

MINUTES
Joint City Council /Planning Commission Work Session
Troutdale City Hall – Council Chambers
104 SE Kibling Avenue
Troutdale, OR 97060-2099

Tuesday, January 31, 2006

1. ROLL CALL

Mayor Thalhofer called the meeting to order at 8:00pm.

PRESENT: Mayor Thalhofer, Councilor Ripma, Councilor Thomas, Councilor Canfield, Frank Grande, William Paugh, Marvin Woidyla, Robert Neibert and Marianne Vier (8:02).

ABSENT: Councilor Gorsek, Councilor Daoust, Councilor Kyle, Daniel Haskins, and Shirley Prickett.

STAFF: John Anderson, City Administrator; Rich Faith, Community Development Director; Marnie Allen, City Attorney, and Debbie Stickney, City Recorder.

GUESTS: None.

2. DISCUSSION: Processes for land use hearings.
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Marnie Allen and Rich Faith gave a PowerPoint presentation (copy is included in the packet).

Marnie Allen stated the objectives of tonight are: Differentiate the types of decisions, legislative versus quasi-judicial decisions; improve our understanding of the decision-making process when it comes to legislative versus quasi-judicial decisions; and have a better appreciation of the roles and responsibilities that we all have.

Rich Faith reviewed the legislative decisions. There is really no specific definition of a legislative decision. What we have are general characteristics based on statutes and case law that help us identify legislative decisions. Slide 3 shows a list of the general characteristics of legislative decisions. That list includes: **1)** a legislative decision is a policy decision of general applicability. What we mean by that is that these decisions are applied broadly, they create general rules or establish public policy and they are not usually specific to any one piece of property. **2)** A decision that affects multiple properties, more than 4 parcels/ownerships or 15 acres. This is a distinction that comes out of the Troutdale Development Code. You probably won't find this in any statute or court decision. **3)** Legislative decisions are initiated by the City. In fact the Troutdale Development Code prohibits citizens themselves from initiating text amendments. A citizen would need to come before the Council or Planning Commission and request an amendment and the Council or

the Planning Commission would have to agree that there is merit to the request and would then have to initiate the amendment. **4)** Legislative actions have broad discretion in terms of the decision making. In making legislative decisions you are not tied to approval criteria. You don't have to follow certain rules of evidence that you would in quasi-judicial. It gives you more latitude in terms of how you treat the matter and in making your decision. Another way of saying it is, you can be more subjective in terms of the decisions you render. **5)** Legislative decisions talk about very broad and general criteria such as consistency with applicable State and Metro goals and rules as well as Comprehensive Plan Policies. Those goals and rules are written broadly and they can be interpreted broadly. Your role in dealing with legislative matters is that you can broadly interpret and apply these various goals. **6)** Impartiality is not required. Because you are basically making rules in legislative decisions and you are setting policy, those things can be based on your belief system. You can come into a legislative decision and bring your value and belief in terms of the decisions that you make. In many cases you are acting or representing your constituency in the decisions that you make. It is a very clear and separate decision and distinction from quasi-judicial decisions. **7)** Findings and a decision are not required. The Planning Commission and the Council are not required to act on a legislative proposal. In fact the Code is very clear that says the City Council can terminate any legislative matter that comes to them from the Planning Commission. **8)** The final, and perhaps the most important distinction that I wanted to make about legislative decisions is that with legislative decisions you really are acting as a rule maker not as a jury. You are making the rules not applying the rules to your decision.

Marnie Allen stated legally findings are not required in a legislative decision which is very different from the quasi-judicial arena. Having said that, they are preferable and desired if you are going to adopt a decision approving an amendment to the Comprehensive Plan because if someone were to challenge that decision saying that it is not internally consistent with another Comprehensive Plan Policy or we believe that a statewide planning goal applies here and you didn't adequately address it, if there are some written findings that explain how you reviewed and arrived at your decision then LUBA will defer to that and take that into account as will the Court of Appeals.

Rich Faith reviewed slide 4 which contains some examples of the types of decisions that are considered legislative: **1)** Adoption of the Comprehensive Plan and amendments. **2)** Adoption of Functional Plans, these are also oftentimes referred to as master plans. By functional plans we are talking about specific elements of a Comprehensive Plan such as the Transportation System Plan, Parks Plan, etc. **3)** Adoption of the Development Code and amendments. **4).** Map amendments, if they are city initiated map amendments to the Comprehensive Plan Map or to the citywide Zoning Map. **4)** Annexations, again we are talking about city initiated annexations that generally encompass a large area as opposed to a specific property that a property owner is requesting annexation.

Marnie Allen reviewed slide 5 which describes the general characteristics of quasi-judicial decisions. **1)** Quasi-judicial decisions differ from legislative because you are not determining the policy and setting policy, you are applying existing policy to particular facts. **2)** These decisions affect a limited number of properties or persons. **3)** Quasi-judicial decisions are usually initiated by a property owner/applicant. It is possible for the city to initiate a quasi-

judicial land use matter. For example, if the city wanted to initiate annexation of only one parcel of property that affected just one property owner that would be a quasi-judicial decision. **4)** In quasi-judicial decisions the discretion in how to decide the matter is limited by the approval criteria and the evidence that is in the record, or the information that comes before you when you are reviewing that application. You don't have the same latitude to decide based on whatever factors you think are important, it needs to be tied to an approval criteria and the information that is presented. **5)** In legislative decisions you can be impartial or bias, there can be lobbying going on and conversations with your constituents. That is common and typical in the legislative arena. With quasi-judicial decision you have to be impartial. You have to provide a fair and impartial decision to the applicant and the opponent.

John Anderson asked can anyone do a random site visit to become more familiar with the area?

Marnie Allen replied you can do a site visit but you need to disclose it at the beginning of the public hearing stating when you went and what you observed so if there were things observed and an applicant or someone who opposes it believes that there was something important about what you observed that may be different, they would have a chance to ask questions and present evidence on it. I will get into this in more detail a little later.

Marnie Allen continued reviewing slide 5. **6)** You do have to adopt findings in quasi-judicial decisions. They are legally required and they have to be sufficient. They have to explain what criteria you are applying and why you believe it was met. **7)** In the quasi-judicial decisions you are acting more as the jury or a judge in evaluating the information and being impartial. Looking at the evidence and information that is presented and then making your decision based on that.

Marnie Allen reviewed slide 6. This next slide is a list of examples of quasi-judicial decisions. Subdivisions and planned developments; conditional uses; major variances (when they are asking for a variance of 30% or more); property owner initiated map amendments; and property owner initiated annexations.

Rich Faith reviewed slide 7 on the legislative decision-making process. The first topic is about how these are initiated. For the most part these are city initiated. They can be initiated by city staff as they often are when it comes to the Development Code. The Planning Commission or the City Council can also initiate legislative decisions. A citizen may also approach either the Planning Commission or the City Council and request a change and if you agree with that we would go forward with the proposed changes. Historically with legislative changes there was no requirement that individual property owners had to be notified through an individual mailing to them. As often would happen if there was going to be a change in the allowed uses in the Development Code or a sweeping change of the Zoning Map, all you had to do was put a notice in the paper, that was the minimum requirement and in many jurisdictions that was all that was done. That changed in 1998 with the passage of Measure 56, which was amended by the Legislature in 2003. The essence of Ballot Measure 56 is that if a governing body that has land use jurisdiction adopts changes that in affect constitutes a rezone of an individuals property then they must be notified by mail

at least 20 days prior to the first hearing on those amendments. The definition of rezone is the critical piece in the Measure 56 legislation. What it means to rezone property is that you are either changing the base zoning classification of the property, for example from R-4 to Commercial, or you are making changes that limit or prohibit land uses previously allowed. The hearing process deals with how that hearing is conducted. The reality is that for legislative matters there is no formal structure like there is when you go through a quasi-judicial. You still have to disclose conflicts and abstain if necessary. Even with legislative matters there could be a conflict of interest as defined under state law and that would be if you have a direct or substantial financial interest from the outcome of the decision.

Frank Grande asked if you had a conflict, or you thought you had a conflict but it wasn't financial and you thought you made that known and you stated that you believe you can make an impartial decision, if I remember correctly at the Planning Commission level isn't there a vote taken by the Commission members.

Rich Faith replied your fellow Planning Commission members could disagree with that and challenge it and bring it to a vote or a member of the audience could also challenge that and may disagree with your opinion of that. Marnie, how is that handled?

Marnie Allen stated if the Planning Commission wanted to take that up as a body and rule on that collectively they could do that or the Chair could say he has already disclosed his bias and said he can be impartial, absent a motion from a fellow Planning Commissioner we are going to proceed and your objection is noted for the record. One thing I want to stress is we are talking about legislative decision-making process, remember I said at the beginning you can be impartial and you can have bias. If it is a legislative decision you are ruling on, you are not legally required to disclose your bias nor are you required to be impartial.

Councilor Canfield asked how is the direct or substantial conflict of interest defined?

Marnie Allen stated the direct or substantial language for conflict of interest that Rich referred to is relative to planning commissioners. The Government Standards and Practice Commission (GSPC) and the Government Ethics Statutes themselves apply to all public officials, which includes planning commissioners, city councilors, city committee members and city employees. They set, what I will call, an overarching broader standard for evaluating conflicts of interest and disclosing them and how you have to disclose them to avoid an ethics violation. If someone were to complain that you didn't disclose a conflict of interest and violated the ethics statutes the GSPC does an investigation and if they find that you violated the ethics statute they can impose a civil penalty for the violation. When it comes to conflicts of interest under state law they are defined in the ethics statute as either potential or actual. This is a subject matter where there are some exceptions and there are a lot of details but I will just give you the general picture. If you, or a family member or business partner, could theoretically, possibly, maybe, or in a far stretched-out situation, might have some financial benefit or you might avoid some financial cost, you have under state law what is called a potential conflict of interest. That potential can be really theoretical and far reaching. State law says that you have to disclose the potential conflict of interest on the record at the hearing. Once you have disclosed your potential conflict of interest you can participate in the

decision making process. The other category is actual conflicts. Actual conflict is defined as a situation where there would be a financial benefit or financial loss. When you have an actual conflict of interest it must be disclosed and you need to abstain from participating in the discussion and decision.

Rich Faith continued reviewing slide 7. My next point was that ex-parte contacts and bias do not apply for legislative decisions. You are allowed to be subjective and apply your belief system. Part of the legislative decision-making process is to analyze consistency with the Comprehensive Plan Policies and State and Metro goals and rules. Findings are not required for legislative decisions. No action is required and there is no time limit for making a decision unlike the 120-day rule for the quasi-judicial. With regard to legislative matters, the Planning Commission adopts a recommendation and forwards their recommendation to the City Council who adopts the final written decision. It must be a written decision because legislative decisions can be appealed to LUBA.

Marnie Allen reviewed slide 8 regarding the decision-making process for quasi-judicial matters. These actions are initiated by the owner of the property or their designee, which might be a developer or builder. They come in and fill out an application. There are specific requirements in the Development Code in terms of what needs to be submitted with that application, the evidence and information. Because we are in the quasi-judicial arena we are looking at approval criteria and evidence in the record. One of the items required from the applicant is a narrative about how each of the approval criteria are met by their proposed application. When that information is received, staff reviews it and has to make a decision on whether or not the application is complete. If it is not complete staff tells the applicant that it is not complete and gives them a time limit to make it complete. If it is complete, staff notifies them that it is complete and we schedule a planning commission hearing and there is a notice prepared for the hearing. The reason that the completeness determination is important is because in the quasi-judicial arena you have a 120-day time limit that runs from the date that the application is complete. ORS 197.763 is the statute that governs the process for quasi-judicial hearings. Our Development Code can go beyond this and has in some circumstances but for the most part is consistent with what is in the statute. ORS 197.763(2)(a) outlines the property owners that are entitled to receive individual notice. Under state law it says that property within 100 feet of the subject property must be given notice if the property is within an urban growth boundary, but under our Development Code it states that everyone within 250 feet, so we have expanded the radius of property owners that are entitled to receive notice. ORS 197.763(3) outlines everything that is required to be included in the notice including: the nature of the application, what uses could be authorized, the criteria that applies, the address of the subject property, it must tell the person who is receiving the mailed notice the date and time of the hearing and inform them if they don't come to the hearing and raise an issue or submit something in writing then they will not be allowed to raise it later. In addition to mailing the notice to the property owners within 250 feet, notice is sent to the county, state agencies that might be affected, utilities and recognized community or neighborhood organizations. The notice also is published in the newspaper. When quasi-judicial matters are appealed to the City Council and appear on the City Council agenda, those agendas are sent to anyone who has requested to be notified of Council meetings. What I wanted to touch on is, what do you do when you are at the public

hearing and people state that they didn't receive notice or they say they didn't get enough notice or they don't like the way they received the notice? My practical tips or advice on that issue are: 1) Were they legally entitled to receive the notice, do they live within 250 feet of the subject property? If not then you can explain and inform them that is the standard set in the Code for notification. 2) Does the record show that they were mailed notice, are they on the list that we received from the applicant? 3) Decide how you want to address it. You have the option, if someone comes in and says that they didn't receive notice to say okay, how do you want to address this? Why do you need more time? They are at the meeting so they received actual notice. The fact that they are at the hearing should be reassuring, they received actual notice or they wouldn't be there. It is the person who didn't receive notice that is not at the hearing that you need to be concerned about. The other thing to keep in mind when someone comes in and complains that they didn't receive notice is, it is fine to acknowledge it, apologize to them, but then focus on what is it they want you to hear. They received actual notice and they are there and have an opportunity to speak to you and present to you what they want you to consider.

Marnie Allen continued reviewing slide 8, process. The hearing is conducted in accordance with ORS 197.763. There has to be a staff report that lists all of the approval criteria that apply. That staff report has to be available seven days before the hearing. At the hearing you have to give people that are in attendance an opportunity to present evidence. The evidence and testimony that is presented must relate to the approval criteria and why they think it is met or not met. One of the reasons we are having this work session is to have the Council members and Planning Commissioners be thinking about legislative and quasi-judicial matters. When you hear about subdivision applications that are going to the planning commission that could be appealed to the Council and there are discussions in the community, we want red flags to go up that say I shouldn't be talking about this because it may be appealed to me as a councilor and I have to be impartial or I have to disclose all of the ex-parte contacts that I have had. If you fail to disclose an ex-parte contact at the hearing then an opponent or the applicant can appeal that decision to LUBA and LUBA will reverse and remand that decision for failing to disclose an ex-parte contact. What you need to do is disclose who you talked to, describe what you talked about, and then you need to give those that are present an opportunity to rebut. Communications with staff members are not an ex-parte contact. You need to adopt a decision within 120-days and if you fail to adopt a decision within the 120-days, under the statute the applicant can file a written mandamus, which is a lawsuit in circuit court asking the circuit court judge to order the city to issue the permit and the city has to issue the permit if we haven't acted within the 120-days and if they prevail we have to pay their attorney fees. In terms of the final decision, you need to adopt written findings that address the approval criteria and we want to explain how we interpreted and applied the criteria. LUBA will defer to the City's interpretation of its own criteria. If we don't explain what that criteria means and how we applied it, it is harder to defend it. The findings not only have to talk about the criteria and how they apply and what they mean, it also needs to state how it is met. The other thing in the written findings that is important to address is conflicting information or evidence. You are the decision maker about what is reliable or not and when you receive one statement from one group and another statement from a different group of people, you are deciding who is more credible or reliable and we want to address that in the findings. The findings also try to respond to some of the party's

arguments, if there was a concern about notice or concern about not getting a request for a continuance.

Councilor Thomas stated for a continuance the applicant has to agree to extend the 120-days.

Marnie Allen stated which is why the statute is interpreted as only mandating that continuance at the initial hearing. The applicant or the opponents are entitled to have the record be kept open or one continuance if they come to the first hearing and want more time, but it is only at that initial hearing because if it could be requested and guaranteed at the second, third or when it gets to the Council we wouldn't be able to comply with the 120-day rule. Having said that the statute says you have to grant it at the first hearing, if you are at the second hearing and you still have 90 more days and you think it would be beneficial to set it over for two more weeks, you can do that. You are not required to deny it but you are not obligated to set it over.

Marnie Allen stated because we are running late, if it is agreeable we can skip over slides 10 – 13 and go to the last slide.

There were no objections.

Rich Faith stated we wanted to finish up with some helpful hints. In terms of land use decisions the objective is to be in the best position possible to implement and defend the City's decisions. So that means it requires everyone to do their part. The tips we wanted to share with you are: 1) Review the information and staff materials prior to the hearing. 2) Obtain the answers to technical and legal questions from staff prior to the hearing when possible. 3) Explain the reasons for your position. This helps in formulating the findings that need to be made to support your decisions. 4) Rely on staff for factual information as opposed to asking us for our subjective opinion. We are a resource but we like to stick to the factual information. 5) Avoid placing staff in the position of taking sides in policy debates. 6) With regard to quasi-judicial matters, discuss your rationale for concluding that the approval criteria apply in the matter being considered and that these criteria have been met and that the information and the evidence that has been presented is sufficient for you to render the decision. 7) Avoid ex-parte contacts. 8) Follow proper procedure for disclosing conflicts of interest and ex-parte contacts if they occur. 9) Ask for advice in advance of the hearing if you have questions so that the hearing can as smoothly as possible. Our goal is that we all want to arrive at the best decision possible and we want a decision that can be defended if it is challenged.

Marnie Allen stated we want to implement and carry forward your decision. You are the decision makers. A lot of the time, because of the constraints and all of the requirements in the land use arena, we can't do that on the fly at a meeting hearing it for the first time. If we aren't thinking about and talking about, in the quasi-judicial arena, approval criteria and evidence that is submitted it just compromises our ability to help you get where you want to go. Remember that conversations with staff are not ex-parte communications.

Mayor Thalhofer asked when folks appear at the planning commission are they advised that it is the initial hearing and that if they don't ask for a continuance or ask for the record to remain open at this initial hearing that it may not be granted if asked for at a future hearing?

Marnie Allen stated I believe that at the planning commission hearings Rich mentions that if you don't raise something now you may be precluded from raising it later.

Rich Faith replied yes.

Marnie Allen stated it may be helpful that at the first hearing before the planning commission on quasi-judicial hearings to say that if you want to leave the record open or request a continuance you need to request it now because this is the initial hearing and you won't get an opportunity to set it over later.

3. ADJOURNMENT:

Meeting adjourned at 9:50pm.

Paul Thalhofer, Mayor

Approved April 11, 2006

ATTEST:

Debbie Stickney, City Recorder