Land use Appeals

The process used to appeal land use decisions is defined by several factors. Our attorney has defined the possible appeal processes as a spectrum which spans limited review to a completely new hearing depending on how the factors are chosen. This discussion is focused on the implications and consequences of the choices.

There are several core values that the appeal process should attain:

- It should be fair and unbiased
- It should be well defined.
- It should give both parties enough time to prepare their arguments.
- It should not place an undue burden on either party.
- It should provide a meaningful role for citizen involvement.

In addressing these values, the process may choose various alternatives. It should decide:

- Who can file an appeal?
- What is the scope of the appeal?
- What changes may be made to the application?

Defining the appeals process involves answering these questions in terms of the listed values.

**Who can file an appeal?**

In order to file an appeal, the applicant must have standing. The definition of standing is actually quite restrictive, requiring that the person bringing the appeal must have a person legal interest that is invaded by the decision being appealed. It is not enough to be just interested in the case. The appellant must show that they would be substantially adversely affected by the decision.

In Oregon land use cases, we can look to the criteria used by LUBA for a possible definition. LUBA simply requires that the person filing the appeal has appeared before the local land use board and offered testimony either orally or in writing.

We currently adopt the same criteria for an appeal to the City Council.

Changing these criteria would seem to complicate matters as the application moves through the review process.

**What is the scope of the appeal?**
The goal of an appeal is to insure that a correct decision has been made. Possible reasons for the incorrect decision are:

Incorrect evidence
Incomplete evidence
Faulty interpretation of the criteria

While it is not difficult to interpret the idea of incorrect evidence, the concept of incomplete evidence is more problematic. Once can imagine a case where the additional evidence is not just to further an argument on an existing issue but actually raises a new issue. For example, a new hydrologist study may influence a part of the decision that affects whether a storm water criterion is satisfied, but might also raise a new issue involving slope stability.

Allowing new evidence to be introduced places a burden on both parties to respond. This could create a situation where the applicant (the person bringing the original application) may introduce new evidence during the appeal and those in opposition do not have time to refute it. It may be possible to couple the right to introduce new evidence to a requirement to extend the 120 clock to allow time for response.

The question to be examined is whether the appeals procedure should limit the scope of the appeal to issues raised in the previous (PC) hearing. Currently the scope is not limited.

What changes can be made to the application after the PC hearing and pending the appeal?

If the application is changed after the PC hearing and before the appeal, the public’s right to review and comment on the application is compromised. For this reason, we should have strict limits on the types of changes that can be made. From the applicant’s point of view, there is a desire to amend a denied application to correct the basis for denial. Allowing this might result in better projects. However, a modification to the application results in the public not being aware of the extent of the modifications and thus being denied citizen involvement.

If we feel that it is beneficial to allow changes, several questions need to be addressed. First the scope of allowable changes should be defined. This may be difficult since not all changes are measureable. How much can an application change before it should be a new application? Second, the modified application should be presented to the NA and there should be sufficient time for the NA to prepare a response. This would imply that the applicant would suspend the 120 clock long enough for the change to be presented and understood.

EDUCATION
The current pamphlet, “Tips for testifying at a land use application” could be updated to explain the new appeals process.

The appeals process should be covered in the pre-app meeting.

The CCI could develop a web page presentation explaining the entire land use process, including appeals. This could also be presented to NA’s.

ADMINISTRATION

If de Novo is expanded to allow substantial changes to the application, there would be additional cost and effort involved in updating the planning report. Any changes would have to be evaluated against code criteria.

CODE CHANGES

Our code online has not been updated to reflect the return to de Novo. The exact code changes need to wait on this update, but several areas were mentioned in the above discussion:

1. Examine the definition of standing and decide if we want to change it.
2. When the appellant (the person requesting the appeal) is the applicant (the person filing the initial application), couple the right to introduce new evidence to an extension of the 120 day clock to insure that there is time to allow a response to the evidence.
3. Specify the amount of change (if any) that will be allowed to the application between the PC hearing and the CC appeal.