



## PLANNING COMMISSION

Minutes of May 16, 2012

Members present: Chair Michael Babbitt , Vice Chair Gail Holmes, Russell Axelrod, Thomas Frank, Robert Martin, Holly Miller and Christine Steel

Members absent: None

Staff present: John Sonnen, Planning Director; Chris Kerr, Senior Planner; Zach Pelz, Associate Planner; and Pam Beery, Legal Counsel

### PREHEARING WORK SESSION

Chair Babbitt convened the prehearing work session at 6:45 p.m. in the Rosemont Room of City Hall. The applicant's counsel, Ed Sullivan, was present. Ms. Beery announced the applicant had just submitted a request to suspend processing of the application until they could work out issues. They would couple the pipeline application with the treatment plant application and work with West Linn on the intergovernmental agreement that would be needed due to Tigard joining the Partnership. They had agreed to continue the 120-day rule for as long as it took. She and staff believed Oregon statutes would limit the process to 365 days even if the applicant was willing to extend the time period. That meant the combined package would have to be processed by sometime in February. She suggested the procedure be to reopen the public hearing; ask the applicant to come forward to clarify their request; then decide the request. She related the applicant's counsel was offering to withdraw a previous letter he had sent regarding leaving the record open if the Commission agreed to suspend the application. If the Commission decided not to table it the applicant would likely maintain that request to keep the record open. Staff would then advise the Commissioners how to complete that cycle in 21 days and then act.

During the discussion the Commissioners wanted to know if West Linn would lose jurisdiction if the application remained tabled beyond the 365-day period and if the current record would be part of a new application if the current one were withdrawn. Ms. Beery advised the application would be 'dead' if it were suspended that long and if the applicant wished to they would have to start all over. If the applicant withdrew and then submitted a new application they could place the existing record in the new record. But they had indicated they were not willing to withdraw the current application. If the Commission denied the current application the applicant could not submit a new one for one year. When asked, Ms. Beery confirmed the Commissioners could give themselves a week to think about what made the most sense. Chair Babbitt recalled the public wanted to combine the plant and pipeline projects. Mr. Sonnen observed the suspension would give the applicant more time to resolve neighbors' concerns and the intergovernmental agreement. It would be more efficient to process the projects together. Commissioner Martin observed a benefit of starting over with a new application was that the City would not have to worry as much about the clock. Ms. Beery reported the applicant's legal counsel had indicated that if the Commission allowed the suspension they would agree not to pursue mandamus against the City based on the 120-day clock. She advised the Commission to ask the applicant about that at the hearing to get it on the record. She advised the Commissioners to be cognizant of *ex parte* contacts and not state a position on the application during the suspension period. Staff clarified the pipeline application had not been submitted yet. It would likely be submitted in June. Staff would have 30 days to deem it complete. The 365 day deadline would be February 21, 2013. There should be sufficient time

to process the combined application to an appeal to the City Council if the Commission managed the open record period aggressively. Staff would watch the clock and alert the Commission to consider acting on the application if they saw the clock running out.

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### **CALL TO ORDER – REGULAR MEETING**

Chair Babbitt called the meeting to order at 7:30 p.m. in the Council Chambers of City Hall.

### **PUBLIC COMMENTS (Regarding items not on the agenda)**

None.

### **PUBLIC HEARING**

CUP-12-02/DR-12-04, Deliberation and action – Proposal to modify and expand the Lake Oswego Water Treatment Plan and site (Public comment period was closed)

Chair Babbitt announced the applicant had submitted a request to table the application to a date uncertain. He reopened the record and invited the applicant to come forward.

Ed Sullivan, Garvey, Schubert Barer, 121 SW Morrison, 11th Floor, Portland, Oregon 97204 and Joel Komarek, Director, Lake Oswego-Tigard Water Partnership, represented the applicant. Mr. Sullivan pointed out that he had submitted the May 16, 2012 letter indicating that the project's Oversight Committee had instructed him to ask the Commission to suspend the current proceedings in order to allow the applicant time to do several things. They had heard the public ask that the pipeline and plant applications be heard together. They expected to file the pipeline application in mid-June so the Commission could consider it along with the water treatment plant application. The Partnership was reviewing its intergovernmental agreement with the City of West Linn. It was time to do that in the sense of looking at the supply of emergency water or normal water provision to the City. They wanted the opportunity to talk with City staff about coming up with an arrangement for water that was more complete and more certain so it would be part of the consideration. They wanted to have the opportunity to talk more with the immediate neighbors and the neighborhood association about further mitigation. They were aware there were folks who would not abide by the applicant's application under any circumstances. But they wanted to be able to talk with those who were willing to talk with them to see if there were further opportunities for mitigation.

Mr. Sullivan spoke to a couple of the legal issues he had heard the Commissioners talk about. He advised the 120-day rule, which had been extended, could be waived by the applicant upon the applicant's request. He stated they were requesting (and would put it in writing if the Commission wanted them to) to extend the 120-day period consideration for the life of the applications. That meant they would not be seeking any mandamus or other relief on the basis of timing. They would not do that anyway, but he was prepared to give them that assurance on the record that night. He said another thing he had heard them talk about was how to deal with the timing on the applications. The applicant currently had about a one year period under Oregon law for completion of the proceedings. He and the City's legal counsel might disagree about that. He recalled a case in which it had been alleged that the 365-day period was violated and the application was dead. But LUBA did not find it to be that way. Nonetheless he was willing to work with the Commission and counsel to whatever period that was allowable by law for a maximum time of deciding the case. Submitting a second application would start a different period. The applicant would waive that 120-day period as well so the City would basically have the one year period for the first application to decide both unless the City's counsel was satisfied that there could be an extension. Mr. Sullivan stated that he and Mr. Komarek were there to hear the Commissioners' concerns. He said he would put the request in

writing. He distributed the May 16, 2012 Memorandum from Mayors Craig Dirksen (Tigard) and Jack Hoffman (Lake Oswego) that he said conveyed the same request.

Commissioner Martin asked why the applicant had decided on this approach rather than withdrawing. Mr. Sullivan explained that withdrawing would require the applicant to go through another neighborhood meeting; pay another fee; start another whole process; and extend this out three or four more months. They would rather keep the testimony in the record and proceed by conjoining that with the second application. He clarified that the applicant had already held the neighborhood meeting related to the pipeline application. Commissioner Miller asked if it would be reasonable to have another neighborhood meeting on the combined application. Mr. Sullivan said they had held the two individual meetings and everybody knew this was the same project. He was not sure what the applicant would gain by doing that. Commissioner Miller asked them to consider having another meeting. Mr. Sullivan said if he got that consensus the applicant would sit down with the neighbors and talk with them about it. Chair Babbitt noted that Mr. Sullivan's letter indicated that the additional time would allow the applicant to conduct further discussions with the affected neighborhood associations and individual neighbors. Mr. Sullivan said the applicant was certainly willing to sit down and talk with the neighbors about the consolidated applications. Commissioner Axelrod indicated he would view that as an open book opportunity to work with them on the whole project. He would expect them to do whatever it required, even holding another public meeting. Mr. Sullivan looked for Commissioners nodding heads and then agreed the applicant would do that.

Commissioner Martin recalled the applicant's rationale for not combining the applications to begin with was that the permits were not ready for the pipeline. He asked why they did not wait for that and then apply for a combined plant and pipeline permit. Mr. Komarek explained it had to do with the fact that there were six separate program components. Each of them had unique permitting requirements (both environmental and land use) and construction durations. The construction duration for the plant project was much longer than it was for the pipelines. In order to manage their design and permitting and planning resources they chose to move designing of the plant forward at a faster pace so they could get the land use application in earlier in order to accommodate that longer construction period. It all had to be done at the same time at the end. But they all had different construction periods and durations. They had no choice but to start this sooner. He agreed with Commissioner Martin's summary that it allowed the applicant to optimize use of their resources by spreading them out.

**Chair Babbitt closed the public record.**

Commissioner Steel **moved** to grant the applicant's request as stated in their letter and as explained verbally to suspend or table CU-12-02/DR-12-04 to a date uncertain. Commissioner Frank **seconded** the motion. Ms. Beery clarified for the public that the Commissioners had an opportunity to discuss the request at the prehearing work session. The proposal would place the application in inactive status for an undetermined time. The Commissioners anticipated the current application would be combined with the waterline application and they would hold new hearings on the combined project. A new public notice would be distributed for those hearings. All of the testimony that had been offered so far would be carried forward and would remain in the record, which was closed. A new hearing would be scheduled when the time was right. She clarified that the application had not been withdrawn and was still pending. The Commissioners should continue to be vigilant and do their best to avoid *ex parte* communications; keep track of them; and disclose them when they reconvened. That would most likely be in the fall. They should do their best to avoid making statements that might lead people to believe they were biased about the projects. She reminded the Commissioners they should not be engaging in deliberations during the period. They should treat the suspended application like a pending application.



Commissioner Martin complimented the applicant for listening to the testimony and taking positive action to deal with it. He acknowledged all the people who had taken the time to testify and offer their ideas. He hoped they saw that the process was working. The applicant had heard and responded to it. He hoped parties on both sides would continue doing that. Vice Chair Holmes recalled the applicant had offered to submit a signed document. Ms. Beery noted Mr. Sullivan's oral assurance was recorded on DVD and on the record. She would prefer to keep the record closed. Commissioner Axelrod asked when the public could get involved again; how they would know when the time came; and how parties interested in the pipeline project could get up to speed regarding the plant project. Ms. Beery advised that when the staff received the pipeline application they would review it and then send out the normal public notice plus additional notice to interested parties who had signed up to receive information about the applications. The documents in the record would be available on the website.

Vice Chair Holmes asked about the required meeting with the neighborhood. She indicated she wanted them to have an opportunity to look at the combined project. Mr. Sonnen related the applicant had assured the staff they would hold a meeting to talk about the whole project, but it would not be the formal, code-based, meeting with the neighborhood association that could delay the project. The result could be the same if they held a meeting with residents all along the project and the neighborhood association. Chair Babbitt pointed out the Commission had their written statement that they would conduct further discussions with the affected neighborhood associations and individual neighbors. **The vote was conducted and the motion passed by unanimous vote.**

Chair Babbitt clarified that everyone who had testified before would have another opportunity to testify about the joint application. Notice would be distributed.

#### **ITEMS OF INTEREST FROM THE PLANNING COMMISSION**

None.

#### **ITEMS OF INTEREST FROM STAFF**

None.

#### **ITEMS OF INTEREST FROM THE COMMISSION FOR CITIZEN INVOLVEMENT**

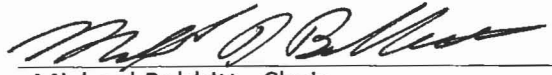
Mr. Sonnen clarified that the Commission was scheduled to follow up on the Bland Pump Station at their June 20 work session. Commissioner Martin suggested the Commissioners think about how to use the Trails Master Plan and water treatment plant hearings as learning opportunities related to how to create more harmonious hearings.

Commissioner Axelrod asked if the neighbor to neighbor lighting issue had been resolved. Mr. Sonnen advised that it was a pre-existing, lawful use the City could not do much about from a regulatory standpoint. The administration was not prepared to address it as a nuisance at this point. The homeowners association's authority to regulate it was limited. The issue would be addressed in a package of code amendments to be presented to the Commission in the summer. The staff had researched how other jurisdictions regulated lighting between residences. The only thing they could do was restrict the hours of operation and the kind of bulb, so when the bulb needed to be changed it had to be replaced with a less bright, less onerous bulb. That might not fully address the complaining residents' concerns. They had sent Mr. Sonnen an email within the last few days. Commissioner Miller related that each neighbor lived in a different neighborhood and neither neighborhood had an active homeowners association.

#### **ADJOURNMENT**

There being no other business, Chair Babbitt adjourned the Planning Commission meeting at 8:01 p.m.

APPROVED:



Michael Babbitt, Chair

6-26-12

Date