Schroder, Lynn

From: Wyss, Darren
Sent: Monday, April 1, 2024 11:45 AM
To: Wyss, Darren
Cc: Schroder, Lynn; Gudelj, Aaron
Subject: FW: CDC Amendments

Planning Commissioners,
Please see the below comments from Shannen Knight regarding the 2024 Code Amendments item on Wednesday night's work session agenda. As always, let us know if you have questions. Thanks.

From: A Sight for Sport Eyes <sporteyes@yahoo.com>
Sent: Saturday, March 30, 2024 3:29 PM
To: Planning Commission (Public) <askthepc@westlinnoregon.gov>
Subject: RE: CDC Amendments

Dear Planning Commission,

Please accept this testimony for your work session on the CDC code changes. I would like to comment on #2, Appeal Process for Development Projects.

I understand that this will streamline things a bit, and I do agree that it is easier if people are clear in what they are appealing. I wouldn't mind requiring that people list the grounds for appeal. Limiting what can be heard in the appeal to only what they put in that brief is the issue I have. You often have residents, not lawyers appealing who are not familiar with code. They do their best to learn how to appeal in a very short amount of time, but might miss things they don't understand or know about in the code.

I also think we need to look at why the 2017 council changed to the de novo process. If I look at this West Linn Tidings article, this move to de nova was to:

> " to allow for what they feel to be a more inclusive and comprehensive appeal process."

"Inclusive" being the key word for me here. Again, the lay person is not going to know our code inside and out. If you limit what can be appealed, this means only those able to hire attorneys are really going to be able to make the best case under this proposal. Also of note is this quote:

> "The current council, on the other hand, felt handcuffed by the on the record process, particularly during a series of recent development appeal hearings when evidence the councilors viewed as important could not be introduced."

If evidence is in the record for the PC hearing but is not listed in the appeal document, then it wouldn't be able to be introduced in the City Council hearing which is the exact reason council changed the code in 2017.

The change to “on the record” was done in 2014, and only lasted a few years before being changed back in 2017. While this is being sold as “de novo”, it is basically the same thing as “on the record”. The slight nuance I see is with an “ on the record” hearing, if the appeal was done for traffic, lets say, and then the appeal had a new traffic report they wanted to add to the record, they couldn’t add it to the “on the record” hearing. However, it could be added to the record in this version of “de novo”. But if another person wanted to testify about a WRA code and the appellant only mentioned traffic in their appeal, then the WRA code testimony would not be allowed, even though the WRA testimony was heard at the PC hearing. That is how I am reading this change. So in essence, this creates the same challenges Council had with their other hearings. They wouldn’t be able to hear testimony that was heard at the PC hearing because if it isn’t specifically stated in the appeal brief.

I did a Google search on “de novo” as it is used in Oregon law. This is what I found:

> “ "de novo" refers to a new trial on an entire case, where the issues of law and fact are determined without referring to any previous legal conclusion or assumption made by the previous court. The term is Latin for "anew," "from the beginning," or "afresh". In de novo review, the appellate court does not defer to the decisions made in the trial court and looks at the issue as if the trial court had never ruled on it.”

From this definition, this code change does not meet the “spirit of the law”. It is not going to allow the hearing to be “anew”. It is not “looking at the issue as if the Planning Commission had never ruled on it”. It is limiting the hearing to evidence only put forth in the appellant’s brief. Again, these are the same issues that the 2017 council had, and why they made the code changes then.

Let’s also consider that not all applications go to the Planning Commission. If it is a planning manager decision, unless you live within 500 feet of the application, you don’t know there is this application being reviewed. Thus, the first time one finds out about a decision may be during the appeal, and the appeal hearing may be the only chance to give testimony. This “de novo” process requires a lay person to do time consuming research in a short amount of time (14 days) on code language they are unfamiliar with, to ensure they cover every piece of code issues in their appeal. Or, it requires the lay person to pay to hire an attorney in order to ensure all the proper parts of the code are addressed in the appeal. Again, an inequity as most people don’t have discretionary funds to do this.

On CCI (Committee for Community Involvement) we threw out the idea of being a resource for people to come and discuss land use issues. Perhaps if we had something like this in place where the lay person could have some free help in drafting their appeal, this code change would be more palatable. But since in a planning manager decision, the rest of the public may only see this application for the first time at the council hearing, we need a full de novo process so issues missed by the lay person can be addressed at the single public hearing.

Also, usually only one person appeals, as the cost is high. Thus, this proposed process requires the person filing the appeal cover all potential issues. Again, in my example before, perhaps the appellant only cares about traffic so they write their appeal about traffic. This means if someone also wants to appeal for the WRA issues, they have to file a separate appeal and pay the $400 to ensure their testimony will be admissible in the appeal hearing. Again, these are barriers to equity.

While I know the argument that will be made that one could just ask for their concerns to be addressed in the appeal document, in my "what if" scenario, this would require the neighbor to somehow get a hold of this random stranger and ask them "can my arguments be part of your appeal". While they could say yes, many people don't like the help of strangers, nor do they have time to meet within that short 2 week period. This again, puts it back on the resident to pay $400 to do their own appeal in order to ensure their point of view can be addressed. I had this happen when we appealed to LUBA on the Athey Creek School. The person who was decided to be the appellant did not want to include my concerns in their brief. (LUBA limits you to so many words, and he didn't have time to meet with me). So I had to pay the few hundred dollars to appeal myself in order for my concerns to be heard. This is why I know this will be an issue.

I did check. I found that cities and certain municipalities can limit "de novo" to what is in the appeal in Oregon, however, maybe staff can tell you what cities actually do this. Another thing I would like to know is if a decision is appealed to LUBA, are arguments made in the PC hearing allowed to be brought forward at the LUBA hearing if they were not heard by council? If arguments from the PC hearing could be made to LUBA, it makes this change slightly more palatable as evidence missed in the appeal could be at least heard at LUBA.

I'm hoping you can see that this version of de novo limits public participation, and creates potential cost barriers for the public. It doesn't meet the "spirit of the law" as it does limit what evidence can be submitted in a de novo hearing. It allows some new evidence, but not all, and does not allow for a "anew" hearing as de novo intends. I can see keeping the language of 3.a and 3.b that was removed in 2017, but keeping the underlined language of C. for a full de novo process. That would be an acceptable compromise. It encourages people to be clear about the code issues in question, but does not limit others from having their voices heard if the appellant does not address their concerns. Another option could be requiring written testimony for other code issues not addressed in the brief. This would give staff and the applicant time to prepare comments on those issues. I do think this too could create issues still, but at least gives people time to see if their issues are addressed in the brief or not which is better than nothing.

Perhaps I'm the only one that feels this way. Maybe the CCI should take create a plan for public engagement on this issue to ensure PC hears various points of views on this.

A quick note on one of the other proposed code changes. Perhaps the EDC (Economic Development Committee) should look at the Home Occupation code changes, or likewise the CCI could ensure that the public is well aware of these potential changes as they could affect their existing home based business, or could increase traffic to a street that a current home based business is operating.

Thank you for your time and service to the city.

Shannen Knight

A Sight for Sport Eyes
1553 11th St.

West Linn, OR 97068
503-699-4160
888-223-2669
Fax: 888-240-6551
www.sporteyes.com

Darren Wyss
Planning Manager
Planning

#6064