different habitat features that would be created from the enhancements and the benefits provided specifically by Johnson Creek.

- A design build contract was signed with the engineering firm Inter-Fluve, Inc., who had subcontracted with Aquatic Contracting, LLC, a river restoration construction firm. Both firms specialize only in river restoration design and construction.
- She reviewed several pictures depicting before/after examples of habitat enhancement projects, including some done by Inter-Fluve. Key habitat features were described, including those created by the engineered log jams.
- The estimated construction cost, based on the 60% design, was about $270,000. So far, secured funding came to about $250,000 to $260,000, and the pending funding looked very likely, so the project would be fully funded.
- The timeline involved primarily fundraising and doing pre-project monitoring. Samples were collected, high school classes helped with hydraulic complexity modeling, and aquatic surveys were conducted to be able to compare the before and after effects of the project.
- All funding may or may not be secured by May. The final design would be available in June, and an email modification would be made to the Army Corps permit for any final design changes from the 60%. The in-water work window was mid-July to the end of August. All construction should be completed by September. Revegetation would be carried out November through April with volunteer groups and the site would be included as part of the event held the first weekend in March, where revegetation is done throughout the watershed every year. Post project monitoring and reporting would document changes
- She confirmed that JCWC agreed with the City's findings and conditions and could provide final designs. A mitigation plan would be provided, though she was uncertain how extensive it would be.
- She clarified that JCWC decided that the access road option would not be a good idea. A shallow sewer pipe ran under Riverway Ln and Ronelle Sears, Stormwater Supervisor, suggested that placing big steel plates over that area to protect the pipe should be fine.
- She added that a natural riffle would be constructed over the top of a City sewer pipe that stuck up out of the water, which was identified as a waterfall on the Riverfront Park Plan. If erosion continued, this could become a fish passage barrier. Large rocks and gravel would be placed over and around the pipe, integrating it into the project, while also helping to protect it. Hydraulic models would be used to size the rock and gravel to resist a minimum 25-year event. The pipe carried more than 40% of the City's sewerage.

Chair Batey:

- Asked if replanting would be done where the access was taken from Riverway Ln once the equipment was gone.
  - **Ms. Jenkinson** responded that the access was an existing access road for the PGE power lines and so would not need replanting.
- Inquired about the removal of the concrete and wood structure along the riverside.
  - **Ms. Jenkinson** responded that JCWC did not have plans to move the traction line abutments unless a logjam was put there. Much of the stream bank was bedrock already, so removing the concrete would not really change the character of the stream bank nor improve the habitat that much. Although aesthetically, it would be nice to clear it out.
- Asked how mussels were salvaged.
  - **Ms. Jenkinson** described how aquascopes were used to locate and salvage mussels. Those in the confluence area might be moved upstream, or relocated to their original location after the project was completed. JCWC had just received a large grant to do mussel monitoring throughout the basin.
  - She announced that JCWC also received the Metro Capital Grant in which they had partnered with the City to propose an interpretive overlook in Phase 1 of the Riverfront

Park. Council believed this was essential to sharing the project with the public and encouraging interest in Johnson Creek.

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

Gary Klein, Riverway Ln, stated he was strongly in favor of the project. He provided a brief history of roads in the project area, noting the proposed access would be from a road on the ODS property and that PGE was also involved in helping with the project. It was great that the City was partnering on the project, which would be a starting point for the Riverfront Park. Metro would help with the north end of the park, which had to stay a natural habitat, and would go right along with what was being done in Johnson Creek.

Chair Batey confirmed there was no further public testimony, comments from staff, or questions from the Commission.

Commissioner Gamba moved to adopt WQR-11-01 with the recommended findings and conditions. Vice Chair Harris seconded the motion, which passed unanimously.

Chair Batey read the rules of appeal into the record.

The Planning Commission took a brief recess and reconvened at 8:08 p.m.

6.2 Summary: Natural Resource Regulations Amendments *cont'd from 4/12/11*
Applicant: City of Milwaukie
File: ZA-11-01, CPA-11-01
Staff Person: Brett Kelver

Chair Batey stated that the Commission had been requested to reopen the public hearing on Code amendments discussed at hearings on March 22, and April 12, 2011. She called the hearing to order and provided each Commissioner the opportunity to state their intent to participate in, or abstain from, the hearing.

Commissioner Gamba declared a potential conflict of interest. He owned property in the city, specifically 1.2 acres currently zoned residential and in the WQR. The Natural Resource Regulations Code and Map amendments under consideration could result in some increase or decrease in the value of his property; however, because any impact, if any, to the value of his property might not be significant, he did not have an actual conflict of interest and was not disqualified from participation in the proceedings.

Vice Chair Harris stated he was not present at the last meeting; however, he had reviewed the materials and was prepared to participate.

Ms. Mangle noted that **Commissioner Churchill** did feel he had a potential conflict of interest and chose not to participate in the hearing.

Chair Batey declared she had approximately 2/3 of an acre in the city that was not covered by natural resource protections but a significant portion was within the 100-ft buffer area. There was a potential impact to her property, but the impact, if any, would be very insignificant, and she did not feel it created a bias or an actual conflict of interest.

Ms. Mangle stated that no formal staff presentation would be provided, but staff would provide information during the Commission's deliberation of the issues in response to questions.

Brett Kelver, Associate Planner, noted the following 4 items had been received since the last meeting that were not included in the packet. Copies were distributed to the Commission and made available to the audience:

Exhibit 12: Handwritten note from Jean Baker received by staff on April 12, 2011, after the public testimony portion of the hearing was closed.
Exhibit 13: Email received from Christopher Burkett dated April 21, 2011.
Exhibit 14: Handwritten letter from Jean Baker dated April 25, 2011.
Exhibit 15: Email from Tonia Burns, Natural Resources Coordinator, North Clackamas Parks and Recreation District (NCPRD), dated April 26, 2011.

Chair Batey called for public testimony.

Jean Baker, 2607 Monroe St, Milwaukie, stated she opposed the section in the proposed ordinance that exempted for transportation, which meant light rail, roads, etc. It was not a good idea to hold the property owner to such a tight restraint on what they could do, while those who would be the biggest disrupters by building roads and bridges would not be held to the same engineering studies that the citizen would be; only a construction management plan (CMP) would be required. Why would a government entity be exempt from any thing to which a private citizen would be held?

- **Mr. Kelver** noted the reference was in Milwaukie Municipal Code (MMC) Section 19.402.4.B.1(f), 5.1 Page 17 of the April 12th public meeting packet. A limited exemption exists for activities and improvements in existing public rights-of-way because a CMP would be required if there was more than 150 sq ft of disturbance. He did not believe there was a direct reference to transportation. The exemption meant that road projects or construction in the public right-of-way would not be subject to the rules, except for providing a CMP.
- In general, the entire zoning Code only applied to private property; those same zone standards did not apply to any public right-of-way.
- **Ms. Mangle** explained the difference was whether the activity occurred on privately owned tax lots, or within the right-of-way. Tax lots owned by public entities would be subject to the rules.
- **Mr. Kelver** noted that the Trolley Trail project was on privately owned tax lots, which was why the application from the NCPRD came to the Commission for consideration. Even though they were a public agency, they were operating on privately owned property.

- She remembered when an Environmental Impact Study was required for everything, and she did not think they were anymore. This seemed like a time for public rights-of-way to be subject to the same standard as private property.
  - **Damien Hall, City Attorney,** explained that the City had the authority to regulate their own rights-of-way. It was typical that a city would provide a lot less regulation in a right-of-way. These facilities and roads were needed to access most every property in the city. The options to do that were either to carve out some sort of zone that only allowed roads and have that run throughout the city, or to require the dedication of right-of-way to limit where people could build and pave roads as a permitted use. It was a policy decision to be made.
- She noted that the one that could do the most damage had the least oversight and the least restriction, which was not what the community was looking for to protect the waterways and

habitats. Big projects should be subject to oversight also. Allowing government to operate carte blanche was not the intent of the ordinance and she hoped that it would be changed.

Jason Howard, Land Use and Board Chair, JCWC, stated he was on the Natural Resource Overlay Project Stakeholder Group and had been tracking Title 13 compliance among the jurisdictions within Johnson Creek. He made the following comments:

- He noted previous discussions about lowering the 150 sq ft threshold for boundary verification, but 150 sq ft was a very conservative measure that was protective of the resources. It was a good starting point and would be conducive in most scenarios.
- Regarding the 150 sq ft maximum allowed disturbance and the discussion for increasing that, he noted that the work, compromise, and rationale that had gone into the Title 13 program accounted for development and resource values. The City's consideration of modifications, including merging of low and moderate HCAs, would definitely allow more disturbance. Compromising to allow more disturbance would move away from the intent of Metro's Title 13 program.
- As far as fees and permits, it was a good idea to incentivize or disincentivize by having a structured program away from the resources. Rather than entirely waiving the fees, he suggested that the Code/Plan be structured toward habitat-friendly or low impact development.

There being no further public comment, **Chair Batey** closed the public testimony portion of the hearing and called for Commission discussion.

Commissioner Gamba:

- Noting Ms. Baker's concern, he asked if there was an example of a WQR or HCA that was in the right-of-way.
  - **Mr. Kelver** stated the Johnson Creek Watershed Council's (JCWC) confluence project was one example. The WQR area involved a protective buffer 50-ft from the edge of the water resource. There were places where the buffer area spilled out, perhaps where the stream crossed under or was close to a road, and technically covered the right-of-way.
  - **Chair Batey** noted also that on the Gary Michael/Carolyn Tomei property, the edge of the street pavement was at least 25 ft, maybe 30 ft, from the edge of the right-of-way, so that 25 or 30 ft closest to the street was still in the HCA, which spilled into the public right-of-way.
- Stated this was an excellent example for Ms. Baker's argument, and suggested adding the issue, "Applicability to ROW" to the list.

Chair Batey agreed.

Mr. Kelver understood that the entire zoning Code was set up to apply to private property. He did not know the legalities of making a specific change in this one particular Code section to say that the rules applied to the right-of-way while the rules did not apply to the right-of-way anywhere else in the Zoning Code. The concern had been addressed somewhat by stating the activities were exempt, except for requiring a CMP. The idea was to keep with the spirit of the overall Zoning Code. If a project potentially had an impact, it would not necessarily need to go through a land use review, but would need to provide a plan stating how the resource would be protected, which the City would likely do as a matter of course anyway.

Ms. Mangle suggested using "fee title property" versus "right-of-way", rather than private property. The issue did not involve whether or not it was private property but whether or not it

was a lot, which was where the zoning code was applied. Many other rules do apply to the right-of-way in terms of the public works and stormwater standards. The City only regulated trees currently in the right-of-way.

Chair Batey explained that the Commission would discuss the issues listed by staff, add any others that were of concern, and get a sense, perhaps through a straw poll, about where the Commissioners stood on the issues and what additional information might be needed from staff to make a final determination.

The following discussion items, identified by the Commission and listed on 6.2 Page 2 and 3 of the packet, were listed on a white board; added items shown in italics (included as Attachment 1).

Ms. Mangle noted that staff sought direction about how to modify the proposal with regard to these listed issues.

1. 150 sq ft threshold *for minor encroachments*
2. Limit division of high percentage resource properties
3. Language = "possible" versus "feasible" versus "practicable"
4. Home exemptions from HCA rules
5. Tree removal
6. Fee reductions for WQR/HCA applications
7. Prohibitions
8. WQR categories
9. Applicability to ROW
10. 150 sq ft threshold for CMP requirements
11. Some oversight, but not too much regulation, of everyday gardening/landscaping/trees
12. Burden on property owners and property value

Staff provided additional information regarding each item and the Commission discussed the issues as follows with key comments and concerns as noted:
[Note: Discussion is captured here as discussed during the meeting. Discussion bullets may reflect the views of individual members or be summary of discussion, and do not reflect a consensus of the Commission.]

1. 150 sq ft threshold for minor encroachments
Mr. Kelver distributed a comparison table, Exhibit 16, showing some "distance" triggers and "allowed disturbance" triggers that have been established in several other jurisdictions, as well the Metro Title 13 and Title 3 model codes along with a list that Milwaukie was doing. He explained that it was not an apples-to-apples comparison. He clarified they had discussed changing the 120 sq ft allowed disturbance for minor encroachments to 150 sq ft for uniformity; 120 sq ft was similar to other jurisdictions and was in Metro's model code. The exemption for minor encroachments was specific to HCAs only.

A brief discussion identified three separate issues regarding the 150 sq ft threshold, and the Commission agreed to address the threshold regarding when a construction management plan (CMP) was required. All three triggers, which concerned CMPs, allowed disturbance and minor encroachments, involved different policy issues although the threshold number might be the same. *"150 sq ft threshold for CMP"* was added to the list.

10. 150 sq ft threshold for CMP requirements

- As drafted, a CMP would be required if a 15 ft by 15 ft portion of lawn within a WQR or HCA was tilled up for a garden.
- Most other jurisdictions were not allowing any de minimus earth disturbance, though their definition of nonexempt activities was unknown.
- 150 sq ft was not a bad measurement because a 10 ft by 10 ft shed could be built in the city without having to go through a permitting process.
- One main issue was Item 4, home exemptions. If homeowners' existing landscapes were exempt from the regulations, a 15 ft by 15 ft garden could be done without a CMP. For most property owners, the home exemption was really where it began, and would be the place to start.
- **Mr. Kelver** noted the suggestion, along with the CMP, was to not charge a fee for reviewing it and address it as a Type I review to make it as easy as possible. In trying to protect the resource areas, the idea was to get people to show what they were doing to protect that area, and the 150 sq ft was a gross tool to keep the Code from becoming more complicated by addressing slope and other features.
- That concept solved a lot of the issues. The concern about a complete exemption for homeowners was that someone who did not care could come into their back yard with a D9 tractor and turn what was a slope into the creek into a new swimming pool.
    - People in Island Station living along the Willamette River have denuded their property, sprayed and killed everything. A homeowner's exemption for landscaped lawns was just something that gutted the whole rule.
- **Mr. Kelver** stated the spirit of the exemption was to allow exemptions for existing residences up to the point where other permits would be required. Once 500 sq ft was disturbed, an erosion control permit would be required. The exemption did not extend to other areas the City would regulate.
- The working group had not discussed an exemption for landscaping.
    - **Ms. Mangle** noted that was likely because such an exemption was not included in staff's earlier drafts. It would directly apply to an estimated 160 properties. An issue was how to track this over time and how the 10% of allowed reduction would be tracked, etc. It would be difficult to implement on the City's side and could create inequities among neighbors.
- **Mr. Kelver** stated tree removal would be included in the exemption as presented in model code. Vegetation could be disturbed, including trees up to 10% of the HCA or a maximum of 20,000 sq ft, whichever was less. The 10% disturbance was allowed for the life of the property, and not 10% per year. This was referenced in Section 3 B and in Section 3 E.5 of the model code Title 13.
    - Staff could adjust the model code if the Commission liked the idea, but not the provided limits.
- It came down to the attitude of the people doing this, which could not be regulated; some people were good caretakers of their properties and others tried to use every loophole to do things that no one wanted to see happen.
- The fee exemption was a far better idea than a home exemption or a fee waiver for minor modifications and moving it down to a Type I review.
- Currently, if handled as a regular Type I application, there would be a fee. In adopting the amendments, the proposal was that no fees would be required for the CMP review and the Type I Natural Resource Management Plan to provide an incentive and make it easier to do.
- **Commissioner Stoll** noted he knew there would be bad landowners, but 500 to 700 parcels would be affected and they should have certain rights that should not be infringed on..

4. Home exemptions and 6. Fee reductions

- **Chair Batey**, **Vice Chair Harris,** and **Commissioner Gamba** concurred that it was better to make it easy with no fee, but still have some review; and not create a home exemption. Make small type uses easy with as quick a review as possible and without a fee.
- **Commissioner Stoll** agreed with the fee reductions, but still wanted a home exemption. He could see working a little bit with the home exemptions to maybe restrict it slightly to prevent really bad behavior.
- **Commissioner Wilson** wanted both home exemptions and fee reductions.
- **Ms. Mangle** stated that in the proposal being presented to Council, no fees were proposed for the boundary verifications and the CMPs as an incentive and acknowledgment of the burden being added onto the property owners. Staff could not reduce or waive all the fees for Type II and Type III. According to policy, the City was not required to cover all its costs, but staff was asked not to shift all that cost onto the General Fund and the taxpayers.
  - Type I tree removal, for example, needed to be specific, because different fiscal policies might apply the bigger fee. It did not mean it was less of a concern for the property owner, but Council would actually have to fund it at some point.

10. 150 sq ft threshold for CMP requirements

- If a CMP was all that was needed, it was proposed to not require a fee and to have a quick staff turnaround. The question was if 150 sq ft was the right trigger for those parameters.
  - **Mr. Kelver** verified that a CMP was all that was required if someone wanted to put in a garden or a similar minor disturbance in a resource area.
- If tilling the soil to raise food was the issue, should that be addressed through an exemption as opposed to changing the 150 sq ft threshold?
- **Ms. Mangle** verified Subsection 19.402 4(b) 0:50:54.6, Limited Exemptions, of the proposed Code (5.1 Page 16 of the April 12, 2011 packet) only listed the types of activities that only triggered the CMP that otherwise would be exempt. Many other projects that also required Type II and Type III would also require a CMP. These were the kinds of projects that would be exempt but for the need to do a CMP. If there was something on the list that the Commission did not think should require a CMP, it could be moved to the outright exemptions list. However, that would mean that the City would not be able to address it at all.

Ms. Mangle added Item 11 to the list and advised the Commission to clarify their key objectives so staff could return with Code language.

11. Some oversight, but not too much regulation, of everyday gardening/landscaping/ trees and 5. Tree removal

- Citizens in the watershed were being asked to do more, which was a goal everyone agreed on; de minimus for the existing homeowners would be great.
- Tree removal should be treated differently than earth disturbance, because the whole point was the canopy protection. Ripping up the lawn was less of concern than someone removing trees. Removing a tree and replacing it with a tree was the goal and the spirit of the concept to maintain the canopy.
  - **Mr. Kelver** stated when something was truly exempt, the City could not require anything else. If tree removal became exempt, it was up to the owner's discretion as to whether or not they planted a tree. The exempt tree removal in the proposed Code had no replanting requirement; however, if it fell into a Type I, there was some oversight as well as the accompanying requirement.

- Putting the tree removal in the same category as the 150 ft CMP threshold so no fees were required and the review was quick still provided oversight where replanting a tree could be required.
- The current tree removal part was pretty good; the measures about exemptions, what was Type I, all made sense.
  - **Mr. Kelver** clarified that trees under a 6-in diameter did not qualify as a tree per the definition; the current draft stated 4 in, but changing it to 6 in had been discussed.
- Even 4 in was a big exemption and would allow time to consider the landscaping before the tree got too mature.
- One purpose for maintaining the canopy, especially in the riparian area right along the watershed in the WQR, was mostly to shade the creek and keep the temperature down for the fish.
  - That was addressed in the WQR. This project went beyond that; it was more about a tree canopy and bird habitat and other things, so it was not directly about shading the creek, which was covered.

The Commissioners all agreed Item 11 was a concern, though not all agreed on a solution. The Commission had mixed opinions about trees being included in some kind of exemption.

- The current exemption did allow 3 removals of trees per year from the nuisance species list; however, not all trees were on that list, like fruit trees.
- The Natural Resource Management Plan would work for a lot of properties, but it did presume that restoration was a goal, which would not be true for everybody.

2. Limit division of high percentage resource properties

- The chart on 5.1 Page 28 of the April 12 packet was a good concept if a small portion of HCA was on a property. The issue, which affected less than 30% of HCA properties, arose when a property was 90% HCA, for example, and large enough to be subdivided.
  - For example, a 50,000 sq ft property could be subdivided 5 times, and since each lot would be covered with 100% of HCA, 50% of each lot could be disturbed. The result was that a decent piece of habitat could be turned into no habitat at all, because it was checker boarded and half of it was wiped out. To keep this from happening, restricting how much it could be subdivided when a property was predominately HCA was suggested.
  - This change would not affect the chart, which worked for the rest of the city.
  - The key point was contiguity. The concept of island biodiversity stated the smaller an area was, the smaller the chain of diversity of species, and this takes place at a very small level. So the larger the area that could be created, the bigger the diversity of species. As that area is divided up, they could no longer exist in that area.
- Originally, the concern was not to prevent developers from chopping up the area, but to address how the HCA was divided, so the 50% HCA across the 5 lots would have to be grouped together.
  - There were many ways to address the issue; the point was to keep from turning a nice habitat into nonhabitat.
- The draft language for consideration, distributed by staff at the prior hearing, was good and addressed the point; however, it came with lots of caveats and would need further consideration and adjustments.
  - Staff was not asked to research whether other cities had a similar code. One caveat with that draft language regarded whether prohibiting division of property with a very high percent of HCA was legal. Other consequences might need to be considered as better

options might be available to address the concern, such as cluster development or addressing the contiguity issue.

- **Mr. Hall** stated Council had raised the issue of a potential taking, which was very site specific. A 90% threshold with 10% allowed to be developed was not a taking.
  - General prohibition was a pretty blunt instrument policy-wise. There were concerns that too much HCA would be developed upon as a percentage, and a checkerboard of HCA would result from a subdivision. Policy-wise, this language did not seem to directly address either issue. It basically said that certain properties could not be subdivided. It did not incentivize a property owner to pursue clustering nor address the problem of a property being 89% HCA.
  - Policy could be written so it was not such a blunt instrument. The Commission needed to define parameters they were comfortable with as far as when to apply the formula; what percentage to use as a trigger, such as for when a subdivision must address HCA contiguity area so a certain percentage remained in a protected tract, etc.
- Land division that created a resource tract would be ideal.

The Commission unanimously agreed keeping the contiguity of larger HCA parcels was a good idea.

3. Language = "possible" versus "feasible" versus "practicable"

- **Mr. Hall** explained there were 2 different issues. The model code used the term "practicable" but also defined the term; staff's draft Code used the word "practicable" without defining it.
  - Most people writing Code assume "practicable" is a synonym for "practical." The dictionary defines "practicable" as "feasible", which is a different standard than "practical." He suggested replacing the word "practicable" with either "feasible" or "practical."
  - "Possible," "feasible," and "practicable" essentially meant, "could it be done"; "practical" is less restrictive, and basically meant, "would it be done", such as if something would be really expensive; there was also a lower threshold or other considerations.
- **Chair Batey** understood "practicable" to be closer to "practical" but more of a threshold than "feasible" or "possible."
- Metro's definition of "practicable" in the Title 13 model code stated, "'Practicable' means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose and probable impact on ecological functions. The practicability of a development option shall include consideration of the type of HCA that will be affected by the proposed development. For example, high HCAs have been so designated because they are areas that have been identified as having lower urban development value and higher valued habitat, so it should be more difficult to show that alternative development options that avoid the habitat are not practicable." On the other hand, it talked about low HCAs, and it would be easier to show things are practicable if they have impacts on low HCAs.
- Retain "practicable" and include Metro's definition in the proposed Code, but modify it to remove the distinctions between high and low HCAs. The type or character of an HCA could be discussed/referenced.
- **Ms. Mangle** expressed concern about the definition applying elsewhere in the Zoning Code. Staff tried to avoid having specific definitions in each chapter. If the definition was in the Natural Resource Areas chapter and not defined elsewhere in the Code, it would not impact the rest of the Code.

    - Having a definition for "practicable" was a good idea, but it should serve a purpose broader than just this chapter.
- Metro's definition of "practicable" was synonymous with "practical," though more specific.

The Commission consented to use "practicable" as intended in the original model code and add a similar definition in the chapter.

Chair Batey added she did not care which word was used, but a definition and more consistency was needed. **Vice Chair Harris** agreed, adding he wanted it defined for the context. **Commissioner Stoll** concurred.

7. Prohibitions

- The issue was the underlying philosophy of the regulation calling out what could be done and then listing what is exempt, what has limited regulation, and what has more regulation; whatever is not listed is prohibited. The other option was to list what could not be done, and if the proposal is not listed, then it would be allowed.
- Everything not expressly prohibited should be allowed; if someone did damage in some unconceivable manner, then that would be added to the prohibited regulations.
    - That was probably a good legal philosophy, but the proposed Code was not drafted in that way; drafting that list could take additional months of work.
- The underlying philosophy of the development code did not list prohibited activities, but rather permitted uses, conditionally permitted uses, and then everything was pretty much prohibited. How the draft Code was proposed was pretty standard.
- The Code was not drafted with the idea of enumerating all the bad things that people should not do; that would be a big rewrite.
- Pesticide use was not a disturbance, for example, and pesticide was not defined in the draft Code. It would be impossible to create such a list, which was as limitless as the imagination.
- **Mr. Kelver** noted Metro's Title 13 model code did not include this language; however, current WQR rules did include the same phrasing. Part of the intent with that language was to make it clearer that it could not be done, rather than simply assuming an activity was allowed if not found on the list. For example, if a use was not listed as an outright or conditional use in R -7, then it was prohibited; that was how the Code was set up. The intent was to capture and delineate the list of exemptions and identify the level of review.
    - For instance, the language "or other activity" included tree removal, and if the tree removal description was not listed as an outright exempted or Type I review, then it could not be done. This did not make sense in light of the current Code. The property owner should at least be able to go to the Commission to make their case. The current Code version stated that Type III review included any tree removal that was not exempt or Type I, so that activity could be addressed.
- A similar provision was in the WQR Code, which had been in effect for 8 or 9 years and seemed to show not many people had been stopped from doing a lot of things they had wanted within that time; otherwise more people than Mr. Burkett would be objecting to the proposal.
- Should other exemptions or Type I review items be identified that people are concerned about? Although a philosophical difference existed, the Commission was actually affecting things in the area already due to the lack a decision; rewriting the Code would only increase those impacts.
- The logical people to ask about whether more specific exemptions should be included were those in the working group and those who appeared at the hearings.

    - Most property owners would probably say they would like as many exemptions as possible.
    - Staff wanted input from them about where the draft Code was too restrictive.
    - It was dependant on intent, which could not be regulated.
- **Commissioner Stoll** could not really list any additional exemptions at the moment, because the home exemption would cover a lot of it, but he would give it some thought.
- **Chair Batey** had not read the model code against Milwaukie's Code to know if there were other things that should be exempt.

Chair Batey suggested that each Commissioner contact Mr. Kelver with suggestions on exemptions. Only Commissioner Stoll wanted to reframe the Code language to reflect that what was not prohibited was allowed.

8. WQR Categories

- **Mr. Kelver** understood there were two components to this issue: one was the actual wording used and if the categories should be relabeled; the other was the possible creation of a new category or two to distinguish between properties not being cared for in addition to well cared for properties, even if they did not meet the highest ecological value.
- Properties that were well maintained, landscaped, and kept in good condition should be considered "good" as opposed to "degraded." An "ideal" category should be established, for those using native plantings and actively doing restoration. The opposite end needed to categorize those actively doing damage, and where enforcement would apply.
- The purpose of Table 19.402.11.C, found on 5.1 Page 27 of the April 12 packet, was solely for classifying and evaluating the property in the context of an application.
    - When a project would result in some disturbance, specifically of the WQR area, the table was intended as a guide to show what mitigation is needed.
    - While the wording was unfortunate, the intent was to provide a more technical evaluation of a property's status and the requirements should there be a disturbance. The fact that a property was well cared for did not change the mitigation requirements. This Code would only be used if an applicant proposed impacts on a section of the property within a WQR.
- **Commissioner Stoll** noted it was important to administer the regulation in such a way that those who were good stewards would support the City. A lot of people did object to the classification of their property as "degraded." He clarified that he would like to see both the approach and language changed. Mr. Burkett's property had been described as "degraded," which was not true. It was well maintained and the habitat was being improved. Comments were made about the language being demeaning.
- Only the "degraded" category in the chart had a specification about nonnative species. Why did "good" and "marginal" properties not have that threshold as well?
    - **Mr. Kelver** responded that the idea was that any portion of a WQR area with at least 10% nonnative species would fall into the "degraded" category, which was essentially having a lawn under the canopy. The categorizations came from the Metro Title 3 model code. Staff should check with Metro about changing or creating a different category to avoid falling out of Title 3 compliance.
    - The ideas and values being put forward were what conditions represented a more ideal, self-sustaining WQR area. The intent was to have properties look more like the ODS property and less like Mr. Burkett's property, thus reducing lawns in WQRs for applications requiring a Type II or higher review. The intent was not to require restoration without some development. It would not apply to the ongoing maintenance of existing landscaping.

Commissioner Wilson left the meeting at approximately 9:40 p.m.

- Having staff take a hard look at the whole table, how it was set up, and the language, would be a lot of work and would require additional help. This would be different than just trying to find kinder language.
- **Vice Chair Harris** noted one thing not listed was the second half of Item 6. Metro's intentions were great; however, a property was appraised and taxes assessed with a well manicured and landscaped garden, and no process existed to reduce the assessment or taxes when a property was returned to riparian land that could never be used. The inability to divide or develop a property could result in a significant reduction in property value.
  - Because taxes were not in the purview of the Commission, there might not be a way to address the concern. This was a huge oversight on the State's part and on the parts of Metro and Clackamas County. The HCAs and WQRs in general create this situation. He would not likely vote against habitat restoration, but it was very concerning.
  - Item 12 "Burden on property owners and property value" was added to the list.
- Table 19.402.11.C was exactly what it should be for the intent of the Code.
- The language stating, "more than 10% surface covers by any nonnative species" could be going too far. Removing invasive species was good, but if it was not an invasive species or native, but an ornamental species, for example, which fostered habitats should be allowed. Native vegetation, which promoted water conservation, should be in the "ideal" category.
  - **Mr. Hall** stated that native species were required to be planted when replanting bare and disturbed areas from development. He suggested the Commission could require that some percentage had to be native. Another requirement was that seeds be planted to provide 100% surface coverage, which could also be adjusted.
  - People on the advisory group were much more qualified to talk about such details. Staff could possibly reassemble the group with Mart Hughes and Zack Perry and others who were more qualified.
  - These were essentially the same standards the City had used for the past 8 years or so and was the model code. The language could be adjusted further, but it was really just continuing the existing policies.

Chair Batey, Vice Chair Harris, and **Commissioner Gamba** agreed to retain the WQR categories as presented; **Commissioner Stoll** wanted the categories changed.

After considering the hour in light of the Commission charter, the Commission consented to continue the meeting past 10:00 p.m.

1. 150 sq ft threshold for minor encroachments

Mr. Kelver clarified that the comparison table, Exhibit 16, was intended to pull out some specific square footage numbers in the existing Code to see what they looked like internally. There were minor encroachments that only affect the HCA that were listed as exempt on 5.1 Page 17 of the April 12 packet. These were special exemptions within HCAs. The current proposal had minor encroachments up to 120 sq ft just in HCAs as exempt.

- Examples were provided of minor encroachments of an impervious surface such as accessory buildings, patios, walkways, retaining walls, and other similar features. 150 sq ft came up as the trigger for a CMP; 120 sq ft for an HCA minor encroachment; and 150 sq ft for a Type II WQR disturbance, which regarded Ms. Baker's bay window example.

    - These thresholds were new; currently any disturbance had to go to the Commission. The idea was to be able to do a Type II for small impacts, even those within the WQR area, because that had been far too restrictive.
    - The 150 sq ft threshold was also used for the temporary disturbance allowed in HCAs. The model code had 200 sq ft, but because staff was working with 150 sq ft for everything else, it had been dropped to be more consistent. Other thresholds for allowed disturbance went up to 500 sq ft for alterations of existing structures that impact only HCAs, which was reflected in the table.
    - The table showed 150 sq ft or 500 sq ft as the thresholds, except for the 120 sq ft which they had talked about changing.
- Eliminating the 120 sq ft metric made sense. Using 150 sq ft or another number for everything would avoid confusion.
- The larger question was whether 150 sq ft was the right number for either sometimes requiring a CMP, or in other cases, if the standards for WQR disturbance could not be met, bumping the application from Type II to Type III.
    - Some who commented suggested this was a little low.
- According to the chart, most of the area was taken from the model code and using 120 sq ft, but going to 200 sq ft for temporary disturbances.
    - Staff created several levels of exemption. Many other jurisdictions were not requiring a CMP for an activity on the exempt list.

All Commissioners agreed 150 sq ft should be the threshold for minor encroachments in HCAs.

Chair Batey and **Vice Chair Harris** wanted to further consider the 150 sq ft threshold between a Type II to Type III review for WQR disturbance, while **Commissioners Gamba and Stoll** supported the 150 sq ft trigger.

- This particular Type II allowance was 150 sq ft maximum and going no closer to the protected water feature, which could be difficult if the entire property was covered.
- Staff would return with a clear explanation about what constitutes Type II and Type III reviews, as well an alternative for the next hearing.
- **Commissioner Stoll** requested a sample CMP or a sample Natural Resource Management Plan that would be done by a typical citizen to understand what the citizens would be asked to do.

10. 150 sq ft threshold for CMP requirements

The Commission agreed to a 150 sq ft threshold for CMP as long as it was subject to Item 11. Some oversight, but not too much regulation, of everyday gardening/landscaping/trees.

9. Applicability to ROW

- **Vice Chair Harris** was not concerned about applicability to ROW, which was not considered in the rest of the Code. Engineering adhered to erosion standards already without these regulations.
- **Chair Batey** was concerned about undeveloped ROW. In most places, it would be a non-issue because the street improvements for an application triggering this ordinance would dictate what happened in the ROW anyway.
- One example was the proposed widening of the Harmony Rd section in the Three Creeks Area, which would kill a bunch of 200-year old oaks to speed up traffic by 30 seconds. Such proposals should come up for review if in Milwaukie.
- **Mr. Hall** explained that Engineering staff wants the flexibility to build a road where needed in order to access property. Standards exist to address natural resources, but it was really a

policy decision of the City. Legally, the Commission could make a regulation on ROW. Generally, cities allow themselves more leeway regarding what they can do in the ROW due to the necessity of access.
  - The exemption was specific to the physical public ROW, not who was acting in it. Those acting within the ROW were subject to many other regulations and staff would return with an explanation of those rules so the Commission could compare them with the proposal. Undeveloped ROW was a bit different.
- Someone from the Engineering Department could provide a sample scenario of what happened when someone wanted to work in the ROW.

Chair Batey and **Commissioners Stoll** and **Gamba** wanted more information so they could further consider applying the regulations to ROW. Vice Chair Harris opposed having the Natural Resource regulations apply to the ROW.

Mr. Kelver noted that as written, the ordinance discussed existing ROW, but not ROW resulting when a new road is created from a new partition or subdivision. Once the road is established, existing ROW would result and would be exempt, but the process of doing the subdivision would need to address any impacts.

12. Burden on property owners and property value
- **Vice Chair Harris** requested that staff get more information from the tax assessor.

Chair Batey asked that the packets be sent to the Commission 2 weeks prior to the hearing because it would be a lot of reading.

Commissioner Gamba moved to continue ZA-11-01 and CPA-11-01 to date certain of June 14, 2011. Vice Chair Harris seconded the motion, which passed unanimously.

Attachments
Attachment 1: Natural Resource Regulations Questions Chart, April 26, 2011 Planning Commission

7.0 Planning Department Other Business/Updates

7.1 Kellogg Bridge – Responses to questions from 3/17 meeting

Ms. Mangle noted the material in the packet was in response to some questions asked at the joint meeting with the DLC regarding the proposed light rail Kellogg Bridge. Another joint meeting was proposed to address other comments and questions, and enable the designers to show their progress and how they were responding to the more substantive comments. She would email the Commissioners about the proposed May 25 or June 1 date and they could respond with the date that worked best. The material was also provided to the DLC for their meeting being held tomorrow.

8.0 Planning Commission Discussion Items
There were none.

9.0 Forecast for Future Meetings:

May 10, 2011	1. Other Business/Updates: Team-building Training
	2. Other Business/Updates: Residential Standards Project Update
May 24, 2011	1. Public Hearing: North Clackamas Park North Side Master Plan cont'd – *tentative*

2. Public Hearing: Wastewater Master Plan

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

- Mr. Hall would be doing training on hearings at the next meeting. She had spoken with several Commissioners about having time to discuss how to work together and run meetings because it was a new group with a new chair.
- The North Clackamas Park North Side Master Plan would not be heard May 24 as a lot of work was still going on; it would probably be June before it returned before the Commission.
- In addition to the Wastewater Master Plan public hearing on May 24, a worksession was planned on a segment of the Residential Development Standards Project, essentially the baseline work of reorganizing the Code.

Meeting adjourned at 10:28 p.m.

Respectfully submitted,

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

Lisa M. Batey

Lisa Batey, Chair