



CITY OF
West Linn

PLANNING COMMISSION

WORK SESSION

Minutes of March 7, 2012

Members present: Chair Michael Babbitt , Vice Chair Gail Holmes (arrived at 6:52 p.m.), Russell Axelrod, Thomas Frank, Robert Martin, Holly Miller and Christine Steel

Members absent: None

Staff present: John Sonnen, Planning Director; Damien Hall, City Attorney

CALL TO ORDER

Chair Babbitt called the meeting to order in the Council Chambers of City Hall at 6:45 p.m.

PUBLIC COMMENTS

Tim McGill, 3020 Remington Dr. explained how he and his wife Mindy were affected by intrusive light and noise coming from a neighbor's sport court. They had been unsuccessful in negotiating a reasonable solution with the neighbor. They had turned to law enforcement which had cited the neighbor for violating the noise ordinance. The problem continued and they were looking to the City to legislate a solution to the light trespass problem.

Mr. Sonnen reported the City Council had directed staff to propose code to address lighting control between residences. Mr. Hall advised the nuisance code was another avenue. The Commissioners asked if the neighbor was able to control when the light was on or off; if there were any homeowners' association rules to apply; and if shielded fixtures would help. Mr. McGill confirmed the neighbor manually controlled the light. The homeowners association was not active and there were no rules that applied to lights. The neighbor had installed a small shield on the light which had not helped. Chair Babbitt related that the Commissioners might look into it to find out what options there might be and forward a copy of the report to the McGills.

Alice Richmond, 3939 Parker Rd., encouraged everyone to come to the Emergency Preparedness Fair on March 14.

APPROVAL OF MINUTES

Commissioner Steel **moved** to approve the Minutes of February 15, 2012. Commissioner Miller **seconded** the motion and it **passed** 7:0.

LEGAL QUESTIONS AND ANSWERS

Refresher on ethics and procedure

Mr. Hall advised that the Commission is often acting as an impartial tribunal in a quasi-judicial hearing. Ethics rules that applied to a quasi-judicial hearing were specific to issues of bias and conflict of interest. A Commissioner could not participate in decision making having prejudged the decision (bias) and she/he could only base the decision on evidence in the record of the hearing. If a Commissioner had a bias and had prejudged the decision he/she had to step down. *Ex parte* contact must be disclosed at the outset of a quasi-judicial hearing and a decision could not be made based on *ex parte* information unless it was disclosed for the record so the rest of the Commissioners and the public had an opportunity to respond to it. Failure to

disclose ex parte contact could be grounds for remand. In a legislative hearing the Commissioners were legislators who could bring their own beliefs and policy interests to the table and use them as guidance for decision-making, therefore the bias and ex parte issues are not applicable in the legislative setting.

Conflict of interest and potential conflict of interest standards applied to both kinds of hearings. A Commissioner had a conflict of interest if the outcome would have any financial impact on him/her, his/her business, a family member, or a business associate. A Commissioner was to disclose a conflict of interest at the start of a hearing and step down. A Commissioner was to declare a potential conflict of interest at the start of a hearing, before any testimony. Anyone could challenge whether it was an actual or potential conflict. If the Commissioner decided not to step down another Commissioner could call for a vote on it.

Discussion

Mr. Hall invited any Commissioner who had a question about ethics to contact him or the Oregon Ethics Commission to discuss their specific situation. He addressed things he had been asked about. The community had been talking about siting a new police station. The Commissioners could anticipate that the application would be heard by the Commission. Mr. Hall advised them not to engage with friends and others about the specifics and the logistics of the application. That would be viewed as *ex parte* communication. If they got sucked into a conversation somewhere, they should try to keep it brief and then fully disclose the conversation and the substance of the conversation at the start of the hearing so anyone could respond to it. There had been articles in the newspaper about the police station. Mr. Hall advised if that *ex parte* communication got into how code criteria related to the development it would be best for someone on the Commission to declare they had read the article and bring a copy for the record. He suggested if a Commissioner received an email with a subject line that indicated it might be about an upcoming hearing he/she should not open it but forward it to the staff.

Mr. Hall then addressed the question of whether or not the Comprehensive Plan was applicable in making quasi-judicial decisions. He clarified that the Comprehensive Plan was usually not directly applied to quasi-judicial applications as approval criteria. If the Plan called something an aspiration or goal it could not be used to decide an application. However, if something in the Plan was explicit enough to be approval criteria it could be used to make a decision when the Commission was called upon to interpret and apply ambiguous or very subjective code, or if the context of the comprehensive plan provision made clear that it was intended to be applicable as an approval criterion. The Commissioners wanted to know if that was also the case when it came to other plans, such as the TSP and neighborhood plans. Mr. Hall confirmed it was, with the caveat that there was a lot of additional law about how and when transportation system plans were applicable. He advised it was best to let the staff work with developers on matters where it is questionable as to the applicability of a provision, rather than try to impose it.

Mr. Sonnen and Mr. Hall stressed it was important to keep in mind that the U.S. Supreme Court had ruled that the value of an exaction (such as a required dedication of right-of-way and improvements) had to be roughly proportional and have a nexus to the impacts the particular development would generate on the public system. That rule would prevent a city from requiring something from a property owner that was unrelated to the development's impacts and so expensive it made the development economically unfeasible. Mr. Sonnen advised that local standards required an applicant to make frontage improvements. Some configured the access from only one frontage and did not generate any trips from the other frontage(s). He asked Mr. Hall's advice on whether the nexus and proportionality tests meant that the applicant did not have to improve the other frontage(s), as the code required. Mr. Hall advised the rule of thumb related to nexus was that the developer was expected to improve the

frontage the development got access from. However, a development should not be expected to improve more frontage than the actual impacts justified. He suggested it was best for the staff and the City Attorney to discuss each situation in the light of precedent; either make findings to support applying the code or agree with the applicant; and inform the Commissioners of the discussion at the hearing.

The Commissioners raised the issue of what was 'economic viability'. The Planning Commission and task forces had struggled with that in the past. Mr. Hall observed the City had taken more than one approach to defining the term and had not been successfully appealed. He advised the 'takings' doctrine in case law provided a sort of baseline when it said a code could not be applied in a manner that took away from the owner all economically viable use of their property. Commissioner Martin related that the WRA task force had researched how other communities handled the issue and preferred to use the yardstick, 'reasonable use' rather than 'minimum economic viability.' Chair Babbitt recalled a case where a developer had argued that they were proposing the smallest hotel that was economically viable and the Commissioners had wondered why it had to be a hotel and not a coffee shop. He recalled a case where the applicant claimed they proposed the minimum square footage residence that would be economically viable. Mr. Hall remarked that it was an ambiguous phrase in the code that was open to being interpreted, and the meaning was not dictated by takings case law.

The Commissioners had asked for advice related to the Commission recommending alternative sites for public facilities. They wondered if that would be a conflict of interest or bias. Mr. Hall indicated he thought just recommending a site to the City Council was sufficiently disconnected from applying the criteria to an application to construct a building that it would not be. He also clarified that the members of the Planning Commission's concern for the financial and policy interests of the City was not a conflict of interest if the City was the applicant, unless the Commissioner had prejudged an application or personally had a financial interest in the outcome of an application. He recommended the Commission lay out a process for establishing what the different siting alternatives were so the Commissioners and the public were on the same page.

The Commissioners asked for advice regarding communication between Commission members in informal settings. Mr. Hall advised that public meetings law said if a quorum of the Commission was meeting together and discussing Commission business, it was a public meeting and subject to public meetings law requirements. He suggested trying to avoid having four Commissioners getting together. If four of them found themselves together they should not talk about City or Planning Commission business. He related that Lane County Commissioners had been found to be in violation of public meetings law after they communicated via email in a series of less-than-a-quorum meetings to talk about county issues. He planned to check on the outcome of proposed state legislation that would clarify that public boards could get together in less than a quorum. He confirmed that the Commissioners' current practice of routing their emails through the staff helped avoid breaching public meetings law.

Mr. Sonnen asked how the Commission should deal with testimony from people who asked the Commission to deny or condition a project for reasons that had no code connection. Mr. Hall advised a condition of approval had to be tied to assuring that approval criteria were met. There were three legal justifications for imposing a condition of approval: The code expressly allowed a condition of approval; the application could be denied if the condition were not imposed; or the condition assured that the applicable criteria or standards would be complied with. He offered examples. If the application proposed a 6-foot high fence and the code required an 8-foot high fence the Commission could condition approval on an 8-foot high fence. If some aspect of the application was less than clear that it met the applicable standard the condition could require the applicant to demonstrate they met that standard before they were granted a building permit. Mr. Hall advised that a state statute adopted in 1999 required

Planning Commissions and City Councils to approve applications if they could be approved by imposition of reasonable conditions.

Commissioner Martin asked if there was a post approval procedure to remove a condition that turned out to be really unnecessary. Mr. Sonnen confirmed the applicant could apply to modify conditions of approval. Chair Babbitt asked if the applicant could ask for an extension of the hearing because the Commission was going to add a new condition to the proposed conditions of approval. Mr. Hall advised state law provided that the trigger for continuing a hearing was when new evidence was presented.

The Commissioners asked the City Attorney to discuss the question of whether an application was 'complete' if something like a required detention pond was missing from the site plan. Wasn't the staff supposed to evaluate the quality of the documents before they deemed the application 'complete'? Mr. Hall advised an application was technically 'complete' if the applicant had turned in a site plan, a narrative that talked about the criteria, and all the other documents the code said they needed to submit, but it might not comply with the code. Even if the staff said it was 'incomplete' the applicant still had the right to move forward to a hearing. The Commissioners could then deny an application that did not comply with the code or find out if the applicant was willing to continue the hearing, extend the 120-day clock, and provide the needed information. Mr. Sonnen advised when staff saw a deficiency they would recommend denial or recommend that the Commission ask the applicant to continue the hearing. Commissioner Steel recalled the Commissioners had asked the staff to alert them at work sessions when there was an element that was subject to interpretation. Mr. Hall clarified that the requirement that a Planning Commission had to approve an application if it could be made to comply with reasonable conditions of approval did not mean the Commission had to approve an application with a site plan that did not show the required detention pond just because the applicant said they would find room for one. The condition had to be feasible. They should be able to see potential places to locate one. If use of discretion is required to determine if a condition is met, another hearing would be necessary to review a final plan that showed the detention facility.

DISCUSS SCRIPTS FOR PLANNING COMMISSION AND CCI MEETINGS

Chair Babbitt outlined the components of the process of quasi-judicial hearings for the new Commissioners. The Commissioners had been talking about refining a script to be read at hearings, but they agreed that if Chair Babbitt was comfortable conducting hearings without it they did not need to perfect a new script.

DISCUSS THE CONTENT AND TIMING OF THE PUBLIC RELEASE OF PLANNING COMMISSION AGENDAS.

The staff sent out notices of work sessions the Friday before each work session. Kari Oaks had asked that they be distributed earlier than that. She had also asked that the agenda items pertaining to items of interest from the Planning Commission, CCI, and staff be identified so people knew in advance what the items would be discussed. Mr. Sonnen explained that the staff put things they knew were on the next agenda after the Wednesday Planning Commission meeting and presented it to the Chair, who sets the agenda. If a Commissioner wanted something else on the agenda staff would need to know by 10 a.m. Thursday before the Friday that the staff produced and distributed the meeting packet.

The Commissioners recalled work sessions were less formal; they typically did not make decisions at work sessions other than minutes; and the agendas were not necessarily 'gelled' until the Friday before the session. They recalled the reasons for the regular 'placeholders' on the agenda. Time was reserved for citizen comments. Items of Interest to the Planning Commission and Items of Interest to the CCI reserved time for the Commissioners to reflect on what had happened or what they had just learned at the hearing and wanted to follow up on.

Commissioner Martin agreed that if the Commissioners knew ahead of time that they were going to talk about something it should be specified on the agenda. The Commissioners asked Mr. Sonnen to relate their discussion to Ms. Oaks.

Commissioner Frank related that he preferred to receive meeting packets electronically. He had looked online and not seen all the attachments. Chair Babbitt recalled hearing other people mention that. Mr. Sonnen indicated he would look into it. The online version was supposed to have everything but the minutes, which were not distributed to the public until after they were approved. Mr. Hall had left the meeting. Mr. Sonnen agreed to seek his advice regarding whether notes taken on electronic tablets at meetings were to be included in the public record.

REVIEW PLANNING COMMISSION GOALS

Mr. Sonnen distributed a summary of current and future goals and accomplishments. Commissioner Martin indicated he liked the idea of reviewing them on a quarterly basis. He related that WRA task force work was going to take longer than the first half of the year because it was going to do substantial outreach. Mr. Sonnen related that the Commission goal is to get training in economic development and urban renewal. He planned to alert the Commissioners whenever a presentation was made to the City Council on those topics so the Commissioners could attend or watch it online. He was asked about the budget for Planning Commissioner training. He reported there was not a separate budget for training, but some funding might be available to pay for local trips to training.

UPDATE ON ONGOING PROJECTS

Mr. Sonnen reported the City Council had finished goal setting and identified what they wanted the Planning Department to work on this year. They had added a project to initiate work on the Robinwood Main Street program. The Council had originally intended to do a feasibility analysis, consider economic viability, and then master plan the Blue Heron site. Now there were another bidder besides the county. City staff planned to meet with him. The Council had dropped two projects: the goal and policy analysis and a stormwater demonstration project at Salamo/Rosemont. It had approved moving the transportation related elements of the Highway 43 project to the Transportation System Plan update process. The Council wanted to do an economic study before deciding whether to move forward with the rest of the Highway 43 project.

ITEMS OF INTEREST FROM THE PLANNING COMMISSION

Chair Babbitt related that a Lake Oswego City Councilor had asked if the West Linn Planning Commission would be interested in having a joint work session with the Lake Oswego Planning Commission. The Commissioners indicated they were interested in doing that. Chair Babbitt advised the Commissioners could download the annual ethics disclosure form from the state website. It was due by April 15.

ITEMS OF INTEREST FROM THE COMMISSION FOR CITIZEN INVOLVMENT

Vice Chair Holmes suggested keeping a log of citizen requests and concerns so nothing fell through the cracks. The other Commissioners agreed and Mr. Sonnen agreed to start doing that. Commissioner Miller asked why the Council's decision about the Highway 43 project had not been communicated to the public. Mr. Sonnen reported the Council had made the formal decision the previous Monday and the staff was about to put an update on the website and distribute it to the email list of 700 people who had participated in the process. Vice Chair Holmes suggested putting it in the water bills as well. Mr. Sonnen agreed that was a good idea. Commissioner Steel recalled the Highway 43 effort had been presented to the public as three phases. She suggested the staff explain that the city was not moving forward with phases 2 and 3, but it had learned a lot from phase 1 and would incorporate that into other related projects.

The Commissioners asked about the status of the CCI letter with recommendations to the City Council regarding how the planning process could better involve citizens. Mr. Sonnen reported it had been presented to the City Manager and the City Council. The administration had sent a draft of administrative procedures to be folded into city processes to all department heads for their comments. Mr. Sonnen had advised that most of what the CCI requested was captured in the draft, but that a couple of substantive points were missing. He expected the next version of the draft would be closer to what the CCI recommended.

ITEMS OF INTEREST FROM STAFF

Mr. Sonnen discussed a letter from Gary Hitesman about the Trillium School development approval. He distributed copies of the approved drawings of the play structure that Mr. Hitesman was concerned about. He distributed copies of the applicable design criteria and the landscaping plan. He advised the decision had been lawful, although there could have been other ways to address the design under the code. He reported the School District had met with the neighbors who were directly affected, showed them how it would use trees to screen the view, and resolved their concerns. The Commissioners asked him to coordinate a factual response to the points in Mr. Hitesman's letter with the City Manager and the City Council; thank Mr. Hitesman for his correspondence; and let him know the Planning Commission had discussed it and agreed there were lessons learned.

ADJOURNMENT

There being no other business, Chair Babbitt adjourned the meeting at 9:30 p.m.

APPROVED:



Michael Babbitt, Chair

4-25-12

Date