



CITY OF TROUTDALE

"Gateway to the Columbia River Gorge"

AGENDA

REVISED 9/26/00

CITY COUNCIL - REGULAR MEETING

TROUTDALE CITY HALL

COUNCIL CHAMBERS

104 SE KIBLING AVENUE

TROUTDALE, OR 97060-2099

September 26, 2000 - - 7:00 P.M.

Mayor

Paul Thalhofer

City Council

Pat Smith

David Ripma

Bruce Thompson

Jim Kight

Paul Rabe

Doug Daoust

- (A) 1. **PLEDGE OF ALLEGIANCE, ROLL CALL, AGENDA UPDATE**
- (A) 2. **CONSENT AGENDA:**
- 2.1 **APPROVE LIQUOR LICENSE:** Sandy River Cellars, Inc.
- 2.2 **RESOLUTION:** A Resolution approving Intergovernmental Agreement NO. 0011074 between Multnomah County and the City of Troutdale for the Traffic Signal Coordination and Optimization Project, Phase II.
- 2.3 **RESOLUTION:** A Resolution accepting an easement from the Port of Portland for a portion of Tax Lot 500, Section 24C, Township 1 North, Range 3 East, of the Willamette Meridian, for the Water Pollution Control Facility pipeline.
- (I) 3. **PUBLIC COMMENT:** Please restrict comments to non-agenda items at this time.
- (A) 4. **AWARD:** Certificate of Recognition - David Warner
- (A) 5. **PUBLIC HEARING / ORDINANCES:**
- 5.1 **PUBLIC HEARING CONTINUANCE / ORDINANCE (Introduced 7/25/00):** An Ordinance amending Goal 5 of the Troutdale Comprehensive Land Use Plan and amending Troutdale Development Code for compliance with Title 3 of the Metro Urban Growth Management Functional Plan pertaining to water quality and flood management and repealing Troutdale Municipal Code Chapter 15.24 Flood Damage Prevention. McCallum
- 5.2 **PUBLIC HEARING / ORDINANCE (Introduction):** An Ordinance amending Troutdale Development Code for Compliance with Title 3 of the Metro Urban Growth Management Functional Plan pertaining to water quality and flood management and repealing Troutdale Municipal Code Chapter 15.24 Flood Damage Prevention. McCallum
- (A) 6. **PUBLIC HEARING / ORDINANCE (Introduced 9-14-00):** An Ordinance amending Chapter 8.28, Nuisances, of the Troutdale Municipal Code. Hanna

- (A) 7. **PUBLIC HEARING / ORDINANCES (Introduction):**
- 7.1 An Ordinance Granting a Franchise for Broadband, Cable, Institutional and Telecommunication services to RCN Telecom Services of Oregon, Inc. ("RCN") Norm Thomas, Chair MHCRC
- 7.2 An Ordinance granting a franchise for Broadband, Cable, Institutional and Telecommunication services to Western Integrated Networks of Oregon Operating, L.L.C. ("WIN"). Norm Thomas, Chair MHCRC
- (A) 8. **PUBLIC HEARING / APPEAL:** An Appeal of the Planning Commission's decision in the matter of Case File No. 00-025, setback variance for Sandy Frontier Trailer Court. Seivers
- (A) 9. **PUBLIC HEARING / ORDINANCE (Introduction):** An Ordinance amending Chapter 12.10 and Chapter 12.01.020 of the Troutdale Municipal Code to establish provisions that require persons providing services for the collection and/or transportation of exempt loads of solid waste for compensation to obtain a permit through the City of Troutdale. Morrow
- (A) 10. **PUBLIC HEARING / ORDINANCE (Introduction):** An Ordinance accepting jurisdiction of NE Hensley Road (County Road 565), NE 262nd Avenue (County Road 565), and Unnamed County right-of-way (NE Cherry Park Road Extension) from Multnomah County. Galloway
- (A) 11. **RESOLUTION:** A Resolution establishing a fee for disturbing pavement within the public right-of-way and amending Resolution No. 1443. Galloway
- (I) 12. **COUNCIL CONCERNS AND INITIATIVES**
- (A) 13. **ADJOURNMENT**



Paul Thalhofer, Mayor

Dated: 9-26-00

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

September 26, 2000 - 7:00pm

Meeting was called to order at 7:02 p.m. by Mayor Thalsofer.

1. PLEDGE OF ALLEGIANCE, ROLL CALL, AGENDA UPDATE

Mayor Thalsofer called on Councilor Thompson to lead us in the Pledge of Allegiance.

PRESENT: Smith, Thompson, Kight, Rabe, Daoust, Thalsofer.

STAFF: Faith, Galloway, Hanna, McCallum, Morrow, Williams, Kvarsten, Allen, Stickney.

GUESTS: Terry Howell, Norman Thomas, Carrie Classen, David Warner, Carol Warner, Dave Munson, Mel Warner, Diane Castillo-White, Nancy Cox, Tori Muck, Tim Muck, Chet Howell, James Leuenberger, TC & Linda Clark, Andrew Stamp, Melissa Robertson, Kirk Gibson, Bill Mahon.

Mayor Thalsofer asked are there any agenda updates?

Kvarsten replied you have before you a revised agenda which is also available for the public. The revision is the addition of item 5.2 which is an additional ordinance under that matter. The City Attorney will give a more detailed description of why that is necessary when you call that issue.

2. CONSENT AGENDA:

- 2.1 APPROVE LIQUOR LICENSE:** Sandy River Cellars, Inc.
- 2.2 RESOLUTION:** A Resolution approving Intergovernmental Agreement NO.0011074 between Multnomah County and the City of Troutdale for the Traffic Signal Coordination and Optimization Project, Phase II.
- 2.3 RESOLUTION:** A Resolution accepting an easement from the Port of Portland for a portion of Tax Lot 500, Section 24C, Township 1 North, Range 3 East, of the Willamette Meridian, for the Water Pollution Control Facility pipeline.

Mayor Thalsofer called this item and read the consent agenda.

MOTION: Councilor Thompson moved adoption of the consent agenda. Councilor Kight seconded the motion.

YEAS: 6
NAYS: 0
ABSTAINED: 0

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

Maxine Stannard stated I am here in regards to the Reynolds School District bond. I am on the school board this year. After the bond did not pass last year, we went back to the voters with a survey and to our staff with a survey and asked why it didn't pass and what we could do to help it pass. We have cut \$11 million dollars out of the bond and are going back out in November for a \$45 million dollar bond. In Troutdale we expect a 30% increase in population by the year 2005 and that is on schools that are already full at this point. We need someplace to put these kids. We have looked at property in the area and there is none in the area that the school district could afford. What we have decided to do is look at remodeling the building that the administration is in now and making that into an elementary school. The middle schools are also increasing in enrollment but we have room to grow. Our high school, we have had two places that we looked at growth that could help. We looked at thirty-two new classrooms, twenty-eight at the high school. We looked at the learning center that is now housed in the administration building and move that over to the middle school and increasing that to 400 students. We also are looking at purchasing the property in Corbett for the natural resources and increasing that program to 250 students. Also in our bond we have money that we will put together with a coalition of Gresham/Barlow, Centennial and Mt. Hood to make an advanced learning center. We are asking for you to put this on your agenda and asking for your support.

Dave Munson stated I live in Troutdale. Around the street lights, it seems that no one is responsible for trimming away the vegetation. We need to find out who is responsible for that.

Mayor Thalhofer stated we will have staff look into that.

4. AWARD: Certificate of Recognition - David Warner

Mayor Thalhofer called this item and presented David Warner with a certificate of recognition.

5. PUBLIC HEARING / ORDINANCES:

- 5.1 PUBLIC HEARING CONTINUANCE / ORDINANCE (Introduced 7/25/00): An Ordinance amending Goal 5 of the Troutdale Comprehensive Land Use Plan and amending Troutdale Development Code for compliance with Title 3 of the Metro Urban Growth Management Functional Plan pertaining to water quality and flood management and repealing Troutdale Municipal Code Chapter 15.24 Flood Damage Prevention.**

- 5.2 PUBLIC HEARING / ORDINANCE (Introduction): An Ordinance amending Troutdale Development Code for Compliance with Title 3 of the Metro Urban Growth Management Functional Plan pertaining to water quality and flood management and repealing Troutdale Municipal Code Chapter 15.24 Flood Damage Prevention.**

Mayor Thalhofer read the ordinance titles and opened the public hearing at 7:13pm.

Councilor Kight stated I would like to check with our City Attorney since there are two issue before us, would I need to declare a conflict of interest on both ordinances?

Marnie Allen stated it is my understanding that you live within the vegetation corridor under both proposed ordinances in which case you would have a conflict of interest.

Councilor Kight stated at this time I will then stand down.

Allen stated I would like to briefly explain the addition to agenda item 5. The title of an alternative ordinance was added to tonight's agenda. As you all know, the Troutdale Charter requires that the City include the title of an ordinance in the agenda of the meeting at which the ordinance is being considered. Unfortunately, this alternative ordinance the title of it was not included on the agenda and publicized at least three days before tonight's hearing. We wanted to include it on tonight's agenda so that you could consider that ordinance, have it introduced tonight and if you want to proceed in adopting the alternative ordinance that is in your packet, you could take testimony tonight and adopt it at the next Council meeting. Because it was left off of the agenda and not publicized you can not take action on it tonight.

McCallum stated following the last meeting we did some investigating about the issue pertaining to the amendments that are proposed to the Comprehensive Land Use Plan Goal 5 text and ordinances pertaining to implementing a safe harbor provision under Statewide Planning Goal 5. The issue was that it was staff's understanding that we needed to address either adopting a safe harbor provision or going forward with an ESEE analysis with respect to the Sandy River setback. In the drafts that have been presented since September 22, 1999 pertaining to the Title 3 revisions to our Development Code, the draft has had a setback standard in a vegetation corridor of a minimum of 75 feet from the Sandy River. That is pertinent to the safe harbor provision under Statewide Planning Goal 5. However, the Title 3 amendments that Metro is requesting do not pertain specifically to Goal 5, they pertain to Goal 6 and 7. Our Troutdale Development Code only requires that text amendments be incorporated into the Development Code if they are actually pertaining to a specific planning goal. When we evaluated it at the staff level we realized that the question before the City at this time is whether we actually need to look at revisions to our Goal 5 standards which would result in the 75 foot setback minimum for the Sandy River or whether we can put that aside until the upcoming Metro Goal 5 issues are brought before us. We did request a clarification from the State and we have not heard from them. As a result staff has prepared two ordinances, one is following through as proposed with some Goal 5 revisions to allow us to operate under the safe harbor provision which includes the 75 foot setback from the Sandy River. The alternate ordinance would be removing all references to Troutdale Comprehensive Land Use Plan Goal 5 and not increasing the minimum setback from the Sandy River but keeping it at the minimum of 50 feet proposed under Metro Title 3. Also subsequent to our last meeting, staff met with the Counsel from McMenamins and Steven Abel requested that we look at the opportunity for map amendments. Some of the notations on the map do not reflect what is indeed on the property, flood plains, there may be letter of map amendments to identify the flood plain and upon an actual survey of the property there may not be wetlands in those specific locations. So they requested that we review the language we have in our draft ordinances pertaining to map amendments. It is the intent that our standards reference the Title 3 mapping as a starting point, the map won't rule in that when people do bring in surveys to us as a result of their land use applications, we would be able to keep a repository of the actual delineation of a wetland and the actual vegetation corridor. We would keep that for reference and transfer that information to Metro so that when Metro actually does some updating to the Title 3 map they could be incorporated at that time. In the memorandum dated September 25th pertains to clarification of the language under the applicability provisions so that the map amendments process is clarified.

Mayor Thalhofer asked Ms. Allen, if we have a consensus to proceed with the alternate ordinance, what do we do with the first ordinance?

Allen replied you could make a motion to indefinitely table the first ordinance and proceed with the introduction and public hearing on the second ordinance.

MOTION: Councilor Thompson moved that we table ordinance 5.1 and proceed with the alternate ordinance 5.2. Seconded by Councilor Daoust.

**YEAS: 5
NAYS: 0
ABSTAINED: 0**

Mayor Thalhofler stated we will now hold the first hearing on ordinance 5.2.

Councilor Rabe stated so the essence of this is now we are going to pull back from 75 feet to 50 feet.

McCallum replied yes.

Councilor Rabe asked that is on the Sandy as well as Beaver Creek?

McCallum replied it is only on the Sandy River because that was based upon the average annual flow of 1,000 cubic feet per second or more. It is my understanding from what information I was able to receive that Beaver Creek does not have an average annual flow of 1,000 cubic feet per second or more.

Councilor Daoust stated I think we have to remember that this 50 foot setback is a minimum and in fact we could have larger setbacks along the Sandy River depending on the slope adjacent to the protected water feature.

McCallum replied that is correct. Even along Beaver Creek or possibly Arata Creek, if the slope is less than 25% the minimum setback will be 50 feet. If the slope immediately adjacent to that stream is greater than 25%, you will measure in 25 foot increments until you get to the end of the 25% slope and at the end of the 25% slope if you are beyond 50 feet then you only add 50 feet beyond that according to Metro Title 3.

Mayor Thalhofler asked how would that affect Mr. Johnson who was here at the last meeting, he seemed to think that the 50 foot setback would be okay, it would work for him.

McCallum replied I don't recall if his house was within that 50 foot setback. If he can establish that his proposed house is complying with that minimum vegetation corridor, he would be in compliance with the vegetation corridor aspect. There is also flood plain on his property and there are separate regulations for limitations on development in flood plains that would affect his property. In addition his property is in the Columbia River Gorge National Scenic Area, so he has other regulations that other agencies can bring into play.

Mayor Thalhofler stated he made the impression that he could live with the 50 foot setback, but the 75 foot was too much.

Councilor Daoust stated actually all of the testimony that we heard at the last meeting, I think that they unanimously agreed that they would prefer 50 feet.

Diane White stated a lot of my questions have been addressed by not going with ordinance 5.1. I have a gradual slope on my property and at the bankfull stage it is leveled off, it goes back not 50

feet but lets say it goes back 75 feet and then from there we have an additional 5 feet height in dirt and then there is another small slope and the property from there on is flat, how does this affect my property?

McCallum replied the percentage of the slope first has to be defined by a surveyor. If the slope is greater than 25% from the bankfull stage, you measure in 25 foot increments until the slope ends and then add 50 feet. If it is less than 25% you only have to measure 50 feet back from the bankfull stage. If there is a break in slope and it levels off, that is the break in slope and we would not be concerned with what is beyond that under this provision.

White stated we requested a map amendment because a lot of my property is off of the flood plain, how does Title 3 apply to the property that is above the 100 year flood plain, is it subject to everything that is proposed within the codes of Troutdale and Title 3?

McCallum replied your letter of map amendment was received by the City and as stated in my September 25th memo, we do have an intent that the revisions to the map will be held here in the City and that is what we will use to determine what standards apply. The portion under your property under the map amendment, that is above the 100 year flood plain will not be subject to the standards of development under the flood management area. Only the portions of your property that are at or below the 100 year flood plain elevation.

White asked so specifically pertaining to Title 3, not being able to make land divisions. The portion that is above the 100 year flood plain would that be subject to that?

McCallum replied the portions of your property that are now determined by the Federal Government to be above the 100 year flood plain don't come under the restrictions of the flood management chapter.

Glenn White stated I think you need to explain again where the setbacks start, where you start measuring from. Whether it is the ordinary high water mark or bankfull stage. I know that Troutdale has used the term bankfull stage, but what I think is happening is that they are changing the definition of what that means. When we talk about increasing the setback we also have to realize that we are increasing the starting point.

McCallum replied the measurement starts at the bankfull stage under our proposed changes because that is how Metro Title 3 has requested that the measurements begin. Bankfull stage is defined under state regulations and that is the definition that we proposed in the proposed text. Bankfull stage is, as defined in the OAR's, is the stage or elevation of which water overflows the natural banks of a stream or other waters of the state and begins to inundate on land areas. In the absence of physical evidence, the two year recurrent flood elevation or storm level may be used to approximate the bankfull stage. The bankfull stage is the starting point for measuring the width of the vegetation corridor from a protected water feature. Under the current Development Code, we have a measurement that begins from what we have defined as the top of the bank, which is defined as the land area immediately above a stream, river or wetland. The bank has a notably steeper slope then the surrounding landscape. The top of the bank is the first major break in the slope between the top of the bank at waterline and the surrounding landscape. The top of the bank does not include the entire canyon created by stream or river, nor does it usually include the entire drainage area of a wetland. The top of the stream bank as well as the location of the 100 year flood

plain and floodway, if known, are depicted on the City of Troutdale flood plain and stream corridor map on file. Our existing starting point is the top of the stream bank for measuring setbacks under our Development Code language. The proposed starting point is in compliance with Metro Title 3 and it is now starting from the bankfull stage. It is my understanding that they are very similar, but we were adopting the actual definition that Metro has instead of keeping with our old definition for consistency.

White stated I had a lawyer explain it to me that the ordinary high water mark is the term that has always been used for determining setbacks, and that is where the water primarily stays during the wet season. Bankfull stage is quite a bit different than that, that is where you will have one or two times a year where the river will peak during a storm event and it would rise quite a bit above that ordinary high water mark. I believe that is where Metro wants to start measuring for their setback. Is that true?

McCallum replied we don't use the term ordinary high water mark in the current code and I don't have an answer for that.

White stated I think that the term top of bank means ordinary high water mark the way I understand it. And now we are going to adopt Metro's wording which changes that definition. We are actually changing the starting point that has been used forever.

McCallum replied the definition is from the State, Metro adopted the definition from the State Administrative Rules, they did not create their own definition.

Councilor Daoust stated looking at it closer, it does appear that it is the storm level. They describe it as recurrent flood elevation, so that would leave one to believe that it is taking into account those temporary rises in the water level.

White stated I would have a problem with using that as a starting point because you would have to have someone down there every day in the winter months.

Councilor Daoust stated it is a good point. I would think we would have to deal with that at the time that we would need to determine where that measuring point was for development purposes. A year from now, the bank of the Sandy River could be 100 feet in another direction from where it is now, that may be an exaggeration.

White stated I disagree with that. The channel can move but the ordinary high water mark is going to be a consistent factor, it will always leave evidence. Take a look at the river right now, there is a distinct stain on the rocks and that is where everyone determines the starting point. If you want to figure out where that waterline is once or twice during the wet season at the peak, no one is going to be able to tell you that unless they are down there on a daily basis. The only reason I can see for changing that definition is to gain more ground.

Councilor Daoust stated so your proposal is to use the term mean high water mark?

White replied yes.

Councilor Daoust asked and your reason for that is?

White replied that is what several other cities have adopted. It is what has always been used for the starting point for measuring setbacks. I don't see any reason to change it. Changing it is simply a way of gaining more green open space.

Councilor Rabe asked I am just wondering if the mean high water mark is in fact the bankfull stage, are they just two words that mean the same place on the river bank.

White stated it currently is. The bankfull stage means, according to my attorney, mean high water mark. Metro is proposing in their language to change that to actually mean bankfull stage which would mean where it peaks out once or twice annually during the wet season.

Mayor Thalhoffer asked Ms. McCallum, is there anything carved in stone here where we have to follow the language of Metro?

McCallum replied I do not have an answer for you this evening whether we can change our starting point to be based upon the ordinary mean high water line. That is described in the Oregon Administrative Rules as the line on the bank or shore to which water ordinarily rises in season. Synonymous with mean high water. The starting point that Metro desires is the bankfull stage or if that is not readily identifiable then it is the two year storm event level. I would have to ask Metro if they see those as synonymous.

Mayor Thalhoffer asked could you look into that and bring back some information to the next Council meeting.

Mayor Thalhoffer closed the Public Hearing at 8:07pm. The second hearing will be held on October 10, 2000.

6. PUBLIC HEARING / ORDINANCE (Introduced 9-14-00): An Ordinance amending Chapter 8.28, Nuisances, of the Troutdale Municipal Code.

Mayor Thalhoffer read the Ordinance title and opened the Public Hearing at 8:08pm.

Hanna stated this is the second reading on this ordinance which amends three sections of Chapter 8.28 the Nuisance Code. The three amendments are section 8.28.020 which revises the definition of abandon vehicles to include vehicles with no registration or invalid registration. The second amendment is in section 8.28.140 which would require the city to advise the owners of property subject to abatement that the cost of such abatement may be attached to the property as a lien if it is not paid. The third amendment is in section 8.28.170 allows the Director of Community Development to file a lien against the property as part of the nuisance enforcement process if the payment for the cost of the nuisance abatement is not paid. That section currently requires action by Council to file the liens. Staff recommends adoption.

Council had no questions.

Dave Munson stated I have worked with Jack Hanna before with some problems in the neighborhoods and I support his proposal tonight.

TC Clark stated I also support Jack Hanna on this issue.

Mayor Thalhoffer closed the Public Hearing at 8:13pm.

MOTION: Councilor Daoust moved to adopt the ordinance which amends Chapter 8.28, Nuisances, of the Troutdale Municipal Code. Seconded by Councilor Kight.

**YEAS: 6
NAYS: 0
ABSTAINED: 0**

- 7. PUBLIC HEARING / ORDINANCES (Introduction):**
- 7.1 An Ordinance Granting a Franchise for Broadband, Cable, Institutional and Telecommunication services to RCN Telecom Services of Oregon, Inc. ("RCN")**
 - 7.2 An Ordinance granting a franchise for Broadband, Cable, Institutional and Telecommunication services to Western Integrated Networks of Oregon Operating, L.L.C. ("WIN").**

Mayor Thalhoffer read the Ordinance titles.

Norm Thomas stated I would like to first explain a little about what the Commission has been doing. The Commission has produced two videos and we have won national awards for both of them. One thing that has happened since I last talked to you is that we have covered a lot of ground this last year especially with the new franchises. We have managed to bring two franchises forward to you in about six months of working effort. We started out last year when a RFQ was requested for other providers to come in and offer competition on broadband internet to offer competition with AT&T Corporation. We held public hearings with four companies in March. We had a couple of the companies decide that they were not able to do this and so we are here with the final two. I would also like to update you on where the construction process is. As you know, according to the franchise agreement with AT&T they are required to rebuild the entire cable system which involved Troutdale. At this point Troutdale is tentatively scheduled for completion by the end of November of this year. I would now like to show the video that we made.

Mayor Thalhoffer oped the Public Hearing at 8:30pm.

Thomas stated I am your representative on the Mt. Hood Regulatory Commission and the Chair. On behalf of MHCRC we are very proud to bring these franchises to you tonight. We have worked hard for most of this year with negotiations on these franchises. We believe that both companies are qualified to bring new competitive choices to the residents here in Troutdale. The Commission held two public hearings on these companies. We have had a lot of public input on the terms of the franchise and we believe that each franchise represents a solid plus for the citizens, consumers and cable subscribers. Each company projects an investment of nearly \$500 million in Multnomah County alone to overbuild the existing cable. They will provide competition for AT&T Cable plus phones. The consumers can look forward to cheaper packages, better services and more choices. Consumers will also be able to bundle phone, cable and internet services for one rate with one billing cycle. Public benefits for cable access, I-Net which is the institutional network (which connects the governments, schools, libraries) are comparable to benefits provided by AT&T under the

Paragon Franchise. The City Attorney asked me to relay to you that on item one was to delete the stricken out Section I that appears before each section, and to also delete "RCN Telecom Services, Inc." from the following: Page 78, Section 27.2, GUARANTOR, revised to read "GUARANTOR: RCN Corporation" and Pages 81 and 82 of Exhibit A, Definition of Guarantor and Signature line for Guarantor, revised to read "Guarantor: RCN Corporation, a Delaware Corporation" and "GUARANTOR: RCN CORPORATION".

Mayor Thalhofer asked will RCN and WIN be wanting to piggyback onto AT&T lines or are they building their own lines?

Thomas replied they will be building completely separate systems, one for each company. As far as open access they have committed, and I believe it is part of the franchise, that they will provide additional providers along their lines.

Mayor Thalhofer asked is this going to involve tearing up the streets on different occasions or are we going to coordinate this to where we only have to go through that once?

Thomas replied I am not sure how the companies will do the construction process. They will be required to get permits from the City, which you control. I imagine there will be some tearing up of the streets and some disruption. What they have said during the public hearings is that they will do everything that they can to be as nonintrusive as possible.

David Kerr with RCN stated we are proud to be here and are pleased to have the opportunity to do this. We have a construction manager who is located locally and we have an aggressive construction schedule. There is no way that we can completely eliminate the disruption in the community to do this but we gain no advantage by coming in and failing to conduct ourselves in the best possible way in the community. The only way that we gain an opportunity here is to come in and try to minimize the affects and work very closely with the staff and with the Commission to minimize those affects.

Bill Mahon with WIN stated thank you for giving us this opportunity. We are very anxious to start building in the area. The question was asked, how do you coordinate the construction. We recently announced that we have signed an exclusive contract to do our construction in all the communities. It is imperative for both companies, even though we are going to compete head to head and certainly we don't agree on everything, I think we do agree that the goal of both companies has to be to make this as least intrusive as possible.

Councilor Kight asked once you bring the line underground out in front of a house, how do they get the line to the house?

Mahon replied the franchise has requirements that if there are underground utilities in the area, we have to also be underground. The exceptions to that would be if the homeowner did not want us to put the line underground for some reason.

Councilor Kight asked how do you tap into the building, do you disconnect the current?

Mahon replied under the rules the homeowners own the wiring inside the house. In most cases I think we are going to find that the interior wiring will have to be replaced just because of the

greater capacity needs. If we can use the existing wiring we will.

Councilor Kight asked who pays for that?

Mahon replied it is an embedded cost within the installation charge.

Councilor Rabe asked if I switch to one of your companies, what is the impact on my driveway? Am I going to see a new trench in my driveway or are you able to pull the old one and use the existing pathway that is being used now to come up my driveway?

Mahon replied there will be a multitude a variations out there. In some cases that may have to happen. Certainly before any work is done the homeowner will know exactly what has to be done.

Mayor Thalhoffer asked is there anyone else who would like to speak to this agenda item?

No further testimony received.

Mayor Thalhoffer closed the public hearing at 9:02pm and stated that the second reading will take place on October 24, 2000.

Mayor Thalhoffer called for a 10 minute break.

8. PUBLIC HEARING / APPEAL: An Appeal of the Planning Commission's decision in the matter of Case File No. 00-025, setback variance for Sandy Frontier Trailer Court.

Mayor Thalhoffer called this item.

Allen stated this matter is a quasi-judicial land use proceeding and therefore it is subject to the procedural requirements that are set forth in State Law as well as in the Troutdale Development Code. I will summarize those requirements. The staff report has been prepared for tonight's hearing and was made available at least seven days before this hearing. The approval criteria that applied to the variance application and the appeal that is pending are listed in the staff report on page 2, they are also analyzed in the Planning Commission's decision. If anyone wants the City to read those criteria, please let the Mayor know and he can read those for you. The process that you follow at quasi-judicial proceedings starts off with a presentation of the staff report by staff. After the staff report the City Council will determine if it wants to hear this appeal "on the record" or "de novo". You may choose to hear arguments in support of the de novo or on the record review. Once the City Council has decided how it wants to conduct the appeal hearing, you will open the public hearing and the appellant, that is the person who has appealed the Planning Commission's decision, is given an opportunity to testify to the Council in support of their appeal. In addressing the Council we ask everyone who is testifying to explain why the Planning Commission decision was incorrect and address your testimony to the approval criteria that are outlined in the staff report. After the appellant addresses the Council, then anyone else who wants to testify in support of the appellants position will be given an opportunity to address the City Council. After the appellant has appeared and testified before the Council, then the applicant and anyone who wants to testify in support of the Planning Commission's decision will be given an opportunity to testify. When you testify we also ask that you state your name for the record so the City knows who to mail a copy of City Council's decision to. If you believe that there are approval criteria that apply that have not

been addressed, you need to identify those approval criteria for the City Council and you need to explain with enough specificity that the City Council and others in attendance can respond to your issues. If the City Council hears this matter de novo, any party who wants the City Council to leave the record open so that you can submit additional evidence or who wants to request a continuance must make that request before the City Council closes the public hearing tonight. Finally, any issue that any party wants to raise on appeal to LUBA or that anyone wants to raise in Circuit Court must be raised tonight with enough specificity that the City Council can address and respond to that issue. If you fail to raise the issue tonight, you will waive the right to raise that issue on appeal both at LUBA or in Circuit Court. Mr. Mayor before you start receiving public testimony but after you hear from staff, we remind all of the City Council to declare any conflicts of interest, bias, or ex-parte contacts. Ex-parte contacts do include site visits, so if you have made any visits to the site you should describe what you saw, when that site visit occurred and invite anyone to ask any questions about that site visit. If any of the Councilors are disqualified from participating because you live within 250' of this property and are entitled to receive notice, you should announce that and refrain from participating.

Mayor Thalhoffer asked the Councilors if they had any ex-parte contact or conflict of interest to declare?

None declared.

Faith stated before we get into the staff presentation on the merits of the case, I feel that it is necessary that we first conduct some order of business in terms of determining what the scope of review is. This is an appeal of a land use decision that was rendered by the Planning Commission. Appeals are governed by State law and by the Troutdale Development Code, specifically Section 16.300 outlines what the scope of review can be in considering appeals. It says that the hearing body, which in this case is the City Council, has the discretion in how broad of scope you would like to have in reviewing this matter. The Council may limit the appeal to a review on the record and a hearing to receive oral arguments regarding the record, which is everything that has been presented this far to the Planning Commission in their consideration. Or, the Council may accept new evidence and testimony. The Code outlines three options to you in this regard. First is to restrict this hearing to the record. Secondly, you can limit this hearing to such issues as you determine necessary for a proper resolution of the matter. The third option is a de novo hearing which is defined in the code as a hearing by the review body as if the action had not been previously heard and as if no decision had been rendered except that all testimony evidence and other material from the record from the previous consideration shall be included in record of the review. It is staff's recommendation that you do conduct this as a de novo hearing to take new evidence and testimony. The reason why we are recommending that is because we feel that there was very probably a procedural error that occurred at the Planning Commission level. That procedural error can be remedied by opening it up for new testimony and evidence. The appellant has requested an opportunity to supplement the record with new evidence and testimony which would be possible to do at a de novo hearing. By contrast, the applicant for the original land use decision for the variance, has also submitted arguments to this Council against a de novo review and has asked that this be considered on the record only. Before you, by motion, decide which of these options you wish to choose for considering this matter you may want to hear arguments by the applicant and appellant in terms of which of the options they feel is appropriate.

Mayor Thalhoffer asked I would like to hear from our City Attorney as to whether we even need

to go through that process because if one of our Planning Commission members lives within 250' that it is mandatory that we conduct a de novo hearing, is that your legal opinion?

Allen replied you have some discretion. It is advisable to conduct a de novo hearing as Mr. Faith has suggested because that would clearly cure any error or any appearance that there was any error that the decision was somehow unfair because the Planning Commissioner participated. However, I also understand that the appellant in this case was present at the Planning Commission hearing and did not raise or object to this Planning Commissioner participating and so there is some argument and merit to the position that they waived the ability to raise that issue now and claim that it was a valid basis for having the Planning Commissions decision reversed.

Mayor Thalhofler stated so your opinion is that we do have discretion and it is not mandatory that we abide by the 250' rule?

Allen replied no, you have some discretion in deciding whether you hear it de novo or on the record.

Mayor Thalhofler asked could you read section 16.180 the part about the 250'.

Allen read section 16.180 "except for Type IV legislative hearing conducted by the governing body, no member of a hearing body shall participate in a discussion of the proposal or vote on the proposal when any of the following conditions exist". Subsection "B" reads " the member owns property within the area entitled to receive notice of the public hearing". I don't believe that that is discretionary, it says that you shall not participate. However, when the Planning Commissioner made an error at the Planning Commission by participating, the appellant was there and knew of that issue and knew of this code requirement but did not object, that error on the part of the Planning Commissioner may have been waived.

Mayor Thalhofler stated may have?

Allen replied may have been. The safest thing to do would be to grant a de novo hearing and then you can avoid questions about whether they waived it and appearance or questions about whether or not it was a fair decision.

Councilor Kight asked at what point did he declare he had the conflict of interest?

Allen replied I believe he declared that he lived within the area that was entitled to receive notice but I will refer to Mr. Faith who was there.

Faith stated at the very first hearing he didn't declare a conflict of interest, he simply stated for the record that he received a notice because he lived within 250' of the subject property but that the fact that he received notice and lived in close proximity he did not believe that would affect his decision and that he could remain impartial on the issue.

Councilor Kight asked and he participated from that point forward?

Faith replied yes.

Councilor Kight asked at what point did the appellant know that Mr. Roehm had been notified?

Faith replied from the first hearing.

Councilor Kight asked and he was in the room at the time?

Faith replied yes.

James Leuenberger stated it is our position that a de novo review would be best. In regards to notice of the disqualification of the member, although the member had notified everybody present that he had received notice, it was not clear to me or Mr. Howell that that was a disqualifying criteria. He went ahead and said that he didn't think that he had any bias based on his knowledge of the participants. When I read the City ordinance in preparation for preparing the appeal, I recognized that it wasn't discretionary whether or not he could remain as a discussing member or deciding member of the Planning Commission. It was mandatory pursuant to your own ordinance that he was disqualified. That is why it is one of the grounds for appeal. I believe that it does clear up the record if the appeal is heard as de novo. We believe that we have a small amount of evidence regarding the history of the property which wasn't put into record at the Planning Commission level. I believe it would be best if we started from scratch.

Mayor Thalhofer asked why weren't you aware of the provisions of the ordinance?

Leuenberger replied I had not retained or read the entire ordinance.

Mayor Thalhofer asked, the history of the property, you didn't have that the first time around?

Leuenberger replied a point I would like to make if given the opportunity is both Terry Howell and Chester Howell could testify that the actual unit that was removed from space one in 1999, had not been there for a very long period of time which was the gist of the testimony that it was a long pre-existing use when in fact it was a relatively short pre-existing use. Prior units were much smaller than the one that was there approximately ten years until 1999.

Mayor Thalhofer asked did you have an opportunity to discover that prior to the conclusion of the hearing at the Planning Commission level?

Leuenberger replied I am sure that the Howells knew about it, they have lived there for many years.

Mayor Thalhofer asked why wasn't this point raised at the appropriate time?

Leuenberger replied I wasn't aware of it.

Mayor Thalhofer stated but they were.

Leuenberger replied yes.

Mayor Thalhofer asked when did you first become aware that the Planning Commission member was perhaps disqualified?

Leuenberger replied when I was preparing the appeal.

Councilor Daoust asked are you bringing forth evidence now that was not presented before the Planning Commission?

Leuenberger replied yes. In addition, one of the things I recommend is that the Council perform a site visit of the property. If you should decide not to do that, I have prepared a new exhibit which has pictures of the units in the Trailer Park. I believe that would be helpful in understanding the whole question about, one of the conclusions of the Planning Commission was that the only thing that was reasonable was to have a modern mobile home in space one, that the smaller trailer would not be practical or possible in today's economy. I would like to establish by pictures and sales brochures that not only does the property have small trailers on it now, but also that you could go to Olinger Travel Homes and purchase a very small trailer that could act as your home.

Councilor Daoust stated the question still stands is why wasn't that brought up during the Planning Commission hearing?

Leuenberger stated the argument was made that trailers exist today that you can purchase, that are much smaller than the mobile home that is located in space one. In the interim I have acquired sales brochures that you could look at that would show you that small units can be acquired now. The Planning Commission seemed to accept that it was not possible to purchase a modern unit that was anything smaller than that which is on space one.

Councilor Daoust asked Ms. Allen, during the Planning Commission hearing when Commissioner Roehm stated what he did and proceedings went forward, if we accept the fact that we clearly had an error in the proceedings, is it a valid legal argument to say that this Council failed to "preserve the error". If there was an error made, is it legally an error if it fails to be called upon or challenged. I am trying to get to the bottom of whether we actually legally made a mistake or not because it was not challenged.

Allen replied which is why I think you have some discretion in deciding whether you do it de novo or on the record. I do believe that you can claim that they did not preserve the error by not objecting and raising that error before the Planning Commission.

Leuenberger stated there is also a document called plain error, at least in the court proceedings. Some errors are so egregious that even if the counsel for the person at the trial level doesn't raise the issue, the error is so bad that the appellate court will address it.

Councilor Daoust stated if the error was so egregious and such a major error, why was it not mentioned at the time?

Leuenberger stated the thing that makes it such an egregious error is the City's own ordinance which states clearly that a person who receives notice is disqualified. That isn't necessarily the way that things work in other jurisdictions, not having practiced here in Troutdale, it wasn't something that I was aware of.

Councilor Daoust asked what is the big deal if the variance goes away when the road is developed. There is a sunset limit on the variance that the Planning Commission approved and that is the

variance ends at the time that the road is improved to City standards and then it is not an issue anymore.

Leuenberger stated that is not what the condition says. It talks about it being an improvement on this very section. One of the things that we put in the appeal is an alternative condition which is very similar to that which was approved by the Planning Commission before it was rewritten by staff and ultimately approved by the Planning Commission. My clients number one perspective is that the setback requirements were instituted for a purpose and those purposes are being missed here and those are safety and aesthetics. The 10' setback is a wise criteria for any property including this property.

Andrew Stamp stated I am a land use attorney here on behalf of Nancy Cox. I just want to talk about this procedural issue about scope of review. As you were informed there are three types of review possible here. On the record or where new evidence taken on specific issues but you leave alone all the issues that aren't contested. The third type is a de novo hearing which means you forget that the Planning Commission decision ever existed and you start over. The City Attorney didn't mention that there is a burden shifting that applies even though it is a de novo review, so the burden is now on the appellant. The reason we don't want a de novo review is because the applicant has filed essentially an appeal that consists of ten separate issues, most of which were not raised below. He sat, he waited he did nothing. He didn't even know, apparently as he just testified, that the code provision existed about the disqualification and yet he wants to seek your mercy on that point for his own errors. Here is a quote from the appellants attorney that he made before the Planning Commission, he is actually talking about me when he says "Counsel makes the observation that the zoning code is difficult to understand and read. Again there is an old axiom in the law that ignorance in the law is no excuse, I am sure you are all familiar with that, it applies to land use laws as much as it does in criminal law". That is Mr. Leuenberger telling you his views on how much mercy he should get for not having read the Code. Neither side has requested a de novo hearing, even the appellant, until tonight had not requested a de novo hearing in his appeal. With one caveat, we don't want a de novo hearing either. The caveat is with regard to Commissioner Roehm's disqualification. We think there is a way around this and I am perfectly willing to defend this at LUBA. The Code, 16.180 discusses disqualification for having property next to the subject property. The provision directly above that is called challenges to impartiality. Except for Type IV legislative hearings.....a member of a hearing body may challenge the qualifications of a member of the hearing body to participate in the hearing and decision regarding that matter. The challenge shall state by affidavit the facts relied upon by the challenger relating to the person's bias, prejudice, personal interest, or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner. Then it talks about how you have to do this in writing and it has to be within 48 hours of the hearing, some procedural requirements. What are we talking about here when we are saying that you are disqualified because you own property within 250', we are talking about impartiality. You can't make a decision because you own property next to it because it will cloud your judgement because of self interest or bias. I believe that the City Council can read those two provisions together and require under their code that a person who is wishing to disqualify a decision maker on the basis of impartiality for owning property within 250' of the subject property must raise that in the manner stated in the code. I also direct you to one other code provision, 16.020 Raising of Issue for Appeal, an issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the following (I think that meant final but it says following) evidentiary hearing on the proposal before the Planning Commission or City Council. Such issues shall be

raised with sufficient specificity so as to afford the Planning Commission or City Council and the parties an adequate opportunity to respond to each issue. That was not done, it wasn't done with the majority of the ten issues in the appeal and it certainly wasn't done with regards to Commissioner Roehm. For those reasons I believe that you don't need to have a de novo hearing to cure that procedural defect. If you are not willing to agree with me that you can interrupt your code in that manner, then you do need a de novo hearing I believe. I will say, that in that regard, you as decision makers are subject to that same impartiality standard but the LUBA case law is clear that if you don't raise those sorts of issues at the local level that LUBA will not consider them, they are deemed waived under state law. The other thing to consider is de novo basically means that everything that we did at the Planning Commission is for not. It is my understanding that the applicants have spent close to \$20,000 on fees associated with recess of hearings at the Planning Commission. That is a lot more money than we anticipated and essentially a de nova hearing means that all of that has been wasted. I have presented written testimony that goes into the four factors that the Council is to consider when it decides whether or not to accept new evidence and to have a de novo hearing. They are listed in TDC 16.320 and in my memo, they are: prejudice to the parties; convenience of availability of evidence at the time of the initial hearing; surprise to opposing parties; and competency, relevancy and materiality of the proposed testimony. Most of the testimony that he proposes to bring up is either irrelevant non-material or just incompetent. Especially for things regarding the jurisdiction of the Fire Department. I am not going to get into that now but they could have brought all of this up beforehand. They had months and yet they just sat around waiting for something to happen, and what is that something? An appeal and that is the first time they got around to opening the code and reading it and I think that is inequitable and they should not be rewarded.

Councilor Kight asked Ms. Allen, Mr. Stamp brought up the 48 hour window where the appellant has time to bring forward those issues. Did Mr. Leuenberger exercise that time frame on this issue? At what point did Mr. Leuenberger bring up the issue relative to the Commissioner living next to the property and finding evidence that he should have disqualified himself?

Allen replied I am going to have to refer to Mr. Faith because I was not present at the hearings.

Faith replied as he stated to you, it was first brought up in his notice of appeal.

Councilor Kight asked what was that time frame?

Faith replied I believe it was submitted seven or eight days after the decision was rendered.

Councilor Kight stated so they are clearly beyond the 48 hour window, is that correct?

Faith replied in terms of that provision of the code, correct.

Councilor Kight asked Ms. Allen, how would you interpret that particular part of the code relative to the 48 hour procedure of the appellant bringing those issues to the staff or other members of the city?

Allen replied I believe that the appellant had the obligation to raise issues that he was going to use as the basis for an appeal to the Planning Commission at the Planning Commission hearing.

Councilor Kight stated absent that, the 48 hour portion of it?

Allen stated I don't see the 48 hour portion of it as being that significant.

Councilor Kight stated so it is not really relevant?

Allen replied not in my opinion.

Councilor Kight stated so from your legal perspective the appellant should have brought this forward at the time of the Planning Commission hearing irrespective of whether he had knowledge of this particular provision or not?

Allen replied right. I guess it does go back to the presumption that you should know the law and it is his obligation to know and be prepared on the law.

Councilor Daoust asked did you have a concern with Commissioner Roehm?

Stamp replied no. If the decision maker identifies an issue and says that I live next door but I can be fair about it, I take him on his word. I recognize that he had a potential conflict. I could have objected at that time, I knew about that code provision.

Councilor Daoust asked was the rest of the Planning Commission okay with it?

Stamp replied they didn't say anything. Everyone had plenty of opportunity to say something. If in the event you do decide to have a de novo hearing, we really are not prepared to move forward tonight. I have witnesses that I would like to call, it is also late in the evening. I would request that we continue this to a date certain. We are willing to extend the 120 rule to whatever that date certain is.

Terry Howell stated this is not just about the setback. Setback is one thing but that is not a trailer it is a modular home.

Chester Howell stated I own the adjacent property and use the road that they are talking about. This gentleman here makes you believe that everything is my fault. I went to the Columbia Gorge Association when I got notice that these people were improving their home. I went out there and I talked to them and I asked them, what do I have to do get a lawyer to defend my road? She said no, don't get a lawyer. I have done everything that I could until I realized that there is nothing else that I can do except get a lawyer. I am not trying to take advantage of anybody. I went up and told that lady that you can't take public government property by adverse possession, and this is what these people are doing. They are using a different bylaw and they are making a real fancy dance of it and they sound good. I can't afford to do that, they have spent \$20,000 doing it. It is not about money is it? Is it about money or is it about who is going to allow us to use our road. I believe that I am entitled to use that 30 foot road. I don't think they have a right, you or anybody has a right, to give an easement to that road when I am entitled to it also. I should have something to say about it.

Councilor Kight asked Ms. Allen, could you run through the second and third options again, the first option being the de novo hearing.

Allen replied the second option would be a modified de novo hearing where you would receive new testimony but only on the issues raised in the appeal. Any issue outside the scope of those raised in the appeal, or if there were other specific issues that you wanted to consider, you would identify the issues you want to hear testimony on and you would limit that testimony to those issues. The third option is to just base your decision on the evidence that is already in the record. You could hear arguments, but you would not hear any new factual testimony.

Councilor Daoust asked so we wouldn't deal with any of the appeal issues since the statement was made by one of the attorneys that none, or the majority of the issues in the appeal were not dealt with at the Planning Commission hearing.

Allen replied you would look at the evidence that was in the record and look at the issues that were raised and try to respond to those issues based on the evidence that is in the record.

Councilor Thompson stated this is a tough decision. I am not sure yet, but I don't want to hear it de novo. I would rather hear it on the record with additional evidence.

Mayor Thalhoffer stated it is difficult when the appellants come in and say that they did not have the opportunity to present evidence when they had three hearings. It is difficult for me to understand why they didn't do that at the appropriate time. I find that the ignorance of the provisions of the ordinance really shouldn't matter because that is not an excuse. The history of the property was known by the client, it wasn't known by the attorney but they should have gotten together and reviewed the evidence before the hearing. It seems that the appellant could have gotten all these issues out in the hearings. I don't want to see a de novo hearing. Under different circumstances I would probably say to hear this on the record but since there is some concern that not everything has been brought up, having additional evidence would be permissible although I really don't like that approach but it is better than a de novo hearing.

Councilor Kight stated the Mayor has articulated my position. Once you have had three meetings and the appellant didn't raise any objection, didn't provide the new evidence, that was the place for them to do that. They are now wanting to set that all aside and have a de novo hearing as if nothing had happened, and that is not fair to the other side. Seven or eight days to wait to file this appeal, obviously that is one of the reasons we have the 48 hour window, they didn't exercise that. My feeling is that we have limited testimony. I don't want to start from ground zero.

Councilor Rabe stated I do not support a de novo hearing for lack of a title of the option that was described by previous Councilors, I would support their approach. I have served on the Planning Commission and it seems like due process occurred. I firmly believe that you need to be prepared when you have a presentation and apparently there has been some negligence or some oversight. I would support option 2 which is the limited testimony and evidence.

Councilor Daoust stated I really clearly feel that we should just take on the record. Do you know what is going to happen, we are going to address, what we are calling "limited evidence", it will turn into a de novo hearing because the issues in the appeal are going to raise up a lot of the same issues that the Planning Commission dealt with or didn't deal with. It is going to turn into a free-for-all in my guess. That is a concern of mine. I believe that because the appeal is based on issues that were not raised at the Planning Commission, I would much rather base my decision on what is on the record and what was dealt with at the Planning Commission rather than open this up again. I don't

know how many hearings that we are going to have, but I have a concern that it would basically turn into a very long process.

Mayor Thalhofer stated it doesn't have to Councilor Daoust. I think the feeling of this Council is going to be that we won't have very many hearings, we will probably have one. I think we can control it and rap it up in a very expeditious manner.

Councilor Daoust stated my second point is that the variance that was given for the setback, which is the whole basis for this argument, it has a sunset time on it such that when Mr. Howell wants to develop the road the variance disappears. Why drag the City Council through another hearing when actually the variance disappears when Mr. Howell wants to do something with the road. What is the issue? Those are my concerns, I don't want to drag this on and I think it will.

Councilor Smith stated I agree with what you are saying, it can drag out. The fact that they are bringing up other things than what the Planning Commission had to review. I think we should go only one meeting but set a time limit, don't let it get out of hand.

Mayor Thalhofer stated I think we can do that.

Allen stated I might make one suggestion if you are concerned about trying to control the scope and time period for the hearing. You could identify what issues you are going to hear new testimony on, request that both the appellant and applicant submit their testimony and arguments in writing ahead of time and you can limit the amount of time that they have to address you to maybe 30 minutes each and then 15 minutes for rebuttal.

Stamp stated you could limit it to the issues that were raised below before the Planning Commission. In other words you have the appellant cite to you in the record where have you raised the issue. That will reduce the amount of time in dealing with appeal, because a lot of those issues just weren't dealt with. It will also make things easier for me because a lot of the points that I need to submit evidence on are in rebuttal to his new issues that I had no idea he was going to raise.

Councilor Daoust stated what I heard the rest of the Council say, even though I disagree with them, is they were going to allow new testimony on the issues raised in the appeal.

Councilor Thompson stated no, on the record.

Councilor Daoust stated maybe we better clarify that.

Councilor Thompson stated on the record with additional testimony on the matters that were raised on the record.

Stamp stated on the record means to the extent we argue about something in front of you, it has to relate to proof that we submitted below. We have to be able to say we have talked about it at a hearing or we had it documented where we made the argument. If you are talking about option 2, you limit it to the issues that were raised below but you allow additional evidence on those issues raised below.

Leuenberger stated I want to make sure you understand my position differs from that of my opponent. De novo review does not mean that you would ignore everything that happened below, everything that was done below remains the record. I am familiar with the issues that were raised at the Planning Commission and the only one that was not raised or touched upon in my view is number one, that is the question of the disqualification of the Commissioner. My appeal is specific that it was addressing I 6.180 not I 6.170 and I believe that your City Attorney agrees with me that the 48 hours does not apply. It is clearly up to you how you want to handle this, but in my view a de novo review would be appropriate, you would not be throwing away everything that the Planning Commission did.

Councilor Daoust stated so what you are saying is that you raised ten grounds and you are saying that all of those were discussed even to a small amount in the Planning Commission?

Leuenberger replied I believe they were.

Mayor Thalhofler stated so if you can show that you raised it then we will hear additional evidence on it.

Leuenberger asked then I suggest that you rewrite your ordinance on how to prepare a notice for appeal because that is not in the ordinance now. You are re-writing the rules, you can do that but it would have been a lot more expeditious had that been done in the ordinance.

Mayor Thalhofler stated I agree. It would be more expeditious if that provision was not in there about the 250' from the site, I hope we can pull that out of there.

Stamp stated the provision I 6.020, Counsel admitted that he never read the code anyway so I am not sure why it would matter. But, it specifically says that you have to raise your issues for appeal. This is a carbon copy of state law which is called a raise or waive. It is in ORS 197, everyone knows about it, it is standard operating procedure.

Mayor Thalhofler stated the points that you raised in your appeal, if you can show that you raised it at the Planning Commission then you can present additional evidence, is that going to be fair to you?

Leuenberger replied it is conceded that the first issue was not brought up below. Another thing that we can do is we can attack and appeal the conclusions of the Planning Commission. For instance question whether or not something is reasonable.

Mayor Thalhofler stated for that you could probably go back and forth all night.

Allen stated it is reasonable to submit arguments as to why you disagree with the Planning Commissions findings. If you were to open it up to new evidence that counters every finding that the Planning Commission made that is outside of the scope of the ten issues that you raised in your appeal it would be equivalent to a de novo hearing. My recommendation would be that you follow the procedure that the Mayor outlined where it is limited to the ten grounds raised in your appeal, that you identify in the record where it is you raised that issue below, submit the new evidence for those basis and also submit in writing your written arguments as to where you disagree with the Planning Commissions decision and that all of that information come into the Council ahead of time

with a limited time to argue and present testimony.

Leuenberger stated if I have to prepare additional argument and citations to the record, it would be appropriate for the applicant to do the same so that when I come to the hearing I know what the applicants position is.

Mayor Thalhofer stated I would think the applicant would do that.

Stamp replied yes.

Councilor Daoust stated can I clarify one more thing. We have already admitted that the first ground was not in the record, the one related to Commissioner Roehm, so we shouldn't even have to address that next time. Both attorneys have already agreed that is was not raised on the record, so we will then deal with grounds 2 through 10.

MOTION: Councilor Thompson moved that we hear the appeal on the record with additional evidence presented limited to issues raised below on items 2 through 10. Seconded by Councilor Kight.

Stamp asked can we have a briefing schedule. I suggest that you determine a date for the hearing and whatever date that you decide two weeks before that the appellant submit the basis for his appeal and arguments in support of and give me a week to respond. I would also suggest that the attorneys copy each other on that correspondence.

Leuenberger stated I would think that I could have my work done within ten days of today. I would like to have, rather than the opposing Counsel have one week and I would get his report by the next Council meeting, I want some time to respond.

Mayor Thalhofer stated what about holding the hearing at the October 24th City Council meeting.

Stamp stated so he would have his prepared two weeks before and me one week before that hearing?

Mayor Thalhofer replied yes.

Both attorneys agreed to that.

Mayor Thalhofer stated the hearing is set for October 24th.

Councilor Daoust asked should we set a time limit for the discussion?

Mayor Thalhofer stated we can do that at the time of the hearing.

Councilor Daoust stated the counsel might like to know how much time they are going to have.

Councilor Rabe stated I would agree with Councilor Daoust, we should set a time.

Stamp stated I would like to request 45 minutes.

Leuenberger stated I am sure that I would take less, but I will reserve as much time as the opposing counsel.

Mayor Thalsofer stated so we will have 45 minutes for each of you to present your testimony and 15 minutes for rebuttal. We should schedule this on a night when this is the only agenda item. If it looks like we are not going to be able to do that, we might have a special meeting for this hearing.

Allen stated I would like a point of clarification from the applicants attorney. He indicated that he was willing to extend out the 120 day time period and I would like some clarification on whether or not he would be willing to extend that out not only to the date of the hearing but until the next City Council meeting after that, two weeks later, at which time the City Council would adopt written findings to support its decision so that the Counsel has time to prepare findings after the hearing.

Stamp replied whatever you feel is appropriate, we are fine with. I am willing to extend the 120 days to a date certain.

Allen asked so if that date certain is two weeks after the City Council concludes the hearing?

Stamp replied that is fine.

YEAS: 6
NAYS: 0
ABSTAINED: 0

9. PUBLIC HEARING / ORDINANCE (Introduction): An Ordinance amending Chapter 12.10 and Chapter 12.01.020 of the Troutdale Municipal Code to establish provisions that require persons providing services for the collection and/or transportation of exempt loads of solid waste for compensation to obtain a permit through the City of Troutdale.

Mayor Thalsofer read the title of the Ordinance and opened the Public Hearing at 10:48pm.

Christa Morrow reviewed the staff report contained in the packet.

Mayor Thalsofer asked is there anyone here who would like to testify to this issue?

No public testimony received.

Mayor Thalsofer closed the Public Hearing at 10:55pm and stated that there will be a second reading on this ordinance on October 10th.

10. PUBLIC HEARING / ORDINANCE (Introduction): An Ordinance accepting jurisdiction of NE Hensley Road (County Road 565), NE 262nd Avenue (County Road 565), and Unnamed County right-of-way (NE Cherry Park Road Extension) from Multnomah County.

Mayor Thalhoffer read the Ordinance title and opened the Public Hearing at 10:56pm.

Galloway reviewed the staff report contained in the packet.

Councilor Thompson asked does money come along with this?

Galloway replied yes. At the next meeting, should this ordinance pass, there will be a proposed resolution which amends the intergovernmental agreement which provides for the same amount of funding on a per mile basis to be transferred. That will amount to around \$4,000 to \$5,000.

Councilor Kight asked what are the conditions of that road?

Galloway replied Hensley and 262nd, the pavement is in relatively good condition, not fully improved to the City or County standards in that we don't have sidewalks on both sides throughout the length of the road.

Councilor Kight stated so we are taking on a liability, since it isn't up to full standards.

Galloway replied that is correct.

Councilor Kight stated the \$4,000 to \$5,000 will not go very far in making those improvements.

Galloway replied right, but you all know from your role in JPACT that the County funding situation as far as roads go is such that the likelihood of the County making those improvements anytime soon is pretty much nil. I am not sure that telling the County to keep them until they improve them would result in much of an improvement.

Councilor Rabe asked is there any way that the allocation that comes back from the County relative to these roads, does that end up in our road maintenance fund or can it be designated to these areas?

Galloway replied unless we were directed specifically to do otherwise, the intent would be to just bring those dollars into the street fund.

Mayor Thalhoffer asked is there anyone here who would like to testify to this issue?

No public testimony received.

Mayor Thalhoffer closed the Public Hearing at 11:00pm and stated that there will be a second public hearing on this item at the October 10th Council Meeting.

11. RESOLUTION: A Resolution establishing a fee for disturbing pavement within the public

right-of-way and amending Resolution No. 1443.

Mayor Thalhofer read the title of this Resolution.

Galloway reviewed the staff report contained in the packet.

Councilor Rabe asked is the .53¢ a standard operating fee?

Galloway replied the way that was derived was we took the current cost that we pay the County, that the County has to pay to a contractor for pavement overlays. We add that asphalt cost to a square foot basis. Also going back through the records determined that the County has an additional cost for preparation of the pavement before the overlay that amounts to about 30% of the asphalt cost, so we included that. Then the County charges us a 15% administrative cost so we also added that in.

Councilor Smith stated whenever we get new streets it seems like the first thing someone does is come along and dig them up and they never put them back the way they are supposed to be. Isn't there a requirement that they have to put them back like new?

Galloway replied there is a requirement that they restore them to as near the original condition as possible. It is really a fact of construction life that you can get pretty close to that, but I don't know if I have ever seen a perfect patch job. There are so many factors that go into that, as well as good workmanship that there is usually some small fractional difference, settlement or a bit of a hump in there. It is something that we will continue to try to get as good as job as we can but I think one of the reasons we want to try to build up some money like this is eventually if a road is cut up enough times I think the only way to really get a good surface is to do another overlay.

MOTION: Councilor Kight moved to adopt the Resolution to establish a fee for disturbing pavement within the public right-of-way and amending Resolution No. 1443. Seconded by Councilor Rabe.

**YEAS: 6
NAYS: 0
ABSTAINED: 0**

12. COUNCIL CONCERNS AND INITIATIVES

Mayor Thalhofer called this item.

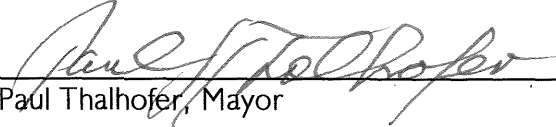
Council had no concerns or initiatives.

13. ADJOURNMENT

MOTION: Councilor Thompson moved to adjourn the meeting. Councilor Kight seconded the motion.

YEAS: 6
NAYS: 0
ABSTAINED: 0

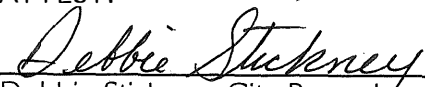
Meeting was adjourned at 11:08pm.



Paul Thalhofer, Mayor

Dated: 10-25-00

ATTEST:



Debbie Stickney, City Recorder

CITY OF TROUTDALE PUBLIC ATTENDANCE RECORD

September 26, 2000
CITY COUNCIL REGULAR MEETING

PLEASE COMPLETE THE FOLLOWING

NAME <small>(please print)</small>	ADDRESS	PHONE #
Ferry Howell	2080 SE Midvale Rd	666-1350
Norman Thomas	2751 SW Clare CT	667-4320
Carrie Classen	1542 S Columbia Sp 1	665-2372
David Warner	14039 SE Raymond Portland OR	761-4475
Carol Warner	PO Box 16608 Port 97292	" "
DAVE MUMFSON	1150 SE 34 CIRCLE	669-1044
Mel Warner	PO Box 16608 -97292-0808	761-4475
Diane Castillo-White	1225 E. Historic Columbia	669-9959
Nancy Cox	1703 NE WOODBARK	665-9184
Tom Muck	" "	" "
Toni Muck	" "	" "
Chet Howell	10300 NE Hassalo	254-2388
James Lensenberg	8100 SW Durham Rd, Tigard 97224	670-8182
TC & Linda Clark	3280 SE Evans Ave. Troutdale	665-1375
Andrew Stamp	1211 SW 5th Ave Supts 1600-1800 Portland OR 97219	496-2892
Melissa Roberts	1535 SE 60th Ave, Portland OR	236-2590
KIRK GIBSON	ATERWYNNE LLP 222 SW Columbia	226-8607
Bill Mahan	WIN representative	" "