

**West Linn City Council Meeting Minutes
December 30, 2008**

Council Present: Mayor Norman B. King, Council President Michele S. Eberle, Councilor Scott A. Burgess, Councilor Jody Carson and Councilor Mike Jones

Council Absent: None

Staff Present: Chris Jordan, City Manager; Kirsten Wyatt, Assistant to the City Manager; Richard Seals, Finance Director; Chris Kerr, Senior Planner; Bryan Brown, Planning Director and City Attorney Bill Monahan

Call to Order/Pledge of Allegiance

Mayor King called the meeting to order at and Council President Eberle led the flag salute.

Proclamations, Recognitions and Presentations

- Shock N' Bots Robotics

Students from Three Rivers Charter School-Shock N' Bots Robotics was given the challenge to find out how climate change is affecting their community and come up with a solution to fix it that had never been done before. Their focus was on the red-legged frogs that they found in their yards. They have created a brochure informing residents and landscapers about the frogs. They are recommending that ponds be available for the mating of these frogs. After June the frogs are large enough to ward off predators and the ponds can be drained. A brochure was presented to the Council.

Mayor King asked if the red-legged frogs are in resident's yards all year long. One student indicated that red legged frogs are in yards through June as that is their mating season. They grow in the water and the water provides protection to them from predators. That is the reason why it is important to have a pond habitat for them.

Council President Eberle asked where the brochures were delivered. Ms. Nun stated the brochures were delivered to City Halls in West Linn and Wilsonville. The brochure is also posted on the Wilsonville website.

Councilor Jones asked if red legged frogs are common only to the West Linn and Wilsonville areas. It was explained these frogs are a threatened species that are almost on the endangered list. They are not common in this area.

Community Comments

Kevin Bryck stated he was here tonight on behalf of the _____ Neighborhood Association. He explained that for the past nine years they have had three dumpsters supplied for their neighborhood clean-up day. They have never been charged by the City for those dumpsters. This year the City instituted a new policy of charging the neighborhood. They get a \$1,500 stipend from the City every year and he feels it is not fair that the City charge them \$200 for running their clean-up day activities. It is his understanding the City has the power to take these moneys out of their neighborhood fund; however, they disagree with it.

Consent Agenda

1. Agenda Bill 08-12-01 Approve City Council Meeting Minutes of 11/10/08
2. Agenda Bill 08-12-02 Approve City Council Meeting Minutes of 11/24/08
3. Agenda Bill 08-12-03 Award of Contract for I-205 Water Line Repairs
4. Agenda Bill 08-12-04 Approval of Access Easement on Kapteyns Street
5. Agenda Bill 08-12-05 Award of Contract to Update Street and Water System Development Charges

Council President Eberle moved to approve the consent agenda consisting of the five agenda bills listed above. Councilor Burgess seconded the motion.

Councilor Carson suggested amending the motion to include the minutes of December 22, 2008 City Council meeting.

Council President Eberle amended the main motion to include the minutes from the December 22, 2008 City Council meeting. Councilor Burgess, the second, agreed.

Ayes: Burgess, Jones, Eberle, Carson, King

Nays: None

The motion to approve the consent agenda carried 5-0.

Report from the City Manager

Chris Jordan, City Manager, updated the Council on staff's response to Bob Stoel's previous testimonies on the condition of the sidewalks and storm drains on Highway 43. Engineering staff will be meeting with Mr. Stoel tomorrow to discuss his concerns in greater detail and get a better understanding of the issues.

There was an article to today's *Oregonian* regarding the costs for dealing with the arctic storm this past December. West Linn's costs were close to \$90,000: staff and overtime (street crews, plows, sanders) at 700+ hours, \$37,000; 200 tons/sand, \$6,000; equipment repairs, \$3,000; fuel, \$5,800; tree service, \$5,000; supplies such as chain, etc., \$5,000; and clean-up costs after cleaning the sand off the streets, \$25,000. Clackamas County declared a State of Emergency and he has received an email with a form to fill out to get reimbursement of some of the costs.

Business from the City Council

Councilor Burgess recognized the council members that are serving at their last Council meeting tonight. He expressed appreciation serving with Mike Jones, Michelle Eberle and Mayor King, saying it was an honor to work with them.

Councilor Jones commended the street maintenance crews for their efforts and hard work over the last two weeks. They have been working 24/7 to serve the citizens in this community. Mayor King too thanked the street crews for the many, many hours they spent working these last couple of weeks.

Mayor King stated he really enjoyed serving the City as Mayor for the last four years. He is very proud. This has been a team effort and he thanked all the City employees top to bottom, side to side for their support in this effort. He commended Ron Garzinni and Andy Parks as being a big help in the City's difficult transition. He thanked his fellow councilors including Teri Cummings and Michael Gates. If there are successes, these people are the ones to thank. He thanked the City's volunteers that are on boards and commissions for their hard work and generosity of time.

Mayor King moved to approve a resolution to support a municipal water system and phasing out city-furnished water. Councilor Burgess seconded the motion.

Mayor King explained the City of West Linn Municipal Departments will phase out the use and water distribution of bottled water except in the event of a water shortage by February 28, 2009 and promote the importance of municipal water. This will allow the City to set the example to the citizens and businesses in the use of water, cutting back and reducing the damage that is caused by use of bottled water.

Ayes: Jones, Eberle, Carson, Burgess, King

Nays: None

The motion carried 5-0.

Business Meeting

1. Agenda Bill 08-12-07 Resolution 08-49; Budget Adjustments

Mayor King opened the meeting to discussion on budget adjustments. He asked for a staff report.

Richard Seals, Finance Director, stated the FY 2007 audit was completed last week and is available online. Staff is currently working on FY 2008.

The current budget (2009) was adopted back in June and totaled \$41 billion spread out over 17 different funds. For the first several months of this budget year the funds and departments are tracking very well. There are adjustments needed and a supplemental budget is being proposed.

There are two new revenue streams that are increasing the budget by \$313,000; one for \$20,000, a new Sustainability Program and the second for \$293,000 an engineering grant from ODOT to improve Blankenship Road.

There are several reclassifications out of Contingency for expenses:

- \$60,000 Completion of second audit in this fiscal year
- \$325,000 in IT (financial software)
- \$12,000 in Parks to cover Hidden Springs boundary survey
- \$10,000 in Library Fund (City's share in the County's Educational materials for the Levy which passed in November)
- \$60,000 in Water Fund relating to a vehicle purchase

Staff is recommending approval of the supplemental budget.

There was no public testimony on this issue.

Hearing no further questions from Council or staff, Mayor King closed the public hearing portion of the meeting and opened it to discussion among the Councilors.

Councilor Burgess moved to approve Resolution 08-49, Adjusting the Budget for the Fiscal Year 2008/2009 by adopting the Supplemental Budget Advising Appropriations. Councilor Carson seconded the motion.

Mayor King moved to amend the motion to include an appropriation of \$200,000 from Unexpected Tax Receipts to the Parks and Recreation Fund for Capital Expenditure for a Restroom at Fields Bridge Park. Councilor Burgess seconded the motion.

Mayor King explained that these funds were part of the budget that came along from property tax receipts and have not yet been applied to the budget. He feels a large problem the City has is completing their parks with restrooms. In talking with Mr. Worcester, it appears the oldest parks that do not have restrooms are Robinwood and Fields Bridge. There are not enough funds to do both parks; it was decided to fund Fields Bridge Park because it has the heaviest use.

Ayes: Carson, Burgess, Jones, Eberle, King
Nays: None
The motion carried 5-0.

Vote on the main motion to approve Resolution 08-49, Adjusting the Budget for the Fiscal Year 2008/2009 by adopting the Supplemental Budget Advising Appropriations and approving an appropriation of \$200,000 from Unexpected Tax Receipts to the Parks and Recreation Fund for Capital Expenditure for a Restroom at Fields Bridge Park.

Ayes: Eberle, Carson, Jones, Burgess, King
Nays: None
The motion carried 5-0.

2. Agenda Bill 08-12-08 Contract Award – Restrooms and Wading Pools Replacement

Mayor King opened the meeting to discussion of restrooms and wading pools for Willamette and Hammerle Parks. He asked for a staff report.

Ken Worcester, Parks and Recreation Director, thanked Councilors Eberle and Jones and Mayor King for their services. He has thoroughly enjoyed working with them.

The Parks and Recreation Department has advertised and received proposals for a construction manager, general contractor contract to provide both construction and construction management services for the restrooms and spray pools at both Hammerle Park and Willamette Park. The goal is to have both parks completed by Memorial Day, 2009. Staff is recommending First Cascade Corporation in Lake Oswego be awarded the contract.

There was no public testimony on this issue.

Hearing no further questions from Council or staff, Mayor King closed the public hearing portion of the meeting.

Acting as the Contract Review Board, Councilor Eberle moved to approve the contract award for restrooms/wading pools replacement project per Agenda Bill 08-12-08. Councilor Carson seconded the motion.

Ayes: Burgess, Jones, Eberle, Carson, King
Nays: None
The motion carried 5-0.

3. Agenda Bill 08-12-09 Remand for LUBA of Hood Street Building

Mayor King opened the hearing for the Council to respond to the remand by the Land Use Board of Appeals (LUBA) of the City Council's earlier decision to approve a design review permit and water resource area permit for a 4,200 square foot office building at 5750 Hood Street. The LUBA case was LUBA No. 28008-051 filed by Laura and Stanley Horsey.

The hearing is limited to the two issues upon which LUBA remanded the earlier approval. They are:

1. Determination of whether the project, with minor revisions proposed by the applicant, satisfies CDC 32.090(A), which allows up to 5,000 square feet of the site within a water resource area to be developed , and
2. Determination of whether the outdoor parking area and retaining wall, with minor revisions proposed by the applicant, satisfy all applicable rear yard setback requirements including CDC 21.070(A)(4)(c) and 34.0760.

Bill Monahan explained the hearing purpose and procedure. He indicated the applicable standards to be considered are found in the Community Development Code, chapter 55, Design Review; Chapter 32, Water Resource Areas; chapter 21, Office-Business Center, OBC; and Chapter 34, Accessory Structures, Accessory Uses and Permitted Uses Setback Requirements.

The application before the City Council this evening must be decided based on these criteria. The authority of the Council is limited only to those issues that address compliance with the applicable criteria.

As noted, this land use matter is on remand from LUBA. The City Council has exercised its right to limit the scope of the hearing on remand to the two issues upon which LUBA remanded the earlier City Council decision. The City Council has authority to do this based on Oregon case law, *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016, rev denied, 305 Or 578 (1988); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419 (1990), aff'd, 106 Or App 266, rev denied, 311 Or 349(1991).

Mayor King explained the hearing conduct. Each speaker wishing to testify will have three minutes of time. One speaker, Laura Horsey, has requested additional time. Because Laura and Stanley Horsey were the petitioners in the LUBA proceedings, they will be granted twenty minutes to testify on the two issues. A decision may be made by the City Council at the close of the hearing or the matter may be continued to a time and date certain in the future. If the matter is continued to a time and date certain in the future, this will be the only notice of that date announced.

Mayor King asked if any member of the City Council visited the site since the earlier hearing on this matter. He noted this afternoon he revisited the site and he did not see or talk to anyone on the site.

Mayor King asked if any member of the City Council wished to announce any ex-parte contacts or any potential conflicts of interest. There were none.

Mayor King asked if there were any members of the audience who wished to make any challenge to any Council member's ability to participate in this decision.

Councilor Jones reported he was not on the City Council when the original decision was made. At that time he was a member of the Planning Commission but was not present when the Planning Commission decision was made. He has studied the Planning Commission records and the City Council records and believes that he can make a decision on this remand.

Mayor King asked if there were any objections to the Council's jurisdiction to consider this matter. Hearing no objections to the Council's jurisdiction, Mayor King asked for the staff report.

Staff Introduction

Chris Kerr, Senior Planner reported in January 2008 the Planning Commission approved the application and it was appealed to City Council. In April of that year the City Council upheld the Planning Commission approval which was appealed to LUBA. In October, 2008 LUBA issued their final opinion, remanding the City's decision sustained to the two specific assignments of error.

The first issue was exceeding the maximum 5,000 sf. area to be developed. In the original calculations the City did not include the sidewalk area and storm drainage area in the 5,000 sf. calculations. LUBA recommended the City make a determination as to whether or not those areas should be included. Both the applicant and City staff agree the drainage area and specific sidewalk area should be included in the 5,000 sf. area of development.

The second item is a specific determination of whether the outdoor parking area and retaining wall constitute 'structures' which are not permissible in the 25' rear setback. LUBA is recommending City Council make a decision as to whether or not the parking area and the retaining walls constitute structures. If they are deemed structures, the interpretation is they are buildings. In that case they are not permitted within 25 feet of the property line.

A copy of the original approved site plan and the revised site plan were displayed side by side. Mr. Kerr explained the changes from the original to the revised site plan:

- A portion of sidewalk was not picked up by staff on the original site plan; the revised plan specifically removes that sidewalk area.

- The stormwater area was pulled back 15-feet to the north from the original location and is now moved toward the parking area. This area is now included in the 5,000 sf. footprint.
- A portion of the parking area reconfigured and reduced. The retaining wall, fill area (level of the parking area), and parking area was pointed out. The rest of the parking area is flat and level to the ground.

There is an issue of whether the retaining wall exceeds 30-inches in height. There is a 25-foot setback and according to the Code there are no buildings (structures) permitted west of this setback. A building becomes a structure when it is over 30-inches in height. With the revised plan, the retaining wall will not be over 30-inches in height. There is a second retaining wall; however, it is below grade and does not qualify as a structure.

There is a question as to whether this is considered an accessory structure. The retaining wall is clearly an accessory structure to the building.

Councilor Eberle asked if the sidewalk were there, would it have exceeded the 5,000 sf. Mr. Kerr said it would. In fact, with the sidewalk removed the application is 2 sf. under the 5,000 sf. threshold.

Councilor Eberle asked if everything west of the setback is parking and not building structure. Mr. Kerr said correct, the building footprint shows the parking area and the required parking.

Councilor Carson asked if the sidewalk removed was required or put in to improve access between the two buildings. Mr. Kerr said correct, it was an amenity provided in the original plan.

Councilor Burgess asked where the height is measured retaining walls on steep grades. Mr. Kerr stated the structure is on a flat surface; it appears to be sloped. There is very little grade change.

Councilor Eberle asked if there would be room for the two spaces that are in the outside area if the trees were taken out. Mr. Kerr suggested the applicants answer that question.

Mayor King asked if there were any correspondence on this matter, other than those items included in the packet. Mr. Kerr pointed out the December 30 memorandum that clarifies the amendment to issue number two. Staff went out and retrieved the file from the architect and confirmed that the development area was 4998 sf., a clear amendment to the previously quoted 4991 sf.

Applicant Presentation

Alma Costin, 5798 Hood Street, read a letter into the record thanking Mike Jones, Michelle Eberle and Norm King for all the years of service they have committed to the City of West Linn. They have concerns regarding this application and find it hard to believe that this is the start of the third year attempting to have approval to use the property they have owned for 45 years. There is no big win for anyone in all of these appeals. As for LUBA appeal, there is a draw two to two. There has been no dialog as to what might be acceptable to the Horseys' even though they declined dialog during these proceedings. The Horseys' purchased property across the street from this lot after 1991. The OBC zoning was in place and there was partial excavation for a building on the site. The neighborhood plan was adopted in 2005.

Ms. Costin stated they struggle with where the conflict of interest begins and ends with both personal and political positions and public comments from Teri Cummings, Roberta Schwarz, Kari Oakes and others who are not residents of the Bolton neighborhood. She feels this is a taking; the City confirmed this was a measure 37 lot. The City was given a written opportunity to purchase the properties contiguous to the library and Maddox Woods in 2003 and 2004. They declined due to various reasons.

During the application process she asked staff several times to be open about what the City desired. There was no dialog. Teri Cummings' letter on record tonight suggests using this lot as a library parking lot.

This is a taking of time and money to design this project. Their lives have been consumed for over two year in an effort to save their interest in this land. If this is denied they will not be able to recover the costs. They are trying to put their house in order after the drainageway ruling. Her brother has been their spokesperson and has given unselfishly to help. He has bent over backwards to work with the City and has been accused of intentional deception. She is asking the Council for approval of this application.

David Peterson, Attorney for Alma Costin, 888 SW Fifth Avenue, 16th Floor, Portland 97204 stated there is a lot of frustration on this remand. CDC 3290(a)(b) states the development has to be 5,000 sf. or less. LUBA found uncertainty as to why the sidewalk on the south side of the building is not being included in the calculation by staff. After the remand, Mr. Pritchard redesigned the project to eliminate the walkway, which is not a requirement. The exit door at the southwest end of the building goes away with the walkway similarly is not required by the building code. The storm drainage facility has been relocated and added into the calculations. There is an agreement between the City and the applicant that the development is under the 5,000 sf. requirement. There have been no materials submitted or alternative testimony that suggests there is any other number than 4998 sf.

The setback issue is a source of confusion. He feels the code definition for building height for houses to determine the building height of an office building or retaining

wall is wrong. If you consider the building, parking lot and retaining wall as one structure, the greatest differential is from the lowest point to the highest point is 10 feet. The LUBA suggestion was to look at the retaining wall and parking lot as a different structure from the building. Now there is a less than 10-foot grade differential. It is very difficult to apply housing requirements because there is no house, there is no exterior wall and there is no front. The rear-yard setback is being applied to the front of the lot. Staff is advocating measuring the height of the wall (30 inches high).

Setbacks primarily exist for fire safety, to avoid a sense of overcrowding, and to maintain the flow of light and air between buildings. This development is not implicating any of those problems.

All of the conditions of approval are acceptable to the applicant except the previous text requiring a re-vegetation plan to be approved by the Planning Director for the natural drainageway area and any areas of the site to be disturbed during construction but not permanent developed. The revision requires the applicant to re-vegetate the entire site with the exception of the permanent group. It will be a significant additional expense and effort on the applicant's part to re-vegetate even those portions of the site that don't get disturbed during construction. This goes beyond the impact. CDC 32.080 specifically requires vegetation only on the disturbed areas of the site. The applicant is asking that the second sentence be stricken from the first edition.

Councilor Burgess asked for clarification of the water retention site. Mr. Pritchard explained that the detention area is in the parking lot. This is a filtration system; all the water drains into the catch basin in the parking lot. From there it flows through a pipe and into the riprap area. There is no retention on site. The water is temporarily detained and then filtered out over time.

Councilor Burgess asked if the landscape plan was required with the revised application. Mr. Pritchard stated originally a landscape plan was submitted; however it is not included in the information passed out tonight. Landscaping will be in the area south of the exterior parking lot and continues on that side of the building. There currently exists along the property line is the neighbors 20-ft. tall, 8-ft wide Arbor Vitae hedge. The remaining space from the hedge to the building will be re-vegetated with native materials. The sidewalk was removed because the exit door was removed.

Council President Eberle asked if the trees were not an issue, could there be two compact parking spaces in that area. Mr. Pritchard stated this would still be a parking area. If parking was place in this spot and eliminated the parking in the rear setback it would save 300 sf. of resource area. This could be an option and the applicant would mitigate the trees.

Mayor King asked what modifications were made to the building to get under the 5,000 sf. Mr. Pritchard explained the changes made were to adjust the column spacing to change the location of full-sized spaces versus compact spaces. An exit door was removed, the interior staircase still exists. That is the only change made inside the building. Outside the building there were several changes:

- A change was made to the wall where they moved the parking within 5 feet of the property line which was allowed.
- They maintained the 5-foot distance so no part of the parking lot would be less than five feet from the property line.
- Two spaces were made compact spaces.
- Adjusted the turn-around area so it met the criteria
- The retaining wall was lowered from 8-feet to 30-inches high and move it uphill

Councilor Carson asked how the removal of the trees would impact the setbacks. Mr. Pritchard stated that removal of the trees would allow them to be well within the 25-ft setback. That corner of the parking lot would be closer to the creek. The vegetation plan will now include all the disturbed area where there was a sidewalk previously.

Testimony in Support

Laura Horsey, 1575 Hood Street thanked the councilors for their service and being here during this holiday time. They have been neighbors with the Costins' for about ten years. She built the house they live in and have developed or sold seven other lots in the immediate area. The lot under consideration is a remnant from the seven lots that were developed contiguously and is constrained in both size and deep slope to the stream.

After the City approved the Costin's prior plan, they took the matter to the State Land Use Board of Appeals because the proposed office building was too big. The plan was approved by the City even though it did not conform to City's codes.

Ms. Horsey submitted a document of requested comments in support of their request for denial of the application.

The LUBA remand is based on two issues. The Costins' did not show that there was no more than 5,000 sf. of disturbance of the land. This 5,000 sf. is the allowed limit. She asked if this quality for hardship. The head parking is located in the library site setback area and is still located there in the appended proposal. If the applicant were really being responsive, there would be something smaller in the amended proposal. She feels the parking lot is extending into the library side setback. The two encroaching spaces would not be required by code if the office building area were reduced to 80% (3,500 sf.).

If the applicant were seeking a hardship exemption to the stream code or being responsive to the intent of the stream protection, the entire footprint would be pulled back from the stream.

The top of bank has not been discussed yet it is the most sensitive area. It is questionable whether any development should be allowed beyond the top of bank, hardship or not. The Costins' are claiming a reduction in the developed area on the south side next to the existing law office by removing the sidewalk and landing to what had previously been a side-rear door. Now the door at the front of the building is the only door at grade level. She suggested that Council find out the height of the south side retaining wall. The dimensions are not given.

Ms. Horsey asked where the utilities will be located. This must be taken into consideration in order to know the full extent of the disturbed area. This basic information is not provided. She asked if Council felt they have sufficient information to base a decision. The hardship code puts the burden on the applicant to show compliance.

The property was zoned OCD when they purchased their home. They are not opposing the development of an office building. There are smaller office buildings, new and older throughout the Bolton area that would make a suitable model for this site. A much smaller office building wouldn't have the safety issues caused by the lower grade parking.

Ms. Horsey said she believes in property rights; hers, the Costins' and their neighbors'. The Costins' should be able to develop a reasonably sized office building that meets codes including basic compatibility with neighboring properties. City ordinances take into account the rights of both the developer and the neighbors. This is a quasi-judicial hearing and code compliance is primary. Council's role is to interpret the code. They are West Linn citizens should not have to go to Salem to have West Linn codes upheld. This has been very stressful and expensive for them as well. She asked Council to focus on the issues.

Ms. Horsey read into the record portions of a document prepared by her attorney.

Page two addresses disturbance to be limited to no more than 5,000 sf. of the subject property. The property is located along the drainageway and subject to CDC Chapter 32, the Natural Drainageway Protection Ordinance. CDC 32.090(a) provides, "Development shall disturb the minimum necessary area to allow the proposed use or activity and in any situation no more than 5,000 sf. of the water resource area including exit roads and driveways."

In summary, the applicant's supplemental materials do not provide adequate evidence to support the determination that no more than 5,000 sf. of the Maddox Creek drainageway and ravine will be disturbed to allow the proposed use.

Therefore, the application must be denied even if the buildings and parking areas perimeter boundary depicted by the applicant's submitted site plans are limited to less than 5,000 sf. The site plans do not calculate the disturbance of various utility installations and other construction impacts (grading, filling, pipes, etc.) that do not account for the total disturbance area of the proposal. Admitted impacts include the surface water detention facilities anticipated by recommendation for a staff report in this matter.

Ms. Horsey then turned to section three, Parking Area Setback. She feels the applicant and staff are trying to have it both ways. Is it an accessory structure or not. On pages 21-23 of the staff report, the applicant and limited terminology is considered the interview.

First it's said that the structure is measured from the front; next they say it should be considered an accessory structure, even though the application then and now does not claim an accessory structure. The staff report recommends considering the parking a separate structure even though the applicant does not. LUBA did not make a decision of how to they wanted West Linn to look at this; however they clearly rejected the notion of structures lacking in height. The staff report indicates the parking area advice is the equivalent of a paved driveway to a residential structure. In the setback area there is continuous use; it is parking whether it is under the building or exterior to the building. It is on the same foundation connected by asphalt. According to the contour lines, the rear wall is actually 36 inches. The railing is not included in the 30 inches, but it is believed the railing is required.

Section four addresses redesign of the parking lot areas. CDC 46 should be included in what is considered because the parking lot has been redesigned. It is her opinion that this violates CDC 46.1050(f) in that there is not a 23-ft requirement whether it is one-sided or two-sided.

There are changes to this design that should require it go back to the original decision-making body (Planning Commission). The changes should require a new submittal. A denial would allow the process to begin again with a more appropriately modified application.

The applicant does not show that no more than 5,000 sf. of the water resource area is disturbed giving the clear meaning of disturbed in the context of Chapter 32. In regards to the parking setback area, if you look at the structure as one structure it is clearly too high to qualify. If you look at it as two structures, the structure that comprises the use and the foundation for parking is too big. Other creative arguments have been rejected by LUBA. The redesigned lot does not meet CDC Chapter 46.

Questions from the Council

Councilor Jones asked the City Attorney to comment on the review requirements by the Planning Commission specifically for this remand. Mr. Monahan stated the obligation the City has is to address the issues raised by LUBA on remand. There is a requirement that these issues be addressed within a certain time framework once the applicant asks. That is what precludes sending this back to the Planning Commission. The issue raised is the City code has a requirement that states if an application as amended (new submittal) it needs to be presented by the Planning Director/Planning Commission. The applicant should speak to why what they have applied for is not an amendment but simply a response to LUBA's remand. It is an interpretation for the Council to make.

Mayor King asked Ms. Horsey to comment on what she meant by "having it both ways." Ms. Horsey stated that LUBA says the applicant claims that it has no accessory structure. In the narrative of the amended application the claim has not changed. Staff and the applicant look at this as an accessory structure but do not call it an accessory structure. If the structure is one structure (including the below-grade parking and the surface-area parking in the rear setback) it is managed from the height of the building as a whole (35 ft. not 15, not 30). Another way of looking at is if the back is a parking structure, and its use and foundation are continuous under the building, it is too big to be considered an accessory structure. She asked the Council to refer to her attorney's arguments in Section 3 on page 5.

The City's initial decision suggested the northwest (fill area) retaining wall is far below a higher elevation point near the grade of the southeast corner of the proposed office building. The retaining wall lacks height in some way that makes the wall less than 30 inches high and thus exempts it from the 25-ft. setback. LUBA rejected this analysis but staff adopts it again in support of a recommendation of approval. The analysis is obviously flawed. She pointed out her position on the height of the building on elevation drawings. It seems ludicrous to consider it as a separate structure; it's the same foundation and the same structure.

Mayor King agreed he feels the 5,000 sf. isn't a right, it's a privilege. The intent is to allow the use and minimize the disturbed area, not exceeding the 5,000 sf. Ms. Horsey stated a smaller office building could be built that respect the definition of disturbed as it exists in the riparian code section. If you are looking for a way to provide use with minimum disturbance, the building could be smaller.

Testimony in Support of the Application

Janet McCarthy, 1535 Burns Street stated her property backs up to Hood Street. She is between the Horseys' and Costins' property. She believes the Costins' have a right to build commercial property on this parcel. Her concerns relate to the size of the proposed structure and how it impacts the area's environment with the water area and the impact it has on the single-family residential neighborhood. This is a

mixed neighborhood, with homes on one side and commercial on the other side. She questions whether this development is within the 5,000 sf. limit.

Kari Oakes, 1125 Marylhurst Drive stated the purpose of Chapter 32 is to provide the highest protections for natural resource areas. Chapter 32 was revised to increase protections and to allow owners the opportunity to build on their property. The 5,000 sf. is not a given, the purpose is for the highest protections and still allow development. The hardship case is an extreme exemption that allows some protections minimized to allow the owner to have viable use of their land. The owner needs to show this is the minimum amount they need. The 5,000 sf. is a maximum and the City should make sure the applicant is staying well within that 5,000 sf.

Ms. Oakes noted the code does not define disturbance as permanently disturbed, however, she appreciates that the permanent disturbance has been shown tonight (building and parking structure). She feels the applicant should have included the driveway and utilities as part of the disturbance. She is unclear whether the access way is the increased width of Hood Street and whether it should be included in the disturbance.

Mayor King allowed **Ms. Oakes** a minute to complete her testimony.

Ms. Oakes voiced concern that all the entrance ways are in the one area where the stair well is. Both exists are within 20-feet of each other. She does not feel the City is following procedure by code. Chapter 99.120 indicates that amendments should be taken to the initial decision-making authority. She asked the City Attorney if Chapter 99.330, Revocation of Approvals would be something the Council could use in making their decision tonight.

Teri Cummings, 2190 Valley Court stated in Mr. Peterson's letter (12/21/08) there were issues raised by modifications are fair game. Clearly the applicant has made numerous modifications and they are fair game. One of the key issues is whether it was reasonable to try to propose such a big building in an area that is almost entirely in the riparian setback. Before revisions, the code would have specified a 150-ft setback plus 15 feet without a hardship clause.

Stream codes are intended to allow owners to have some use of their property. The applicant chose to go with 32.090(a) after switching from 32.090(b). The latter has provisions for economic viability. Staff compared this application with nine other buildings and found that this building is one-third larger than the average buildings in the area. There is no justification for such a large building in this area. The other buildings are not on a 60% slope and not almost entirely in a riparian setback.

In her opinion, the modifications do not create a better building. The parking structure is now separate and the only entrance and exit is in the same place. This

is a loss in design. Ms. Cummings asked Council to put in some provision for safety. She is in favor of denial of this application.

Councilor Burgess asked Ms. Cummings to comment on her issue of safety. Ms. Cummings stated that she feels the modifications compromised the safety of the project in that the rear entrance is being eliminated. There are issues of integrity when you put a building of this design (separating the parking lot and wall) on a slope. She feels the drainage triangle should not be in the fill area.

Daniel Hartung, 19448 Wilderness Drive stated he wanted to comment on the 5,000 sf. maximum. He uses the library on a frequent basis and he feels it is important to try and conserve the riparian area as much as possible. The applicant in response to the remand was to reduce the square footage by 2-3 sf. (removing sidewalks and reducing the parking lot size). He does not feel this meets the spirit of what LUBA required. This is a dead-end street and already is congested with parking. Reducing the parking lot size will impact that situation.

Neutral Testimony

Gary Hitesman stated he is with the Hidden Springs Neighborhood. He complimented Chris Kerr for the December 10th memo responding to the LUBA remand. He has seven observations he wanted entered into the record:

1. This process does not use our limited City resources properly. The Planner is trying too hard to substantiate the approval.
2. 32.0090(a) is poorly written. He questions the validity of what constitutes an economic hardship. There is an exit corridor and the drip line should be added to the area which will increase the 5,000 sf. calculation.
3. Do not believe the description of accessory structure as proposed by Mr. Kerr applies. The parking lot is a requirement of codes and programs. The structure and area needed are required.
4. There is a structure supporting the parking lot. The West Linn codes may have been met but have the State codes been met. A structural engineer will need to provide calculations based on the known characteristics of the site to determine if the wall is a structure.
5. Setbacks are needed to provide protection to the riparian area.
6. Landscaping is a critical component to the proposed system of storm water control.
7. Exiting is a function of occupancy. It is not clear to him that the code is met; there is only one exit.

Mr. Hitesman stated he is not against this development. The application may still be non-conforming. He suggested that the application go back for redesign and made to comply with what the LUBA remand states.

Alice Richmond, 3939 Parker Road stated that she has lived in this city for 50 years. Staff is being paid to do a good job. She feels staff has reviewed this application and she is confident that they have made the correct recommendation.

Lynn Fox, Hidden Springs Neighborhood Association stated that Mr. Hitesman testified that he was speaking for Hidden Springs Neighborhood Association; he is not authorized to do so. He is a resident and entitled to his opinions. She just would like to clarify that he does not have authority to represent the views of Hidden Springs Neighborhood Association.

Councilor Burgess moved to extend the meeting to 10:30 p.m. Councilor Jones seconded the motion.

Ayes: Burgess, Eberle, Carson, Jones, King

Nays: None

The motion carried 5-0.

Recess was taken and the meeting reconvened at 10:05 p.m.

Applicant's Rebuttal

Mr. Peterson stated he appreciated the efforts everyone has made to focus on the two issues the remand is limited to. He made a blanket objection to any arguments that have been made in opposition that are not related to the two issues of the remand. These comments were outside the scope of this hearing, raised previously before Council, not appealed to LUBA and waived. Some of the issues he objects to are:

- The appropriateness of the size of the building. The concept of the size of building on this site is incorporated into the Water Resource Code in the language that requires the Council to determine that the application is using the minimum necessary area for the use proposed.
- The use proposed is not just an office building; the use proposed is an office building that is economically feasible and has a reasonable opportunity of being built. The issue appealed was does this project impact 5,000 sf., yes or no. They submit the answer is no.
- The question of whether or not to count temporary disturbance toward the 5,000 sf. total. If you count the temporarily disturbed areas which the applicant is obligated to re-vegetate to its natural condition, it defeats the purpose of the re-vegetation plan.

Mr. Peterson stated that they advocate the retaining wall can be an accessory structure. Staff has suggested this is a valid interpretation, notwithstanding any previous staff report indicated. The LUBA decision says the City may consider that theory on remand if it wishes. Council has the discretion to apply the accessory structure definition to the retaining wall if they so chooses.

The uphill retaining wall was on the prior plans. The parking lot could not exist without an uphill retaining wall. That wall being a structure violating setback argument was not appealed to LULBA.

It was suggested that by measuring contour lines the lower retaining wall may be 36-inches high. There is a condition of approval proposed which says the retaining wall will not exceed 30 inches. The applicant is not objecting to this condition.

In response to the suggestion that the amended application go back to the Planning Commission, Mr. Peterson stated the modifications that have been made are exceedingly minor. They were only made in response to LUBA's direction as to where the project may be inadequate.

The east-side sidewalk is not on the Costins' property; it is in the public right-of-way. It drains in the other direction onto the street into the catch basin at the bottom of the street.

The transformer mentioned in testimony was already there; it is not owned by the applicant. The square footage of the transformer would not count towards the disturbance being caused by the applicant.

Mr. Peterson stated he submitted a letter into the record that objects to Ms. Cummings testimony in her letter.

Questions from Council

Councilor Burgess asked for confirmation of the condition requiring the 30-inch limit. Mr. Peterson stated that Condition #11 states, "...would not increase, but what is shown on the approved site plan." The applicant is in agreement of changing that language to say 30-inches if Council wishes.

Councilor Burgess asked if the building height is maxed out. Mr. Pritchard indicated the height is close to the maximum peak. They are agreeable to lowering that and take 6-feet off the top of the building.

Councilor Burgess asked what the impact would be if the excavation hole were deeper. Mr. Peterson stated that lowering the parking lot would not achieve much. It would create problems coming into the entrance into the building.

Councilor Burgess asked for clarification of the applicant's objection to Condition #1 regarding re-vegetation, "The Re-Vegetation Plan shall cover the entire site except for the actual building and parking area footprints. The re-vegetation area shall not allow a buffer zone between the vegetation and building." Mr. Peterson stated that in Condition #1 there was a sentence added to the previously approved condition. The clause about not allowing a buffer zone is fine. He reads it to say that the

applicant will have to re-vegetate the entire site to the extent that it has not been improved with permanent improvements. He is seeking clarification that this sentence refers to areas disturbed.

Council President Eberle asked why the two parking spaces were put outside the parking area. Mr. Peterson stated the parking spaces were put in that location to save the significant trees. In order to include those parking spaces in the inside parking area would have increased the building size. The applicant is not opposed to relocating this outside parking.

Councilor Carson asked if the applicant knew where the utilities are located on this property. Mr. Pritchard stated a utility plan will be submitted. The sewer line is across the east side of Hood Street. The only other utilities will be their drainage from around the building to the filtration system. Power will be underground from the existing transformer. There will be no other utilities beside sewer and water. The water line in the street is required to be upgraded from the corner of Hood and Burns Street. The only utility work to be done outside the construction zone of the building footprint will be the connection of the water line across Hood Street.

Mayor King asked if the 5,000 sf. calculation only include the outside sidewalks not the public sidewalks. Mr. Pritchard stated the sidewalk east of the property line and in the public right-of-way is not counted in the 5,000 sf. calculation.

Council President Eberle moved to extend the meeting to 11:15 p.m. Councilor Carson seconded the motion.

Ayes: Eberle, Carson, Burgess, Jones, King

Nays: None

The motion carried 5-0.

Final Staff Comments

Mr. Kerr stated he was not here during the original pre-application conference through the site plan. He suspects part of the reason the surface parking area was further to the west is because the trees are significant and would have triggered a possible variance or significant tree issue. If Council is leaning towards a motion addressing this situation, staff would have to review the information to see if this would not create a worse scenario. Council could at that point have the option of referring it back to the Planning Commission.

Mr. Monahan stated Section 99.120 speaks to amendments. Section A says an amendment application shall be required if the Planning Director determines that the proposed revision will change the project by a factor greater than 10%. The code goes on to say, "...10% in a quantifiable manner, namely the number of proposed lots, square footage of the proposed buildings, number of parking spaces, or relocation of building footprints."

Section 99.330 speaks to revocations of approval. Revocations are those instances when there is an approved application and there are conditions of approval. The applicant or the developer doesn't follow those conditions of approval. The code provides an opportunity for the City to go through a process to revoke the application. This clearly is not that situation.

Questions from City Council of Staff

Councilor Burgess asked staff to comment on the re-vegetation language in Condition #1 and the last sentence in Condition #11 regarding the definition of structure. Mr. Kerr stated that the retaining wall is considered a separate structure so there wouldn't be any misunderstanding about whether this was a separate structure or not. Treating the wall as a separate structure impacts how the height is measured. You can call it an accessory structure even if it were formally attached to the building. While the retaining wall butts up against the building, it is a separate structure. He feels the applicant submitted the application with the break shown between the building and the retaining wall for the purpose of meeting the specific letter of the code.

Mr. Kerr stated he intended to have a specific 30-inch provision in a condition to make sure that it is clear. The end of the first sentence talks about the proposed retaining wall. He suggested adding a sentence, "The wall height may be less than those shown in the approved plan but may not exceed 30 inches in height within 20-feet from the rear of the property."

It is staff's intent to have applicants remove non-native species and re-vegetate with the City's plant list. The re-vegetation plan will be for any areas that are disturbed around the building. The re-vegetation Plan should include some type of language as to how the applicant will treat the area along the creek. The term "landscape plan" would be better than re-vegetate areas that are disturbed.

Councilor Carson asked the City Attorney to comment on the whether the right-of-way should be included in the 5,000 sf. calculation. Mr. Monahan stated the code language says, "Development shall disturb the minimum necessary area to allow the proposed use or activity in any situation no more than 5,000 sf. of the water resource area including access roads and driveways." In his opinion this speaks to only to the developable site, not off-site. If the City right-of-way is also within a water resource area, it would not be considered in the calculation.

Mr. Kerr indicated the 5,000 sf. only applies to the applicant's lot; none of the improvements that take place in the right-of-way.

Mayor King asked what purpose the fill between the parking area and retention pond has. Mr. Kerr stated the applicant needs to bring in the fill and put in the adjacent retaining wall to make this parking area level so it drains appropriately.

Councilor Carson asked if the City owns right-of-way for a street and sidewalk, is the applicant required to put in a sidewalk on the right-of-way? Mr. Monahan stated there is not a dedication necessary in this situation. If there is right-of-way owned by the City, the applicant is required to build the sidewalk on the City-owned right-of-way.

Chris Kerr explained there is an existing sidewalk that now runs a few feet within the right-of-way. The sidewalk the applicant needs to put in moves to extend that portion of the sidewalk further down.

Mr. Monahan LUBA was specifically focused on the eliminated sidewalk, not all sidewalks. There is discussion on circled page 19, page 3 of the LUBA decision states, "...petitioners argue the City failed to consider the square footage of A sidewalk that runs along the south side of the building." If that square footage had been considered the area disturbed by the development would have exceeded 5,000 sf. LUBA was addressing the portion of the property that was subject to the application that was to be disturbed.

LUBA had the entire file with the original drawing to show how the building was to be situated and where there would be a public sidewalk and where there was this on-site sidewalk. They were specifically looking at the on-site sidewalk.

Hearing no further questions from Council and no further response from staff, Mayor King closed the public hearing.

Councilor Burgess moved to approve West Linn City Council Final Decision Notice AP-08-01 in the matter on remand from the Land Use Board of Appeals to address specific issues related to the City's approval of a design review and water resource area permit for an office building at 5750 Hood Street per Agenda Bill with the following exceptions:

- **Amend Condition #1 by replacing the word "re-vegetation" with "landscape."**
- **Amend Condition #11 to read, "...construct and may not increase in height above what is shown on the approved site plan and in no case in excess of 30 inches."**
- **Add Condition #12, "Prior to commencement of site development, the applicant's storm drainage management plan and system is subject to approval by the City Engineer."**

Councilor Jones seconded the motion.

Councilor Burgess noted this issue is dealing with a proposed hardship. The question is if the motion adequately addresses it. The code is inadequate to address the retaining wall. In response to reducing the disturbed area, the applicant has removed the sidewalk on the south side which is not critical to the development. Staff has indicated the removal of the exit did not violate code. He does have concerns about the storm drainage because the size could violate the 5,000 sf. However, there needs to be a storm drainage system that works. He feels staff has addressed the issues raised by LUBA. He will be voting in favor of this motion.

Councilor Jones stated he will be supporting this motion. Two issues were under consideration tonight, the disturbed area (5,000) and the parking and retaining wall. The landscaping plan proposed will take care of the disturbed area issue and having the 30 inch limitation adequately addresses the retaining wall concern. He does not feel the public sidewalk should be part of the 5,000 sf.

Councilor Eberle stated that she feels comfortable with the calculations that have resulted in tonight's discussion regarding the retaining wall and disturbed area. The applicant's revised design meets the rear setback requirements. Looking at the application as a whole she feels a better design would be to move the two compact car areas into the corner eliminating an extensive amount of parking lot and allowing for the sidewalk to be put back in.

Councilor Carson stated she feels that the LUBA concerns have been adequately addressed. She agrees with the idea of eliminating the outside parking areas; however does not feel it is within the scope of the Council's decision tonight. She is in support of Condition #12 and having a plan for the construction of the drainageway and making sure the plan is not going to cause any downhill erosion.

Mayor King stated he is not in support of this motion. He feels all of this is predicated on this project meeting the requirements of the structure, "...subordinate structure with maximum area of 1,500 sf. except where agricultural building is located on a lot which use is incidental." It is not incidental; it is clearly an integral part of the application. It doesn't meet the definition of an accessory structure under the code. Once that happens, all the other issues fall by the wayside. The justifications don't hold water once it is determined it is not an accessory structure.

Councilor Burgess stated he is intrigued by the proposed parking lot alternative design and agrees it is not something that can be decided tonight. He too does not care for the decision of "accessory structure" and feels the 30-inch limit on the structure is adequate.

Mr. Monahan suggested that the applicant be given an opportunity to comment on the new Condition #12 being proposed.

Councilor Burgess moved to extend the meeting to 11:30 p.m. Councilor Jones seconded the motion.

Ayes: Burgess, Jones, Eberle, Carson, King

Nays: None

The motion carried 5-0.

Mr. Peterson stated the applicant will maintain their objection to Condition #1. They have no objection to the new Condition #2; however, Condition #2 in the proposed final decision has not been updated with the new text. He asked that in Condition #11 it is clearly stated that only the north retaining wall is required to be limited to 30-inches. There is no objection to the new Condition #12.

Councilor Burgess moved to amend the main motion to revise the language in Condition #2 as proposed by staff in their December 30, 2008 memorandum with changes in the text to clarify that the 30-inch limitation refers to the northern retaining wall. Councilor Jones seconded the motion.

A member of the audience raised a point of order. She understood that hearing was only to address the two issues remanded by the Council by LUBA. The Council is now deciding on a new condition and she would like to have the record kept open so she can respond to the new condition.

Mr. Monahan explained that Council is only required to allow the applicant to provide input when a new condition of approval is proposed prior to a decision being made.

Ayes: Carson, Burgess, Jones, Eberle, King

Nays: None

The motion carried 5-0.

Vote on the main motion:

Ayes: Jones, Eberle, Carson, Burgess

Nays: King

The motion carried 4-1.

Mayor King adjourned the meeting into Executive Session at 11:25 p.m. pursuant to ORS 192.660(a)(h) to consult with legal counsel concerning current litigation or litigation likely to be filed. The Mayor also announced the City Council will be reconvening in a public meeting following the conclusion of the Executive Session.

The City Council reconvened in Council Chambers at 12:30 a.m. on December 31, 2008.

Councilor Jones moved to approve the proposed employment agreement with City Manager Chris Jordan. Councilor Carson seconded the motion.

Ayes: Eberle, Carson, Burgess, Jones, King

Nays: None

The motion carried 5-0.

Adjournment

The City Council meeting of December 30, 2008 adjourned at 12:21 a.m. on December 31, 2008.