City of West Linn

Memorandum

Date: January 26, 2011

To: John Kovash, Mayor
Members, West Linn City Council

From: Chris Jordan, City Manager

Subject: Land Use Appeals Process

Purpose
This memorandum has been prepared to initiate a Council discussion on the City process for City Council land use decision appeals.

Background
In accordance with Community Development Code (CDC) 99.280, all appeal hearings before the Council are de novo. Therefore, the record from the Planning Director or Planning Commission review/decision is considered by the Council along with any new documents and testimony the parties to the appeal care to submit.

The City charges $400 to appeal a land use decision to the Council; appeals are free for recognized neighborhood associations. The fee is set by resolution and is part of the Master Fees & Charges schedule. The free appeal for neighborhood associations is established by CDC 99.240.

Attached is a chart providing some details of each of the appeals from the last two years.. Although there have been only three appeals, they have been expensive to process and hear, and time consuming for staff.

Discussion
The issue for Council discussion is whether or not land use appeals should continue to be de novo. There are some advantages to de novo appeals:

1) Hearings allow citizens and the applicant to provide additional relevant information for consideration by the Council.
2) Hearings allow individuals who failed to testify or provide information during the initial review process to participate at the appeal hearing.
3) Hearings remedy any procedural errors that may have occurred in the earlier decision process. (No procedural errors were raised on appeal during the last two years.)

There are also some disadvantages to de novo appeals:

1) Applicants can use the land use process as a negotiation by proposing one development during the initial process and a modified version during the appeal, thus testing the limit of the City's willingness to approve the project.
2) Applicants can use the de novo process to "stuff" the record for the appeal hearing in an effort to overwhelm and confuse the decision makers so that the decision is vulnerable to being overturned or remanded by the Land Use Board of Appeals (LUBA). In addition, the influx of new materials and arguments in the short time frame dictated by the 120-review period increases the potential for staff errors and incomplete findings that can be raised at a subsequent appeal to LUBA. This creates legal and financial risks to the City.
3) The de novo process effectively leaves the Planning Commission as only a recommending body on those items that are appealed, as opposed to a decision making body. Applicants and citizens can effectively skirt the Planning Commission if they think that the Council would be more willing to see things their way. Having an appeal "on the record", rather than de novo, would require the applicant and other participants in the process to submit all relevant information to the Planning Commission so they have the benefit of such information in reaching their decision.
4) The de novo appeal is essentially a rehearing of the case. "On the record" appeals are generally simpler and more straightforward because the Council must determine whether the original decision properly applied the code to the facts.
5) The de novo appeal process is excessively time consuming for staff and the Council as well as the applicants and members of the public trying to monitor the project. Due to the typical influx of new material and arguments, staff is forced into spending significant time analyzing the new information, compiling the expanding record, and drafting a new staff report and findings pertaining to an application that may be of relatively low priority to the Council, thus undermining their capacity to work on the Council's priority projects. And, the Council can spend several hours and, on occasion, several nights on an application that can distract the Council from its other priorities.
6) Because of the low or nonexistent fee, the cost of the appeal process is borne by the City's taxpayers. In recent cases, the added processing costs for the City and the project proponent have not yielded significant benefits because the appeal did not result did not result in a changed decision.

The attached chart details the cost of de novo appeals. The chart includes the cost of staff time, other city expenses, and legal costs. In total, the three appeals referenced above cost the City approximately $100,000 to process. The cost would be approximately ten percent of the cost of a de novo hearing if the appeal hearing was based entirely "on the record" established through the initial decision process.

Although some cities occasionally offer de novo hearings under certain circumstances, research of other cities throughout the state indicates that other cities typically offer "on the record" hearings.

Staff believes it is appropriate to reconsider the City's approach regarding appeals to determine if de novo appeals are in the best interest of the community and the City.

Options for Changing the Current Process

There are numerous tools available to revise the de novo appeals process, if the Council so chooses. The following options may assist in a Council discussion on this matter:

1) Increase the fee for a de novo appeal to more accurately reflect the processing cost to the City and to discourage frivolous appeals. A few years ago the appeal fee was $2,500. However, during the time the fee was at that level, no appellant ever paid the fee; all appeals were either by neighborhood associations (free) or the Council "called up" the application for review.
2) Change the CDC to make all appeal hearings "on the record." The record that is created during the original decision process will remain the record for the appeal and no new issues could be raised on appeal.
3) Modify the CDC and create a hybrid system for appeals. The City could continue to charge a relatively low fee for "on the record" appeals. However, if an appellant desired a de novo hearing, the CDC could require that 1) if it is the applicant who is appealing, the applicant must be willing to extend the review deadline by at least 30 days; and 2) the fee would be much greater, up to, perhaps, the full cost to process the appeal.
4) If the Council decides to continue to allow free appeals for the neighborhood associations, consider only allowing free "on the record" appeals.

Conclusion

As staff, we believe it is incumbent upon us to identify areas that can be made more efficient and/or effective. De novo hearings are costly to tax payers, with a benefit that seems to be marginal, at best. We believe this topic is worthy of a Council discussion as soon as practical.

Attachment

2009-2010 Land Use Appeals

Subject	Appealed by	Hearing Date	Fee received	Planning staff cost to process*	Legal Cost*	Total Cost	Net Cost to City	Decision
Suncrest 6-lot PUD	Hidden Springs NA	1/4/2010	$0.00	$22,097.00	$2,612.00	$24,709.00	$24,709.00	Upheld PC decision w/ amended conditions
Bundy swimming pool	Bundy	7/19/2010 9/13/2010	$400.00	$37,815.00	$18,910.00	$56,725.00	$56,325.00	Upheld Planning Director decision
Tannler West extension	Savannah Oaks NA	11/29/2010	$0.00	$11,325.00	$1,674.00	$12,999.00	$12,999.00	Upheld PC decision
		Total:	$400.00	$71,237.00	$23,196.00	$94,433.00	$94,033.00	

* The cost shown here for staff and legal is the cost for the period of time between the original decision and the Council decision. It does not take into account any costs that might be incurred by an appeal to the Land Use Board of Appeals.