

City Council Agenda Advance Packet

Dated: August 13, 2010

For Monday, August, 23, 2010, Council Meeting

Included in this packet is documentation to support the following Agenda item(s):

PUBLIC HEARINGS/ORDINANCES

- Ordinance 10-O-671, adding Section 8.05.030.C to Chapter 8.05, Fire Hazards, and amending, in their entirety, Sections 8.15.050, and 5.15.110, of Chapter 8.15, Nuisances, Brookings Municipal Code. Pg. 2
- Public Hearing on LDC-2-10, Development Permit Procedures, Chapter 17.04 of the Brookings Municipal Code (BMC), City initiated. Pg. 6

CITY OF BROOKINGS
COUNCIL AGENDA REPORT

Meeting Date: August 23, 2010

Originating Dept: Building


Signature (submitted by)

City Manager Approval

Subject: Changes to Brookings Municipal Code, Section 8.05.030, Duties and Responsibilities of citizens, Section 8.15.050, Height limitation on certain vegetation – noxious vegetation and 8.15.110, Penalties, Title 8, Health and Safety.

Recommended Motion: Motion to adopt Ordinance No. 10-O-671, revisions to Brookings Municipal Code, Section 8.05.030, Duties and Responsibilities of Citizens, Section 8.15.050, Height limitations on certain vegetation- noxious vegetation and 8.15.110, Penalties, Title 8, Health and Safety.

Financial Impact: None

Background/Discussion:

- It was determined at an earlier Council meeting that it would be appropriate to add language (Section C) to BMC 8.05, Fire Hazards in order to insure that any vegetation that has been deemed a fire hazard can be ordered abated.
- Staff has re written BMC 8.15.050, Noxious Vegetation in its entirety, with the goal of creating an enforceable ordinance which is not overly regulatory but still allows for some control over growth of invasive species.
- Changes to BMC 8.15.110, Penalties are to create consistency within the BMC for violation penalties.

Attachment(s):

BMC 8.15.050 existing language to be deleted in its entirety
Ordinance No. 10-O-671

8.15.050 Height limitation on certain vegetation – Noxious vegetation.

A. It shall be unlawful for the owner, occupant, agent, or other person in possession of any lot, tract, or parcel of land within the corporate limits of the City of Brookings to permit grass or other vegetation, excepting shrubs, trees, or crops raised in the ordinary course of husbandry, to grow over 12 inches tall.

B. Prior to June 15th, such owner, occupant, agent, or other person in possession of property shall cause any such grass or growth on any unoccupied lot to be cut, removed, or destroyed. No person shall burn such grass or growth from any unoccupied lot without first having obtained a permit from the Fire Marshal so to do. It shall be unlawful for any person within the City of Brookings to accumulate, permit to accumulate, deposit, or cause to be deposited on any premises within the City of Brookings any accumulation of inflammable refuse or rubbish in amount or quantity sufficient to constitute a fire hazard.

C. No owner or person in charge of property may allow noxious vegetation to be on the property or in the right-of-way of a public thoroughfare abutting on the property between May 15th and October 31st of any year. It shall be the duty of an owner or person in charge of property to cut down or to destroy grass, shrubbery, brush, bushes, weeds, or other noxious vegetation as often as needed to prevent them from becoming unsightly, from becoming a fire hazard, or in the case of weeds or other noxious vegetation, from maturing or from going to seed.

D. Between April 15th and May 15th of each year, the City Recorder may cause to be published three times in a newspaper of general circulation in the City a copy of subsection (C) of this section as a notice to all owners and persons in charge of property of their duty to keep their property free from noxious vegetation. The notice shall state that the City intends to abate all such nuisances 10 or more days after the date of the final publication of the notice and to charge the cost of doing so on any particular parcel of property to the owner thereof, the person in charge thereof or the property itself. In addition to the abatement costs will be an administrative charge as outlined in BMC 8.15.090(F).

E. The general abatement procedure as outlined in BMC 8.15.090 may be followed by the City in addition to or in lieu of the procedure set forth in subsection (D) of this section.

F. If the notice provided for in subsection (D) of this section is used, it shall be in lieu of the premises-posted and mailed written notice required under this chapter.

G. As used in this section, the term "noxious vegetation" means weeds or grass more than 12 inches high, poison oak, gorse, berry bushes that extend across a property line or into a public thoroughfare, and any such other vegetation that is a health hazard, or a fire hazard due to proximity to other combustibles,

H. See BMC 8.05.020 for clear space around fire hydrants. [Ord. 07-O-591 § 2; Ord. 93-O-406.A §§ 5, 6; Ord. 93-O-134.A § 2; Ord. 86-O-406 § 5; Ord. 59-O-134 § 8.]

**IN AND FOR THE CITY OF BROOKINGS
STATE OF OREGON**

ORDINANCE 10-O-671

AN ORDINANCE ADDING SECTION 8.05.030.C, TO CHAPTER 8.05, FIRE HAZARDS, AND AMENDING, IN THEIR ENTIRETY, SECTIONS 8.15.050, AND 8.15.110, OF CHAPTER 8.15, NUISANCES, BROOKINGS MUNICIPAL CODE, TITLE 8, HEALTH AND SAFETY.

Section 1. Ordinance Identified

Section 2. Adds Section 8.05.030.C

Section 3. Amends Sections 8.15.050 and 8.15.110, in their entirety.

The City of Brookings ordains as follows:

Section 1. Ordinance Identified. This ordinance adds Section 8.05.03.C, to Chapter 8.05, Fire Hazards, and amends, in their entirety, Sections 8.15.050 and 8.15.110, of Chapter 8.15, Nuisances, Brookings Municipal Code, Title 8 Health and Safety,.

Section 2. Adds Sections 8.05.030.C. Section 8.05.030.C is added to Chapter 8.05, Fire Hazards as follows:

8.05.030 Duties and responsibilities of citizens

C. It shall be unlawful for the owner, occupant, agent, or other person in possession of any lot, tract, or parcel of land within the corporate limits of the city of Brookings to permit grass or other vegetation to grow in a manner that is determined to be a fire hazard by the fire marshal.

Section 3. Amends Sections 8.15.050 and 8.15.110 in their entirety. Sections 8.15.050 and 8.15.110 of Chapter 8.15, Nuisances, are amended, in their entirety, as follows:

8.15.050 Noxious Vegetation.

The Department of Agriculture has declared many species of vegetation to be a menace to the public welfare (ORS 570.505). A list of the vegetation covered under this declaration may be found in OAR 603-052-1200. It shall be unlawful for the owner, occupant, agent, or other person in possession of any lot, tract, or parcel of land within the corporate limits of the City of Brookings to permit the following:

A. The growth or propagation of gorse. The City may allow an abatement plan to be filed if it is determined that the gorse infestation is severe enough to merit a long range eradication program.

B. The uncontrolled growth of nuisance vegetation, nuisance vegetation is defined as vegetation that;

- Encroaches onto the property of another, the encroachment must be by the plant itself and not by seed or underground root systems; and
- Is listed in Oregon Administrative Rule (OAR 603-052-1200).

8.15.110 Penalties

Pursuant to Chapter 1.05 BMC

First Reading: _____
Second Reading: _____
Passage: _____
Effective Date: _____

Signed by me in authentication of its passage this _____, day of _____, 2010.

ATTEST:

Mayor Larry Anderson

City Recorder Joyce Heffington

CITY OF BROOKINGS

COUNCIL AGENDA REPORT

Meeting Date: August 23, 2010

Dianne Morris
Signature (submitted by)

Originating Dept: Planning

City Manager Approval

Subject: A hearing on File LDC-2-10 for consideration of revisions to Chapter 17.04, Development Permits, Brookings Municipal Code (BMC).

Recommended Motion: Motion approving revisions to Chapter 17.04, Development Permits, BMC.

Financial Impact: None

Background/Discussion: Staff noted there was a revision needed in Chapter 17.04, Development Permit, to be consistent with case law. Dolan vs the City of Tigard was decided in favor of Dolan after the City required an easement for a public pedestrian path on his property as a condition of approval. It was found the path was not necessary to mitigate impacts that would occur from the proposed use. This case determined there must be a direct nexus, or connection, between expected impacts from the proposed development and the requirements imposed in the approval process. Two other revisions are also proposed. The following is a summary:

- 17.04.070, Exemptions, lists circumstances when a property owner is exempt from the requirement to do public infrastructure improvements. The draft language adds "replacement" of a dwelling to the list of circumstances that are exempt. This is in keeping with case law. If a use is no more intense than what was there previously, the jurisdiction can not require new, additional improvements.
- 17.04.050, Permit Issuance, describes the notification process for a decision. An Administrative Decision does not require a Final Order, so language was added to clarify that a notification will be sent. This is important as it starts the appeal period.
- 17.04.060, Lands in Violation, presently states a permit will not be issued for lands "developed" in violation of the Code. Draft language has been added to include lands "used" in violation of the Code. This will mean property with outstanding violations, such as storage of inoperable vehicles or living in an RV, two of the more common violations, will not be able to get a permit to further develop the property until the violations have been resolved.

The Planning Commission reviewed this Chapter and recommended approval of revisions to Sections 17.04.050 and 17.04.060 to the City Council. Commissioner Bismark expressed concern about whether the case law referred to in the revisions to 17.04.070, Dolan vs. City of Tigard, covered this situation and requested additional information be provided to the Council. Other Commissioners agreed the revision made sense but approved the motion to request additional information. Commissioner Bismark put his comments concerning this in writing and it is attached. The details of the Dolan vs. City of Tigard case are different than our

"replacement of a dwelling" situation but in the 16 years since that case was decided a broader interpretation has evolved. You'll recall a few years ago the County applied for a conditional use permit to use an existing building on Railroad Ave. and initially they were required to do street improvements. Our Land Use Attorney, Jim Spickerman, was consulted and recommended the removal of that condition due to no greater impact by the proposed use than had existed previously. Staff did not locate any additional court cases on this topic.

Following this report is the draft version of Chapter 17.04 (Attachment B).

Policy Considerations: N/A

Attachment(s): **A. Commissioner Bismark's comments**
 B. Draft version of Chapter 17.04, Development Permit , BMC

Argument Brief: Applicability of Regulatory Takings Jurisprudence with Regard to Conditioning Building Permits to Exactions for Street Improvements

1. Regulatory takings claims arising from permit conditions are substantiated on the basis of two tests outlined in *Agins v. City of Tiburon* (1980) thirty years ago:
 - A. The imposed condition(s) "does not substantially advance legitimate State interests."
 - B. The imposed condition(s) "denies an owner economically viable use of his land."
2. Only if a government-imposed condition satisfies one of these two tests is it a candidate for a regulatory takings claim under 5th/14th Amendment objections.
3. The U.S. Supreme Court decision in *Nollan vs. California Coastal Commission* (1987) resulted in the "essential nexus" principle as a case-specific test for 1A above.
4. In *Dolan vs. City of Tigard* (1994), the Court added a second prong to the "essential nexus" test: the "rough proportionality" test, i.e., once the existence of an essential nexus has been confirmed, the "degree of connection" between the imposed condition and the "projected impact" of the proposed development must be "roughly proportional."
5. In both *Nollan* and *Dolan*, the basis for a regulatory takings claim was a *possessory exaction*: the creation of a new public easement on land that was under the applicants' private ownership as of the date of permit application – **NOT the financial onus of building the required infrastructure thereon**. The fact that the imposed condition required a conveyance of land from private to public ownership in both cases is a critical point.
6. The notion that the doctrine laid out in *Nollan-Dolan* is elastic enough to also cover *nonpossessory exactions* – wherever it came from – did not come from the U.S. Supreme Court. If there are binding case-law decisions for Oregon that establish this, I would like to see them.
7. More importantly, what is in need of disambiguation here is exactly why the City can require street improvements in the case of new development, but not in the case of a replacement dwelling on a lot where the public easement already exists. The "essential nexus" test of *Nollan* is not a useful tool to parse this distinction. The essential nexus between requiring street improvements as an exaction, and the legitimate state interests served by doing so is the same whether there was a preexisting dwelling on the lot or not (and without an essential nexus question, the applicability of *Dolan* never comes up). There's no conveyance of land and the nature of the exaction is unquestionably related to the impact of the proposed development.
8. I really don't see how imposing street improvements as a building-permit condition for a replacement dwelling trips either the 1A or 1B test above. The improvements do substantially advance legitimate state interests: they provide for full implementation of the pedestrian and bicycle accommodation requirements of the Transportation Planning Rule, OAR 660-12-0001(c). Neither does the imposed condition deny an owner of economically viable use of his land if the easement already exists (it's not really "his land" anymore). Only in cases where no sidewalk easement was ever created could such an argument be made, and even then, the economic viability of the narrow strip of land immediately bordering a public street is highly questionable.

17.04 Development Permit

Draft 6-25-10

Proposed text in ***bold and italicized*** type.

Text to be omitted has ~~striketroughs~~.

17.04.050 Permit issuance, appeals of a City decision, and effective date of approval.

Development permits shall be issued by the City Manager or their designee according to the provisions of this Code. Neither the City Building Official nor any other state or local official shall issue a permit for use, development or occupation of a structure which has not been approved according to this Code.

An appeal of an administrative decision or a Planning Commission decision may be filed with the Planning Department no later than 15 days following the date of mailing (postmark date) of the notice of the final order, ***or 15 days following notification of the administrative decision.***

The effective date of approval in any land use decision under this code is the date upon which the decision is no longer appealable. [Ord. 10-O-654 § 2; Ord. 09-O-632 § 2; Ord. 08-O-600 § 2. Formerly 17.04.030.]

17.04.060 Lands in violation.

The City Manager or their designee shall not issue a development permit for the partitioning, subdivision, development, or use of land that has been previously divided in violation of state or local codes then in effect, or divided in violation of this code subsequent to its adoption, or otherwise developed ***or used*** in violation of this Code, regardless of whether the permit applicant created the violation, unless the violation can be rectified as part of the proposed development in a manner provided by this code. [Ord. 10-O-654 § 2; Ord. 09-O-632 § 2; Ord. 08-O-600 § 2. Formerly 17.04.040.]

17.04.070 Exemptions from requirement to do improvements to public infrastructure.

The developments and activities listed below are exempt from the requirements to do improvements to public infrastructure, but are nevertheless subject to the provisions of this code:

A. Remodel, addition, alteration, ~~or~~ repair, ***or replacement*** of an existing residence for residential use, or siting of an accessory structure;

B. Remodel, alteration or repair to a commercial structure resulting in no greater impacts or intensity of use;

~~C. All structures damaged or destroyed by fire or acts of God, provided there is no increase in original floor area, unless otherwise required by law, nor in density, nor expansion of use of the original structure is involved. [Ord. 10-O-654 § 2; Ord. 09-O-632 § 2; Ord. 08-O-600 § 2. Formerly 17.04.050]~~