

**MINUTES**  
**Troutdale City Council – Regular Meeting**  
**Troutdale City Hall – Council Chambers**  
**104 SE Kibling Avenue**  
**Troutdale, OR 97060-2099**

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**Tuesday, January 11, 2005**

**1. PLEDGE OF ALLEGIANCE, ROLL CALL, AGENDA UPDATE.**

Mayor Thalhofer called the meeting to order at 7:02pm.

**PRESENT:** Mayor Thalhofer, Councilor Gorsek, Councilor Thomas; Councilor Canfield  
Councilor Kyle, and Councilor Daoust.

**ABSENT:** Councilor Ripma (excused).

**STAFF:** John Anderson, City Administrator; Jim Galloway, Public Works Director; Rich  
Faith, Community Development Director; Marnie Allen, City Attorney; Debbie  
Stickney, City Recorder; Kathy Leader, Finance Director;

**GUESTS:** See Attached List.

Mayor Thalhofer stated if there are no objections by the Council, I would like to change the  
order of the agenda by moving agenda item #3 before agenda item #2.

No objections made.

**3. PRESENTATION: Presentation to Jim Kight.**

Mayor Thalhofer stated Jim Kight has served the City on the Budget Committee from 1989 to  
April 1994, the Charter Review Committee from December 1993 through July 1994; the City  
Council from May 1994 through December 2004; and he served on JPACT, Joint Policy  
Advisory Committee on Transportation, which is a very important committee in this region.  
Jim was appointed alternate on JPACT on October 25, 1996; appointed as the representative  
on November 29, 1997 and reappointed as our representative on March 29, 1999. On  
January 1, 2001 he was appointed as the alternated and continued to serve as the alternate  
through December 2004. Jim has put in a lot of time working for the City of Troutdale and we  
deeply appreciate it.

Mayor Thalhofer presented Jim with a statue called Rainbow Splendor, which is a replica of  
the statue that is located in Mayors Square in downtown.

Jim Kight stated I want to thank the community. It has been an honor and privilege to serve  
Troutdale. We have excellent staff within the city, I am very proud of our employees. At

every occasion I give accolades to our employees, particularly in our building department and the parks department. We have made a lot of progress in the ten years that I served on the Council, obviously with the cooperation of the Mayor and many other folks working closely together. They are going to be facing some heavy problems particularly with the fire service issue and budgetary issues and I am sure they are up to it and they will serve the community well.

**2. ELECTION:** Election of Council President - 2005.

Mayor Thalhofer asked are there any nominations for Council President?

**NOMINATION: Councilor Thomas nominated Councilor Daoust for Council President. Seconded by Councilor Kyle.**

Mayor Thalhofer asked are there any further nominations?

None made.

Mayor Thalhofer called for the vote:

**VOTE: Mayor Thalhofer – Yes; Councilor Canfield – Yes; Councilor Kyle – Yes; Councilor Daoust – Yes; Councilor Gorsek – Yes; Councilor Thomas – Yes.**

**Motion Passed Unanimously.**

**4. CONSENT AGENDA:**

**4.1 Accept Minutes:** November 23, 2004 Regular.

**4.2 Resolution:** A Resolution recognizing the completion of the public improvements associated with the Weedin Addition Dissipaters project and accepting them into the City's Fixed Asset System.

**4.3 Resolution:** A Resolution recognizing the completion of the public improvements associated with the SE Sandy Avenue Sidewalk Infill project and accepting them into the City's Fixed Asset System.

Mayor Thalhofer read the consent agenda.

**MOTION: Councilor Daoust moved to adopt the Consent Agenda. Seconded by Councilor Gorsek. Motion Passed Unanimously.**

**5. PUBLIC COMMENT:** Please restrict comments to non-agenda items at this time.

Mark Dorrrough provided a handout to the Council (copy of the handout is included in the packet).

Jill Dorrrough stated I just want to take a few minutes of your time and let you know some information for a cause that has been engrossing my life for twenty-six months now; something I thought was over ten weeks ago. It has cost us close to \$150,000 and the City of Troutdale just seems to be stepping in our way every opportunity it has as far as getting

this resolved. Mark has handed to you an outline of the points that I want to go through quickly. First is a picture that you can look at for your reference. It is a picture that was taken in our backyard of storm water coming out of the City of Troutdale's outfall. In November of 2002 I called the City asking for help. We were in our backyard and saw what you see in the picture going over our bare property. So I called the City to see what was going on. I didn't ever hear back from the City, instead I got Multnomah County at my door giving us fines for illegal things that Troutdale claims we had done on our property. Those of course were all unfounded, but Multnomah County obviously saw the problems of the storm water going across our property and for ten months we tried to get the City's cooperation to resolve this. Finally after ten months the County filed a lawsuit against us for allowing the City to run their storm water across our property, and those are their words. It dragged on for months and months, and over a year, and finally this last September we had a trial; a two-week long trial where a Judge determined fault and causation of this storm water problem. His findings of fact state that the development drainage over the Dorrough property constitutes an unreasonable interference with that property in general, and particularly to the extent that it would require the Dorroughs to protect the swale. He also stated the City unreasonably failed to enforce a condition of perfected drainage rights over the Dorrough property. November 3<sup>rd</sup> all parties involved in the lawsuit agreed to a settlement; a legal settlement. Martha Hodgkinson, the City's litigation attorney, our attorney, the developer's attorney and Multnomah County all signed and agreed to the conditions. November 4<sup>th</sup>, the very next day, our attorney drafted a storm water management easement, which was part of our condition. The City agreed to draft the formal settlement agreement. After three weeks we finally heard back from the City on their comments on our easement and after six weeks we finally received a draft of the settlement agreement. Both of these differed substantially from what was discussed and signed and talked about in the settlement meeting. By December 22<sup>nd</sup> most outstanding issues had been resolved, but after weeks of trying to communicate with Marnie at the City, she sent us an email saying that the City was inflexible and would not compromise on the remaining three issues. She further said she would be unavailable until after January 3<sup>rd</sup>. We still have not heard from her. The three remaining issues are: The width of this easement. Two City witnesses, at least that I recall in the trial, testified that a 10-foot wide easement was sufficient for taking care of storm water. The only engineering ever presented by the City was in a deposition of the individual who prepared a plan, and he testified that he did no engineering and that the planting fixed dimensions were pretty arbitrary in his own words. He spent less than five minutes on our property, did not measure or examine the drainageway or anything. Two attempts by the developer were made, previous to our purchase of the property, at obtaining an easement and both of these documents, one of which I included in the handout, stated that it would be 10' wide. So we agreed to provide a 10' wide easement at the settlement. So now the City's comment is that exports who have looked at it, exports unknown to us, exports who never asked to go on our property, exports who never measured the slope, who never measured the drainageway, stated it must not be less than 20'. No explanation of this. When we ask why they say because our exports say so. We've also been told that the City is not open to compromise on this issue. Although nothing was ever said prior to the lawsuit, the trial, or the settlement about needing more than 10'. The second issue is our right to cross this easement that we have agreed to provide. This easement will nearly bisect our property, leaving one and one-half acres on the far side of the easement. Hundreds of trees that Mark has planted and our

rights and our plan to landscape that property will require some sort of tractor to go over there. Marnie at the City has stated that the City will allow us to cross the easement only on foot, which makes the next point very interesting. At settlement we agreed to allow the City a temporary access across our property where it borders on Sandy Dell Road, although we can not give permission for them to actually use Sandy Dell Road as that is a private road, we can grant the permission, if they have that Sandy Dell Road permission, to come across our property to the drainageway temporarily until the permanent fix is installed. So we agreed to that temporary access. I have included a plat map. In the bottom left corner you can see a dark shaded area, between lots 12 and 13 and the tiny print says, a 10' wide private storm drainage easement. Whoever owns the storm water system owns this easement. You will notice it goes directly from the cul-de-sac down to where the storm water outfall is. From that point, where this water comes out, daylight, is where our easement that we have agreed to provide at 10' wide would begin and continue down hill to the Sandy River. The City owns this 10' wide easement between these two lots. You can walk from the cul-de-sac down to the storm water outfall and continue into the easement we have agreed to provide. However, for some reason, Marnie at the City has decided that is not good enough. They want permanent access.

Mark Dorrrough stated for those who don't know, Marnie is the City's attorney.

Jill Dorrrough stated we agreed at settlement to the temporary access across our property knowing full well the City has a permanent access from the cul-de-sac to access this further easement we are providing. This new easement that we are providing will connect up and allow the City to access our new easement through their old easement for maintenance and inspection and installation of erosion control measures. The City Attorney insists that we now must grant the City a perpetual right to cross our property from Sandy Dell Road anytime, anyhow, now or in the future without requiring any notice. We maintain that the City's permission to cross the property ends when permanent measures are installed as was discussed at settlement. After that the City must use its own easement from the neighborhood to access the property. For some reason when we ask, why isn't that good enough coming from the street directly into the easement, we are told we are being unreasonable. That is the only answer I have received. In asking that direct question, why, why can't you come from the street through your own easement, why do you need my backyard for evermore to get to the easement instead of straight from the street? I am being unreasonable. Marnie will not concede that the City has an easement or that it is adequate for the City to use and therefore, we must allow them permanent rights to our backyard in a location the City approves of. Further rights to our property, above what was agreed to in settlement, would require a separate written easement obviously, which was not hinted at, discussed or brought up at all during settlement talks or during the trial. We have six little children who will be using our backyard. We have lived there nearly three years now and have not been able to landscape or use our backyard because of this continuing litigation. We maintain that as private property owners we must not forfeit our right to have and use our own backyard as we see fit other than adhering to these restrictions we did agree to in granting this easement. We need you to use your power as a City Council to direct staff to resolve this issue by Friday. If it is unable to be resolved by Friday, our choice when we decided to settle was to make legal settlement, get it over with now. The City's litigation

attorney and litigation insurance agent said to me that day, you are done, this is the last day you will have to worry about this. Let me tell you, I was so happy I started crying because I have had this stress for two years and it was done; I thought it was done. That was ten weeks ago. I don't know how long City staff plans to drag this out, if they are trying to bleed us dry by never actually signing a final thing that we agreed to in settlement. We have done all we can to resolve this through City staff. We have waited twenty-six months for resolution and our only other option other than making the City live up to what they agreed to in settlement, is to have a jury decide. We had decided to settle right now, not get everything we want and be done with it. Now it appears that we have wasted another ten weeks of our lives, our worry, stress and our sleepless nights and we are still going to have a jury trial if you can't help the city staff do what they said they would do during the settlement agreement. Please immediately bring these outstanding three measures under consideration and make the City of Troutdale stand by what it promised in a legal settlement. The City's word that it will adhere to conditions of a legal settlement should not be taken lightly. I didn't take my words lightly; Multnomah County has lived up to everything they were required to do. Even the developer has done everything he was required to do under this settlement agreement. It is the City of Troutdale's staff who is now backing away and throwing in nuances that were never talked about; new restrictions. I am just helpless and it is so frustrating and I just want you all to remember what I said at the beginning, this all started when I called and asked for help from city staff.

Mayor Thalhofer stated as you probably know, we are in litigation and still are and it wouldn't be appropriate for any of us to make comments on this as a governing body of the City of Troutdale. It is going to have to be dealt with through legal proceedings. I am sure that our attorneys will give us a report as to the status of these negotiations, or lack there of. I am sure we will get a report on that fairly soon since you brought it up.

Mark Dorrough stated basically, you should know that we have tried everything, and this is dragging on. Basically we are going to be forced to go to a jury trial and if that does happen it is going to be an expense to everybody involved. The bottom line is, not getting into legal terms, there can be some money given to pay our attorney and we will give the City some of our property and we are losing some rights. If it comes down to a jury we will prevail with the jury. We have already prevailed with the Judge and ultimately the City will lose. At this point and time, come Monday, if this is not resolved that will be what we are forced to do. We wanted to give the City a chance. The question is who controls the City? Is it Marnie Allen, the City Administrator, or is it you? If you guys truly, as elected officials, run the City we would like something done. We have gone twenty-six months and we would like to see if you guys have the power within you to do that. If not, I guess we are forced to go.

Mayor Thalhofer stated we are in a position where we cannot comment on this because we have legal counsel and it would be inappropriate for us to make any comments no matter what we think or how we feel about it. We just can't do it.

Mark Dorrough stated we do not want a comment, we want action.

Mayor Thalhoffer stated I know you want action but we are sitting here and we can't do anything at this time. We have an attorney, the attorney is handling this case and we will get a report from the attorney very soon now. Since you are here tonight I think we are all curious as to what is going on.

Mark Dorrrough stated this is a whole new prospective of government and to me government taking rights of private individuals is definitely the way we have felt the last couple of years. As I tried to figure this out, even in trying to work with the City in resolving this matter over two years, it is confusing to me as to who is running the City. Is it the City Attorney or is it the City Administrator? Who oversees them? How do we, as private citizens of this community...

Mayor Thalhoffer interrupted our staff does staff work for us. The City Attorney does legal work for us. The City Attorney has, from time to time, made reports to us on this case. We will hear the next report, which will probably be coming to us very soon now. But until then there is not a thing we can say because anything we say could jeopardize the City's case. The City is the residents and citizens of the City of Troutdale, all of them not just two of you. We understand that you have been through a lot and in fact this has been going on for a long time and I think most of us are aware of that. But once you are in litigation it is not proper for any of the litigants to talk directly to each other when you have legal counsel. You need to let the legal counsel, your legal counsel and our legal counsel, work this thing out.

Jill Dorrrough stated it is just frustrating when the City's legal counsel will not talk to our legal counsel, or takes weeks and weeks to answer simple questions.

Mayor Thalhoffer stated if that is the case it is unfortunate. I understand where you are coming from. It is very frustrating when you are in that situation but we are not able to make comments or take any action at this time.

Jill Dorrrough stated right. We came tonight to bring you new information that we knew had purposely been not given to you, so now you have both sides of the story as they say.

Mayor Thalhoffer stated we appreciate the information very much. We have read it with interest and we have listened to you with interest. Our City Attorney has that information. As I said before, we are eagerly looking forward to the next communication from the City Attorney pertaining to this matter. But until then we can't say anything or do anything in regards to this matter since it is in litigation. I am sorry, but that is the way it is. You folks are good people, you are good citizens of the City of Troutdale and we appreciate that but we are in a position where we can't do anything now.

John Anderson stated you meet in two weeks we could schedule an executive session for that meeting and we could give a proper report in the proper venue.

Mayor Thalhoffer stated whatever the City Attorney decides is the way to go is the way we will go because we have to take the advice of our City Attorney on this matter.

Jill Dorrrough stated it's interesting that it would take an executive session. You all agreed to a settlement. The City Council agreed to a settlement, which is not being lived up to.

Mayor Thalhofer stated well, we will find out about that from our City Attorney.

Jill Dorrrough stated she wasn't at the settlement though. So that is part of the problem.

Mayor Thalhofer stated I am sure she had communication with the lead attorney for the City during those settlement negotiations.

Jill Dorrrough stated but we have been getting mixed messages though from the litigation attorney and Marnie. They are saying two different things, ten or twenty feet?

Mark Dorrrough stated the City's insurance carrier seems to be in good communication with our lawyer where the City's attorney, Marnie, seems to be in extremely poor communication. I think that is the point we are trying to make is we would really like to see this resolved. But from the City's end, you guys, as far as the organization is concerned, if we could get Marnie to communicate with our attorney ...

Jill Dorrrough interrupted and stated one example is we say go out and mark a line down the center of the water and then lets see, ten or twenty feet. Let us see, tell us why, show us why. Marnie keeps saying no, no, no we can't do that. Today we talked to the litigation attorney and she is going, that is a great idea, lets do that.

Mark Dorrrough stated the City's attorney and the litigation attorney are not on the same page is what we are trying to bring about to you. There is some real chaos and we are stuck in the middle of all of it.

Mayor Thalhofer stated I will assure you that we will get a report from the City Attorney very shortly. If we need to have another executive session soon, we will have it. Other than that there is not anything we can do at this time. We have received your comments; we understand them. We appreciate you coming forward and giving us the information, but that is all we can do at this point.

**6. PUBLIC HEARING / ORDINANCE (Introduced 12/14/04):** An Ordinance vacating a portion of the Hardy/Parks road deed.

Mayor Thalhofer read the ordinance title and opened the public hearing at 7:36pm.

Rich Faith, Community Development Director stated the action to initiate this vacation was actually taken by the City Council during an October 12<sup>th</sup> work session. It was at that time that you had agreed to initiate the vacation. I have attached to my report a copy of the staff report that went to the Planning Commission that explains in detail the background of this matter. I presented that information to you at the first hearing on December 14<sup>th</sup> so I am not going to go through it again this evening. This is sort of a housekeeping measure to rectify a situation where the city took a deed for a 40' strip. 30' of that strip could not legally be conveyed to the city for a public road because of restrictions of an underlying easement that

dates back to 1921. We attempted to rectify that and thought we had done so. Now that the property that encompasses this 40' strip has been subdivided or at least a preliminary plat has been approved, the County is holding up the recording of that pending a formal vacation of the northerly 10' that was not subject to that easement restriction in the original 1921 easement. We are merely trying to rectify this problem so that the County will accept the final plat and record it. There is an approved subdivision, that the Council itself approved, and the owner/developer of the property is still waiting to record that final plat so he can get on with the development of the subdivision. The Planning Commission held a public hearing on this matter on November 17<sup>th</sup> and is forwarding to the Council their final order and recommendation for vacation, and staff concurs with that.

Council had no questions for Mr. Faith.

Mayor Thalhoffer asked is there anyone here that would like to speak to us on this matter?

No testimony received.

Mayor Thalhoffer closed the public hearing at 7:40pm.

**MOTION: Councilor Daoust moved to adopt the ordinance vacating a portion of the Hardy/Parks road deed. Seconded by Councilor Gorsek.**

**Councilor Daoust stated we have had this matter before us in different versions for quit a while. It is completely understandable why we now have to finish up this last step.**

**VOTE: Mayor Thalhoffer – Yes; Councilor Canfield – Yes; Councilor Kyle – Yes; Councilor Daoust – Yes; Councilor Gorsek – Yes; Councilor Thomas – Yes.**

**Motion Passed Unanimously.**

**7. PUBLIC HEARING / ORDINANCE (Introduced 12/14/04):** An Ordinance approving the annexation of 11.23 acres and concurrent comprehensive plan map and zoning district map amendments on the easterly 2.3 acres (Land Use File No. 04-088 Asakawa – Tax Lot 1S 3E 01D-00400, located on Sweetbriar Road).

Mayor Thalhoffer read the ordinance title and opened the public hearing at 7:41pm.

Rich Faith, community Development Director stated in addition to the annexation this ordinance also included concurrent comprehensive plan map and zoning map amendments for the easterly 2.3 acres, which was just brought into the Urban Growth Boundary (UGB) last year. Because it was not within the UGB it was not subject to the City and County's current Urban Planning Area Agreement. With the 2.3 acres recently being brought into the UGB it is necessary that we place City zoning on the property in conjunction with the annexation. At this time I would like to address a question that was raised at the first hearing by the Council regarding the procedure that Metro uses when they are going to amend the UGB and what notification they provide for those minor amendments to the UGB. In researching this



particular adjustment to the UGB, specific to the Asakawa property, we found that back in March of last year Metro did send notification to the City that was received by me and by Jim Galloway, the Public Works Director. We were asked to comment on the application for the UGB amendment. The public works department did provide comments concerning the availability of public utilities. The information in that response was merely factual information and did not take any type of position regarding the proposed UGB adjustment. When Metro did finally make the decision to add this 2.3 acres into the UGB, the notification was also sent to the City in April of last year. We have no written procedure anywhere in City documents, the Development Code, Municipal Code or Comprehensive Plan regarding how we are to respond to UGB adjustments. As a policy matter, if the City Council wishes to be informed of these in the future and involved in offering any comments, we would be glad to bring those to you. In the absence of that myself and the public works department did respond to the notice that we received from Metro. You will notice that there is a change in the ordinance from the first reading. This change stems from the passage of Measure 37 during the November election. Since Measure 37 was approved I think all local governments are a bit nervous about the prospects of potential future Measure 37 claims and feel that it is always in the City's interest to protect itself and avoid such claims if and whenever possible. One way that we feel that is possible to do is when it comes to annexations impose a condition on the annexation that the property owner be required to sign a waiver of their Measure 37 rights against the City. The effect of this type of a waiver is that the current property owner, and any successors of interest and ownership of that property, would be waiving their rights to file a claim or to assert any rights or remedies under Measure 37. Another way that City staff is looking at this is if someone does desire to come into the City and wishes to receive the benefit of city services that comes with being included within the city limits, then they ought to fully accept the regulations that would be put into effect on that property when it comes into the city and any future regulations that might be adopted. With that in mind we are proposing a change to the ordinance to speak to our concerns about potential Measure 37 claims. The ordinance now includes a new finding, Number 6a, which speaks to the condition of the Measure 37 waiver. Section 1 of the ordinance is where the condition is placed and it says that the annexation is approved provided that the owner of the affected territory, exclusive of the public road right-of-way, signs and records a waiver of rights to file a Measure 37 claim against the City. Such waiver shall be in a form acceptable to the city attorney. In addition to that there is a new Section 5 that has been added to the ordinance to tie the affected date to the signing of that waiver. This section would establish that the ordinance shall not take effect unless and until the owner of the affected property, exclusive of the public road right-of-way for Sweetbriar Road, signs and records the waiver of rights referred to in Section 1 of the ordinance, but in no case shall this ordinance take effect sooner than thirty days from its date of adoption. With the proposed change it provides another option for the Council's consideration this evening. Those options are: Approve the annexation and the concurrent plan map and zoning map amendments by adopting the ordinance in its present form, which would include the condition for a waiver of Measure 37 claim rights; Approve the annexation and map changes without the changes that are being proposed this evening, therefore excluding the Measure 37 waiver; Or deny the annexation entirely. The Planning Commission met on this matter on November 17<sup>th</sup> and held a public hearing and has forwarded their recommendation for approval of the ordinance. The second option that I mentioned to you is consistent with the Planning Commission's recommendation, which did

not include the waiver condition. However, to eliminate the risk of potential Measure 37 claims in the future, staff is recommending that the ordinance include the condition to require signing of a waiver of Measure 37 rights consistent with Option 1. You have been provided with a copy of a letter that came in late this afternoon from the attorney representing Carol Asakawa, the property owner. In that letter the attorney, Mr. Livingston, has provided his reason for opposing the condition of the Measure 37 waiver. I interpret his letter that they would certainly favor the approval of the annexation and the map changes, they don't want to jeopardize that but they really don't feel that the condition for a waiver of Measure 37 rights is necessary or even appropriate and are asking that you don't include that in the ordinance.

Mayor Thalhoffer stated I would like to suggest that the Council be notified when there is a possible UGB amendment. I don't think we want to necessarily get involved, but it would be nice to receive the memo.

Rich Faith replied okay.

Mayor Thalhoffer stated I have concerns about the waiver. I am not so concerned about having them waive their rights as to the regulations that are already in place at the time of the annexation, but waiving future regulations doesn't strike me as being fair because they don't know what that is yet. When they come into the city they know what the regulations are, but after that they don't have any way of knowing what regulations are going to be imposed and therefore how can they waive their right to challenge those with any degree of knowledge. The attorney does say that he thinks that requiring such a waiver is not permitted under Oregon Law. Marnie, could you address that.

Marnie Allen, City Attorney stated I believe that if the City were to approve the annexation with that condition that we could legally defend it. The cities of Lake Oswego and Oregon City are looking at imposing similar waiver requirements associated with annexations. I believe it is more of a policy decision that needs to be decided of is it reasonable to require a waiver if property is going to be added to our City, or instead, do we error on the side of having citizens exercise Measure 37 rights at any time.

Mayor Thalhoffer asked does this provision of the waiver in the proposed ordinance include the waiver of all future regulations that the property owner doesn't yet know about?

Marnie Allen replied the way the condition is written is that the waiver would be in a form acceptable to the city attorney and certainly if it was the desire of the Council to limit those waivers to only waive claims based on the regulations that exist today, we would draft a waiver that achieved that.

Mayor Thalhoffer stated I think that is reasonable.

Councilor Canfield asked can you give us an idea of how staff came about thinking of requiring this waiver?

Rich Faith stated we have been following Measure 37 since its adoption and reading various news items and general postings that are being put out on web sites trying to interpret Measure 37 and what it could mean. From the information that we have received and from certain work sessions that I have attended, we were aware that some communities here in the region and perhaps even across the state, have been looking at this as a condition that would go with any annexation. There are some communities that have quite a number of annexations pending and they felt that it was entirely within their purview to place these types of restrictions on a property if it is going to be brought into the city. Knowing that, we have been contemplating that and actually had discussions about that prior to the first hearing before you, but we were not yet ready to propose that. Since then I think there are some other things that have come to our attention and perhaps just the feeling that we ought to exercise caution in these annexations. Keep in mind that the condition in this ordinance is not just singling out this annexation but would be a policy matter that all annexations should include this condition. In recent weeks I guess we really decided to give this issue our full attention and staff felt that it is our responsibility to look out for the interest of the city in the future and putting this condition in the ordinance is the correct thing to do.

Councilor Canfield asked when, or did you, notify the property owners of this amendment to the ordinance?

Rich Faith replied as soon as we (staff) agreed that we wanted to propose this change to the ordinance I notified the applicant looking to buy the property from Ms. Asakawa, Andy of Centex Homes, and left him a message. I think it was a day or two latter that he got back to me and I explained to him what we were going to be doing at this hearing. From that he forwarded the information on to the attorney representing the property owner.

Councilor Canfield asked what day was that?

Rich Faith replied I believe that was last Thursday.

Councilor Canfield asked so staff's main concern is to prevent future Measure 37 claims?

Rich Faith replied that is correct.

Councilor Kyle stated I don't have any questions but I would echo some of the questions that have already been asked and some of the concerns that the Mayor voiced.

Councilor Daoust stated one of the points made in the letter we just received tonight was that the petition for annexation was submitted on September 16<sup>th</sup>, which was months before Measure 37 was to be affective on December 2<sup>nd</sup> so they don't think this waiver should be done retroactively. What are your thoughts on that?

Marnie Allen replied I don't think it would be unreasonable for the Council to decide that this particular annexation application should be evaluated and decided based on what the law was when they filed their application and not impose the Measure 37 waiver because this was already in progress. You could decide that you want to impose that requirement on all

future applications. At the same time if you believe that it is a strong public policy to subject property that is being annexed into the city to the land use regulations that exist and have owners accept that responsibility by waiving Measure 37 claims, it is also reasonable to require it. We couldn't have known that Measure 37 was going to pass when they filed their application.

Councilor Daoust asked I am assuming that when the Planning Commission met on November 17<sup>th</sup>, which was after the election, we didn't have enough information from any source like the League of Oregon Cities on how to implement Measure 37 for the Planning Commission to even consider the waiver?

Rich Faith replied that is correct. We choose not to introduce that idea to the Planning Commission simply because we were still unclear of all the ramifications of Measure 37.

Councilor Daoust asked but it is your reading that other cities are considering waivers similar to the one we are looking at?

Rich Faith replied yes. We have heard from other communities that are considering annexations and they have told us that they have drafted waivers that they would intend to use.

Councilor Daoust asked specifically for annexations?

Rich Faith replied correct.

John Anderson stated another way to look at the filing date of the applicant was, is that was before Measure 37 passed. By having the waiver what we are doing is maintaining the rules that were in place when they filed. Measure 37 is the change so if it was waived they would be living with the rules that were in existence when they filed.

Councilor Gorsek asked do we normally enforce things retroactively?

Marnie Allen replied there have been situations where the City Council will adopt something new and have it applied retroactively. I don't think retroactive laws are the norm.

Councilor Gorsek stated basically what we have is a transition problem. We have a piece of land that we are now considering that started out during old regulations and now spills over to the new regulations. Seems to me that there is a question of how fair it is to retroactively go back. I understand what Mr. Anderson is saying and I am not a huge fan of Measure 37 but at the same time this goes back to September and now it seems a little late to be saying we are going to tack this other condition on. Measure 37 is a pain for the state and local governments, I understand that. But I am really wondering how legal it can be for us to try and pass ordinances that undermine the state vote. Isn't there some question about that?

Marnie Allen replied I think there might be more of a question if the City were to say if you want to submit a land use application for site plan approval or for a subdivision or for a

traditional land use or development proposals, the only way we would accept it is if you waive your Measure 37 rights. To me that is very different than the fundamental question of, should we add more property to our City? Because when the City is trying to decide where to set its boundaries and what land to bring in, it is reasonable for a city in that case to say we are planning our city, our services, our community, and compatibility between uses with a vision of our land use regulations and if you are going to come into our city and be compatible and we are going to be able to serve you, we need to have some certainty that you will follow our regulations and the only way we can have certainty is if you waive your Measure 37 rights to file a claim, or that is the best way that staff could come up with to try and provide that certainty. In the annexation arena I don't think that it violates public policy or the law.

Councilor Gorsek asked going back to what the Mayor was commenting on in terms of legislating against an unknown? It is one thing what you just described saying that these are the regulations in place today and you need to agree to live by that or not be annexed. I can see that, but the other part, correct me if I am wrong, sounded like we said any claims anytime in the future.

Marnie Allen replied what we are saying is if you were to adopt a condition and instruct us to draft a waiver that had them waive any claims based on current regulations and future regulations, as a condition of coming into our city you are going to abide by our rules meaning the rules we have in place now and whatever rules we adopt in the future.

Councilor Gorsek stated the interesting thing about that is anybody else already in the city can turn around and put forward a Measure 37 claim, can't they?

Marnie Allen replied if it is based on existing land use regulations that apply today, they have to do that within two years of adoption of Measure 37. But you are right; they have two years to do that.

Councilor Gorsek stated so in other words in some ways we are making it much more difficult for new members to the city to get a benefit from Measure 37.

Marnie Allen replied you could look at it that way. What I think staff is trying to do is provide some consistency in how we plan for the city.

John Anderson stated I am trying to understand your point. Let's say it is three years later and the city rezones a section of the community and in that section there is an annexation and the property owners signed this waiver. The people around them could file a Measure 37 claim but they couldn't because they waived that on new regulations. Is that the point you are making?

Councilor Gorsek replied yes. That is what it sounds like to me and that seems fundamentally unfair.

John Anderson stated so you were looking at it as a two step process, waive things at the date of annexation but not future because that would put them on the same playing field with their neighbors.

Councilor Gorsek stated yes, because what you get is a second class citizen, somebody who can not benefit when everybody around them can. I am not here to be a cheerleader for Measure 37, I am just saying thinking in terms of future changes, I think once they are in the city they need to have the same advantage, whether we like the advantage or not.

Councilor Thomas stated I think I agree with Councilor Thomas. If I understand Measure 37, when most of that is developed and sold off they wouldn't be eligible for a Measure 37 claim anyway, so the only thing that would be left is whatever is not developed at the time, right?

Rich Faith replied the condition would apply to the entire 11.23 acres. Really, I guess the question is, what is the potential risk of a Measure 37 claim when this property comes into the city? By virtue of annexing into the city we are assuring them that they can get the city services to allow them to develop the property at the density of the current zoning. The majority of the property currently has our R-10 zoning, which the County adopted but without the services they can't develop to that density. So, when it is annexed into the city they will then have the means to develop it so obviously the property is going to increase in value by virtue of the annexation.

Councilor Thomas asked you said that the County currently has that zoned at R-10?

Rich Faith replied they adopted our zoning under our Urban Planning Area agreement. It is zoned R-10 except for the easterly 2.3 acres, which was not in the UGB at the time of our Urban Planning Area agreement.

Councilor Thomas asked so the real issue is with that 2.3 acres?

Rich Faith replied probably more so but even now in conjunction with annexing the property and zoning it R-10, again I would have to believe that it increases the value of that property because the current zoning I believe is exclusive farming and there is no opportunity for development and by annexing and changing the zoning it will have more value. So there is a question of whether or not there is a sufficient risk at this time for a Measure 37 claim.

Councilor Thomas asked are they developing this whole piece of property?

Rich Faith replied their intent is to develop the whole piece. The concept plan shows a 37 lot subdivision. Their intent is to develop the entire piece but because the southeastern quarter of the property is a pond/wetland there are constraints on how that can be developed and it forces the density to shift to other areas.

Councilor Thomas stated my understanding is that once it is developed and sold to the new property owners then Measure 37 wouldn't apply to them unless we went back and rezoned it at a later date.

Rich Faith replied you are correct. As soon as there are new owners, assuming that the actual ownership has changed hands then the new owners can not file claim for any previous regulations that may have reduced the property value.

Councilor Thomas asked so in this case since Centex is going to purchase the property, would they be considered the new owners?

Rich Faith replied that is correct.

Councilor Thomas stated which would exempt them from filing a Measure 37 claim.

Rich Faith stated if in fact they do take ownership of the property and develop it under their name, that should be the case.

Councilor Kyle asked if you have the current owner sign the waiver and then Centex signed the waiver, are you requiring the owner of each parcel thereafter to also sign a waiver?

Rich Faith replied no. The way it would be structured is the current owner would sign it and then it runs with the land.

Councilor Thomas stated if we did that then what you are saying is that anyone who owns that property in the future couldn't make a Measure 37 claim.

Rich Faith replied yes.

Councilor Thomas stated that is what Councilor Gorsek was getting at, that is not fair.

Rich Faith replied that is one way to look at it. The other way is that the property is not currently in the city and it is the owners that are requesting to come into the city and it is a question of whether you want to allow that subject to them playing by whatever rules the city has in effect. I understand that they are going to be different then those who are currently in the city, but they are not in yet and it is a question of, as a condition of coming into the city do we want some assurance that we would not be subject to a claim that would put the City at risk of having to waive the regulation or compensate.

Councilor Thomas stated I can see it for the existing regulations but it bothers me for future regulations.

Mayor Thalhoffer asked is there anyone here that would like to speak to us on this issue?

Dana, with Centex Homes, stated we are neutral on this issue. We are not the property owners right now. We intend to propose development that is compliant with all of the cities regulations; we don't expect Measure 37 to come into issue here. We are sympathetic with Mrs. Asakawa and her position on this and all of the issues you have been discussing this evening. What I am hearing is it sounds like the Council has a lot of questions. No one

knows what can happen with Measure 37. Even if you get a waiver they could challenge the waiver and bring forward the Measure 37 claim. I am not saying that is what we are going to do; we expect to be able to comply with all of the regulations. I think a fair approach that has been proposed is to collectively as a Council figure out if you want to be one of the cutting edge cities to require a waiver on annexations, if that is so then let folks know when they come in with their petitions for annexation. We submitted our petition when there was a prospect of Measure 37, and the election was two weeks after we applied. What we didn't know was that it was possible that if we were afforded rights by the voters of Oregon that they would then be taken away three days before the last public hearing on the annexation petition. It is a policy decision for you to make and I encourage you to be fair. But we are neutral on this because we don't expect to have any issues with complying with city regulations. I don't represent the owner of the property so I really don't have a position. I think a very reasonable way for you to approach this is to approve the annexation tonight without the condition; decide as a Council if for future annexations you should require a Measure 37 waiver.

Andy with Centex Homes stated our intention is not to develop the property using any Measure 37 claims. We want to develop at the current land use regulations. If the annexation is approved we would be submitting our application shortly after and we will take ownership of the property after the subdivision is approved and at that point we wouldn't have any opportunity to make any Measure 37 claims.

Farrand Livingston, attorney for Carol Asakawa stated Carol is quite interested in this issue that you have been discussing. In terms of time, I apologize for the lateness of my letter but the timing came real quickly. I was notified about the request of the waiver I think Thursday afternoon. Since then there has been a lot of conversation as to where do we go from here. Carol's husband acquired this property shortly before they were married in approximately 1955. They have lived on the property and farmed it since then. Carol's husband passed away a number of years ago and she finally decided that it was time for her to think about retiring; she is actually working still and so she decided to try and sell the property and ultimately selected Centex Homes as the buyer. Request for annexation was filed because our understanding is that the agreements between Multnomah County and the City of Troutdale in effect require, number one if she wants to subdivide her property that it must be approved and annexed into the City of Troutdale. So it is kind of a two step process. So one question that I have in my mind about the statement that Mr. Faith presented and some of the conversations, is the privilege of being annexed. It is obviously a privilege to be annexed into Troutdale. From what I have heard it is a nice city and a great place to live, but by the same token I am not sure that Carol Asakawa has any choice but to request annexation. With that in mind it seems to me that Measure 37 may well apply here. I don't consider myself a Measure 37 expert and I don't think that there are very many lawyers in the State of Oregon who have the courage to say that at this point and time. The problem is that the waiver answers that question. If Carol Asakawa has to give a waiver, she in affect is being forced to give up some statutory rights that the voters in the State of Oregon said she had just for the right to develop her property. I think it is a legitimate issue for her to say that the requirement of the waiver should not be applied to her, further more I think it is probably illegal but I don't want to debate that with the City's attorney at this point. The second thing I was very



surprised at how quickly the Council addressed the other issue and that is the fairness concept. I favor Option 2. My letter is for the purpose of registering Carol Asakawa's objection to the requirement of the waiver. At the same time she favors adoption of an ordinance approving the annexation simply to prevent delay. She believes that it should be adopted without the condition requiring the waiver. If the Council felt that it was essential then she would prefer that the ordinance be passed that way and allow us to deal with the city attorney and see if we can negotiate appropriate language. I don't know if that prevents litigation. I have had some conversations with some lawyers who are interested in this issue. I am here to speak on both sides of this issue. On the first hand to object to the inclusion in the ordinance of a requirement of a waiver of Measure 37 rights, a statutory right that the voters had decided that Carol Asakawa should have and on the other hand asking that to prevent further delay to approve the annexation, preferably without the waiver requirement, but if you have to, approve it with the waiver and allow the parties to negotiate with the city attorney.

Mayor Thalhoffer closed the public hearing at 8:29pm.

**MOTION: Councilor Gorsek moved to approve the annexation but exclude all of the Measure 37 language (Option #2). Seconded by Councilor Thomas.**

**Councilor Gorsek stated I think first off there is the question, for me, of fairness and the fact that this was well underway before Measure 37. To me this is one of those transitional times and I really don't think we should make it retroactive to before the law was passed and try to enforce it on someone. Secondly, as to Measure 37 itself, it does pose challenges for governments but what I worry about is whether we like Measure 37 or not, as elected officials we do have some obligation to hear the voice of the people, and they did pass Measure 37. On the other hand Mr. Faith is right we need to try and protect the City's interest as much as we can. I think here we really do have a situation where annexation isn't a question of privilege. I think Carol Asakawa is trapped. If she wants to develop she has to come into the city. I think we need to think about Measure 37, but I would not include Measure 37 in this annexation approval. I think it is the fair thing to do.**

**Councilor Thomas stated I have to agree with Councilor Gorsek. I believe it is the fair thing to do. Had this started after Measure 37, and we had included the language when it was before the planning commission I would be much more comfortable with that part of it. In the future if we need to address that I would be willing to entertain that, but I would sure like to work on that beforehand. I think to be fair to the property owner and also to keep everybody on the same playing field, not applying Measure 37 in this case makes sense.**

**Mayor Thalhoffer stated I favor the motion because I don't think we should be mixing Measure 37 into this at all at this point. I don't think it would be too detrimental to Ms. Asakawa but I just don't think we ought to put it in the mix here. We can talk about it later; in fact we probably should develop an ordinance for the future but not for this particular annexation.**

Councilor Canfield stated I am in favor of this motion also. It would be unfair to impose a condition like this at this late hour. I also agree with Carol Asakawa that this would be contrary to the rights given to her by Measure 37. The very reason that voters passed Measure 37 in the first place, I think, is because governmental bodies weren't listening to folks regarding property restrictions. It is interesting to note that statewide Measure 37 passed by a margin of 60% but in Troutdale over 70% of the voters were in favor of this. I am a firm believer in the vote of the people and they have spoken on this and we need to respect that instead of creating adversarial relationships with the citizens by proposing to put this condition on the annexation. I think we need to accept the fact that Measure 37 is here instead of trying to find loopholes and ways out. We need to work with the property owners, potential property owners, and folks that may annex into Troutdale.

Councilor Kyle stated I am in favor of the motion. I am not comfortable at all coming in at the last minute and adding this waiver. It is not fair.

Councilor Daoust stated I will support the motion. I want to thank staff for prompting these types of policy discussions/decisions. It gets us thinking about how to address Measure 37 and I think it is healthy to discuss Measure 37 some more. We don't need to have a waiver of land use regulations in place because the risk is pretty small anyways with the land value probably increasing. I am not really in a rush to consider a waiver for future annexations. We can discuss it further but I am not in any kind of rush to take that subject on anytime soon because I think we are all just learning how to implement Measure 37.

**VOTE: Mayor Thalhofer – Yes; Councilor Canfield – Yes; Councilor Kyle – Yes; Councilor Daoust – Yes; Councilor Gorsek – Yes; Councilor Thomas – Yes.**

**Motion Passed Unanimously.**

Mayor Thalhofer called for a break at 8:35pm and reconvened at 8:50pm.

**8. PUBLIC HEARING / ORDINANCE (Introduced 12/14/04):** An Ordinance repealing Chapter 5.12 of the Troutdale Municipal Code relating to auto wrecking businesses.

Mayor Thalhofer read the ordinance title and opened the public hearing at 8:52pm.

Rich Faith, Community Development Director stated this is the second hearing on this ordinance. The purpose of this ordinance is to eliminate dual processes that we now have for approval of wrecking yards within the City. The statutes impose certain procedures that can be followed and those were incorporated into our Municipal Code as far back as 1961. Since then with the adoption of our Development Code and our zoning maps, we have listed wrecking yards as a conditional use in our industrial zone thereby putting the procedures for the approval of those through the public hearing process and a decision by the Planning Commission. It is really unnecessary to have dual processes. Since it has come to our attention that we have procedures outlined in both the Development Code and the Municipal

Code we put this question to the Council during a work session on October 26<sup>th</sup> and you directed us to bring forward an ordinance repealing Chapter 5.12 of the Municipal Code which sets out procedures for approval of auto wrecking businesses. It is our recommendation that Council approve the ordinance repealing Chapter 5.12 of the Municipal Code and let the procedures in the Development Code rule in the review and approval of auto wrecking yards in the City.

Mayor Thalhoffer asked would appeals then come to the Council?

Rich Faith replied yes, with a conditional use if the applicant or any interested property owner or party does not agree with the decision of the Planning Commission then they can appeal to the City Council.

Mayor Thalhoffer asked is there anyone here that would like to speak to us on this matter?

No testimony received.

Mayor Thalhoffer closed the public hearing at 8:55pm.

**MOTION: Councilor Daoust moved to adopt the ordinance repealing Chapter 5.12 of the Troutdale Municipal Code relating to auto wrecking businesses. Seconded by Councilor Canfield.**

**Councilor Daoust stated I am okay with letting the Troutdale Development Code rule.**

**Councilor Canfield stated I think it is a good idea to avoid duplication and make the approval process simpler.**

**Mayor Thalhoffer stated I support the motion.**

**VOTE: Mayor Thalhoffer – Yes; Councilor Canfield – Yes; Councilor Kyle – Yes; Councilor Daoust – Yes; Councilor Gorsek – Yes; Councilor Thomas – Yes.**

**Motion Passed Unanimously.**

**9. PUBLIC HEARING / ORDINANCE (Introduction):** An Ordinance pertaining to public contracts and purchasing procedures and amending Chapter 2.24 of the Troutdale Municipal Code.

Mayor Thalhoffer read the ordinance title and opened the public hearing at 8:57pm.

Jim Galloway, Public Works Director, stated this is primarily of the housekeeping nature. As you may recall in the last session of the State Legislature they completely revised ORS Chapter 279, which deals with the state law regarding public purchasing and contracting procedures. One of the requirements was that prior to March 1, 2005 local governments either adopt their own purchasing rules, like we are proposing here, or they will be required to follow the model rules published by the Attorney General's Office. As in the past we are

recommending that we adopt our own rules rather than abide by the rules put out by the Attorney General's Office. One fairly significant change is in years past we have come to you with a purchasing and contracting ordinance that contains several more pages than what we have for you today. What we have done in the past is duplicate everything in the state law in our city ordinance which led us to come back to you with a change anytime the state legislature made a change in the state law. This time we are proposing that we only have in our code those things that are either mandated by state law or where they provide some options or where we need some implementing instructions to carry out a portion of the state law. So for implementing this we would refer to the state law for most items and we would refer to the city ordinance where we have implementing procedures or where the state law has specifically directed us to take some action.

Jim Galloway reviewed the major items that are included in the proposed ordinance include (see copy of staff report included in the packet).

Councilor Daoust asked do we get many protests of award?

Jim Galloway replied no. In the twelve and a half years that I have been here we have not had a formal protest.

Councilor Daoust stated so are the procedures that are provided for the protest of award different than what we have now?

Jim Galloway replied I don't believe that we actually have a formal protest procedure written in our current ordinance, so that would be new language.

Councilor Thomas asked are informal quotes received over the phone or what is the difference?

Jim Galloway replied it does provide that they can be verbal and then simply documented by the person receiving them, or sometimes we do actually go out and get written quotes. It depends somewhat on the urgency of the matter and how likely we think there is to have a large discrepancy in the quotes.

Councilor Thomas asked is your preference to have written quotes?

Jim Galloway replied generally speaking we would do that unless time was a critical issue.

Councilor Thomas what would constitute an emergency procurement?

Jim Galloway replied it is defined as whatever the majority of the Council would say it would be. I would think we would be looking at a natural disaster, like a terrible ice or snow storm. It would probably be something where getting a contract in place in a quick period of time is necessary to save lives, prevent suffering, protect property or to restore services.

Jim Galloway stated I need to mention one suggested change in the proposed ordinance in front of you. If you would turn to page six of the proposed ordinance, Section 2.24.170(B), in the first line it mentions that the bidder shall submit the protest to the city administrator in five days. After I put this together we received information that at the state level they are allowing seven days. We thought to be consistent and try to avoid confusing prospective bidders we would fall in line and do the same thing. Unless there is an objection from the Council, when we bring this back in two weeks for adoption I will change that from five to seven days.

Council did not object to the change.

Mayor Thalhofer asked is there anyone here that would like to speak to us on this issue?

No testimony received.

Mayor Thalhofer closed the public hearing at 9:08 and stated there will be a second hearing on January 25, 2005.

#### **10. DISCUSSION:** Discuss setting date and establishing a process for 2005/06 City Council Goals.

John Anderson stated this is an informal discussion about setting a date and some procedures for your annual goal setting session. We are suggesting February 15<sup>th</sup> starting at 6:00 or 6:30. I have talked to the Mayor about the possibility of including the department heads in the process. It is my understanding that the previous city administrator would work with the department heads and provide a draft list of major issues and present that. You may want to have us do that again, but by having department heads at the meeting it may improve the communication. I have heard from some Councilors that they would like to see us put a little more focus on defining objectives and figure out some measurable outcomes. Some of the issues are pretty large so we would have milestones. If you would like, staff could provide an initial list. In the past you have used a facilitator, I don't know if you are interested in that this year. 2007 is our centennial and you may want to add that to the long-range goals.

Council agreed to hold a work session to establish the 2005/06 Council Goals on February 15, 2005 at the City Conference Building starting at 6:30pm. It was decided by consensus of the Council that they would not have a facilitator or department managers attend the work session, but would like the department managers to provide a list of the major issues.

#### **11. STAFF COMMUNICATIONS**

John Anderson, City Administrator stated in response to the concerns from Mark and Jill Dorrrough this evening we would like to suggest scheduling an executive session to discuss the lawsuit.

Council agreed to schedule an executive session on January 18<sup>th</sup>.

Mayor Thalhofer suggested that we also add a work session to that evening.

Council agreed.

## **12. COUNCIL CONCERNS AND INITIATIVES:**

Mayor Thalhofers wished everyone a happy New Year. Mayor I appreciate that the Reynolds High School Students attended the Council meeting tonight and I hope that you were able to learn something about local government. I hope that everyone continues supporting our troops who are in harms way in various parts of the world.

Councilor Canfield thanked the voters for voting for him and stated that it will be an honor to serve the City of Troutdale.

Councilor Kyle welcomed Councilor Canfield and stated that this is an interesting opportunity for us to volunteer to serve our city. I also want to thank the students from Reynolds High School for attending the meeting this evening.

Councilor Gorsek stated on Wednesday evenings from 7pm to 9pm in February, Mt. Hood Community College will be showing a number of films for Black History Month.

Councilor Thomas congratulated Councilor Canfield on his election victory and congratulated the returning members of the council; Mayor Thalhofers, Councilor Daoust and Councilor Ripma. I also want to thank the students for attending the meeting tonight.

## **13. ADJOURNMENT:**

**MOTION: Councilor Thomas moved to adjourn. Seconded by Councilor Gorsek. Motion passed unanimously.**

Meeting adjourned at 9:33pm.

**Paul Thalhofers, Mayor**

**Approved February 8, 2005**

**ATTEST:**

**Debbie Stickney, City Recorder**