

CANBY CITY COUNCIL
REGULAR SESSION
DECEMBER 6, 1995

Mayor Scott Taylor presiding. Council members present: Dennis Nolder, Terry Prince, Roger Harris, Cheryl Stark, Shirley Strong and Walt Daniels.

Also present: Administrator Michael Jordan, Assistant to Administrator Sarah Jo Chaplen, City Attorney John Kelley, City Recorder Marilyn Perkett, Police Chief Jerry Giger, Assistant City Planner Jim Wheeler, Library Director Beth Saul, Roger Reif, Jeff Kleinman, Mark Greenfield, Steve Donovan, Fred Kahut, Tom & Jeff Brandt, Bernie Strom, Chrism Kelleher, Pam Thompson, Judy Brown, Larry Boatright, Robert & Belva Clark, Karen Jackson, Paul Bell, Pam & Chuck Walker, Bill Dickinson, Rick Bair, Gordon Wanner, Derok Hills, Mark & Ena Riseling, Donna Jean McManamon, Mark & Carole Wheeler, Joan Jones, Bernie & Kathy Levy, Chris & Diane Kloser, Steve & Carla Sather, Pat Nellen, Jim Maples, Margauriete Overholser, Brad Gerber, Nan Olson, Ron Tatone, Gertrude Thompson, Nancy Wilmes, Mike Donovan and Cam Sivesind.

Mayor Taylor called the session to order at 7:30 p.m., followed by the flag salute and a moment of silence.

Roll call of the Council showed a quorum to be present.

MINUTES OF PREVIOUS SESSIONS: **Councilman Prince moved to approve as distributed the minutes of the Workshop Session and Regular Session of November 15, 1995. Motion seconded by Councilwoman Stark and approved 6-0.

CITIZEN INPUT ON NON-AGENDA ITEMS: Tom Brandt, Leader of Scout Troop 58 - Mr. Brandt introduced Scouts Jeff Brandt and Bernie Strom and expressed concern regarding matters at the Canby Community Park on the Molalla River. He specifically noted the fact that the park has been locked due to the pond excavation project, and has caused his Scouts some long waits in the rain prior to entering the park.

Bernie Strom read a letter describing their concerns and suggested that the chain be cut in two sections so the City could have a key to one section and the Scouts a key to a second lock on the other section.

Councilman Daniels asked how the Scouts currently gained access to the park and their building. Mr. Brandt stated that they go to the Police Department and pick up a key, which takes from 5 to 25 minutes, depending on the Police workload.

Mayor Taylor thanked them for bringing the matter to the Council, and specifically for

suggesting a resolution to the problem.

Library P.I.E. Program - Beth Saul introduced Bernie Levy, the inventor of the "Partner's In Excellence" campaign to raise funds for the library.

Mr. Levy introduced Frank Cutsforth from Cutsforth's Thriftway, who presented a check to the library for the store's share of money from their participation in the P.I.E. Program. Mr. Levy added that Roth's IGA store participated in the P.I.E. program and had a check to present to the Library.

PROCLAMATION: Toys for Tots - Mayor Taylor proclaimed the week of December 11 - 17, 1995 as Toys for Tots Week in the City of Canby. Members from the Kiwanis group gathered toys and canned goods from the Council and staff for their annual holiday event.

COMMUNICATIONS: None presented.

NEW BUSINESS: Accounts Payable - **Councilman Daniels moved to pay accounts payable in the amount of \$407,720.08. Motion seconded by Councilman Prince.

Councilman Daniels commented that \$208,892.50 of the accounts payable were allocated to pay off sewer bonds.

**The payables were approved 6-0, by roll call vote.

Adult Center Rental Amendment, - Nan Olson, Adult Center Director, informed the Council that the new addition of the building is almost ready to use, which is why the amendment to the rental agreement is necessary.

**Councilman Harris moved to adopt the Adult Center Rental Agreement Amendment, drafted November 8, 1995. Seconded by Councilwoman Strong and approved 6-0.

Mrs. Olson reminded everyone that "meals on wheels" drivers would be needed in the event of adverse weather conditions and she invited people to contact the center who wished to donate their time for this worthy cause.

C REG Alternate - Mayor Taylor advised the Council that it was his opinion that Councilman Prince was the alternate to the C REG meetings. Councilman Prince agreed and staff will notify the proper people regarding future meetings.

AGENDA CHANGE - At this time, Mayor Taylor suggested a change in the agenda to accommodate the audience.

UNFINISHED BUSINESS: LUBA Remand on Kahut Application - Attorney Kelley reported that LUBA had remanded the decision in the Canby Quality of Life Committee vs.

City and Kahut, back to the City Council to review two issues of assignments of error raised by the petitioners.

LUBA cited the third and sixth assignments of error as needing to be addressed on the remand:

Third Assignment - the City failed to make adequate findings that Policy 1 of the Land Use Element Goal regarding compatibility has been complied with: "Canby shall guide the course of growth and development so as to separate conflicting or incompatible uses while grouping compatible uses."

Sixth Assignment - the City failed to define or interpret in its findings the meaning of "compatibility" as it is used in the Land Development & Planning Ordinance (LPDO) 16.49.040 (1)(b), which states, "The proposed design of the development is compatible with the design of other developments in the same general vicinity."

Attorney Kelley stated that the Council had a couple options regarding the remand:

- the matter could be remanded back to the Planning Commission for their interpretations;
- the Council can make those interpretations, without remanding back to the Commission; or
- the Council can re-open the matter for new evidence or it can return the matter to the Commission to re-open for new evidence.

Attorney Kelley pointed out that only two (2) Planning Commissioners are currently on the Commission that initially heard this matter. He added that staff believes there is sufficient information without opening the record for new evidence; and staff believes it need not go back to the Commission since it would be ultimately back to the Council on an appeal. He added that the Council has been provided with draft findings for Council review.

Attorney Kelley informed the Council that if they decide to hear the matter tonight, there is LUBA case law that allows that the applicant and appellants have an opportunity to comment on the proposed findings and the two assignments of error that LUBA has remanded back to the City.

Mayor Taylor asked each of the Council members for their comments on the matter:

Councilman Prince - since LUBA upheld the two assignments he felt it should be re-opened and not go back to the Planning Commission.

Councilman Harris - agreed with Councilor Prince that the Council should hear the

case, however, he did not wish to re-open the matter since there has been exhaustive testimony and discussion on the matter.

Councilman Nolder agreed with Councilor Harris and said it should be done at Council level and enough testimony had been provided.

Councilman Daniels said he had enough testimony to make a decision tonight.

Councilwoman Strong agreed with Mr. Nolder and Mr. Harris and said she did not need to hear anymore testimony.

Councilwoman Stark said there has been a lot of documentation and listening to tapes of testimony and she was ready to make a decision tonight.

Councilman Prince reiterated should be re-opened to hear the two issues on the Council level.

Mayor Taylor said it was a majority of the Council, 5-1, that preferred not to re-open the matter and they would now proceed with the matter.

****Councilman Harris moved to not re-open the LUBA remand matter on the Kahut application for new evidence and that the matter be kept at the Council level rather than remanding it to the Planning Commission. Seconded by Councilwoman Stark and approved 6-0.**

Mayor Taylor asked the hearing body if they had any conflict of interest regarding the matter:

Daniels - none and plan to participate.

Strong - none and plan to participate.

Stark - none and plan to participate.

Prince - none and plan to participate.

Harris - none and plan to participate.

Nolder - none and plan to participate.

Mayor - none and plan to participate.

Mayor Taylor next asked the hearing body to declare any ex parte contact and visits to the site:

Nolder - has drove by the site. The audience was asked if they wished to question Mr. Nolder. No response.

Harris - has drove by the site. The audience was asked if they wished to question Mr. Harris. No response.

Prince - declared that he had spoke with Mr. Gerber about whether a decisions regarding the findings would be on the agenda and he mentioned the options that were available to the Council. He also drove by the site. The audience was asked if they had questions of Mr. Prince. No response.

Mayor Taylor declared he had drove by the site on numerous occasions. The audience was asked if they wished to question the Mayor. No response.

Stark - declared she has had no contact but has drove by the site. The audience was asked if there were any questions of Mrs. Stark. No response.

Mayor Taylor stated that the matter came up during some neighborhood meetings and he noted that he could not comment. The audience was asked if there were any questions of the Mayor. No response.

Strong - stated that she has drove by the site. The audience was asked if they had any questions for Mrs. Strong. No response.

Daniels - said he had not exparte contact, however, had drove by the site. The audience was asked if they had questions for Mr. Daniels. No response.

Attorney Kelley reiterated the remand opinion from LUBA regarding the third and sixth assignments of error that the City failed to address adequately. Mr. Kelley reminded the Council that LUBA case law states that when a governing body makes an interpretation of its Land Development Ordinance, all parties must have an opportunity to comment to the City Council on the issues.

Attorney Kelley stated that a total of fifteen (15) minutes will be allotted to each party for their presentation, followed by deliberation by the hearing body. He further stated that if a decision is not made tonight, a date certain will be set.

Jeff Kleinman, stated that he had an objection for the record.

Mark Greenfield asked to hear Mr. Kleinman's objection.

Mr., Kleinman, representing Canby Quality of Life Committee and all the named petitioners to LUBA, said to preserve their objection on the record the staff report was to be available seven (7) days ahead of the hearing. And, the final staff report, with all of the revisions, was not available, till six (6) days ahead. They felt they were prejudiced by that and therefore, this matter should be continued.

Attorney Kelley asked Mr. Kleinman under what statutory authority he was relying on his request.

Mr. Kleinman responded that he did not have the exact statute to cite but it is set out in Chapter 197 of the ORS. There is a requirement that the staff report for a land use hearing shall be available seven days ahead, and further, in the public notice that was mailed by the City in this mater, it states that the staff report will be available seven days ahead.

Attorney Kelley asked if Mr. Kleinman had any precedent for the fact that this matter is a remand and not a land use hearing and in light of the case of Wentland vs. the City of Portland and Sanchez vs. Clatsop County, that says, on remand you do not have to repeat the statutory procedures that were required earlier

Mr. Kleinman said he did not believe that either of the two cases cited contemplate the decision of LUBA and Friends of the Metolious vs. Jefferson County, that when a matter comes back on remand, and if it is just for the question of additional findings or interpretations, then the prevailing party at LUBA has a right to comment. So he did not think it was applicable. Secondly, he added based upon the notice that was mailed by the City saying there would be seven days, the City has elected to follow the statutory procedure and should not now decide not to do so.

Mr. Kelley said, "I think the choice was made." Attorney Kelley read the following quote from Sanchez vs. Clatsop County:

"absent code provisions to the contrary when a local government decision is remanded by LUBA, local government is not required to repeat the procedures applicable to the initial proceedings unless LUBA's remand specifically requires that those procedures be followed."

Mr. Kleinman said that given the nature

Mayor Taylor interjected that he wanted to check with the Council to see if they wanted a set- over on this subject matter or proceed at this time.

Mark Greenfield asked if he could comment on the matter.

Mayor Taylor noted that the Council and himself are "laymen" and LUBA will ultimately make the decision on which attorney is correct in their argument. However, he noted that he was hoping the Council could resolve this issue.

Mark Greenfield said that Mr. Kelley is correct in regards to the case he is referring to, however, there are other cases that deal with the shorten time for issuing the staff report that say it is harmless error, and based on this case is the case of Forest Park Estate Joint Venture vs Multnomah County. Mr. Greenfield said he anticipated some sort of procedural issue from Mr. Kleinman. He added that the applicant is willing to take their chances and go forward, as they believe there is no procedural error.

Councilman Daniels asked if there is a time limit to respond back to LUBA. Mr.,Kelley said he thought the time frame was ninety days.

Councilman Nolder asked if one day would make a difference to Mr. Kleinman.

Mayor Taylor stated that there is a "potential" procedure contesting He asked the Council if they wished to procedure, to make sure that issue is not relevant.

Councilman Prince stated that LUBA is very clear in regards to procedure matters, which could prejudice the case. He said it is important to give people due process to assimilate the

documents, adding that staff has had plenty of time to get this report out.

Attorney Kelley stated that a staff report was out on time, Mr. Kleinman called and said the staff report does not allow the opponents an opportunity to be heard. At that time, Mr. Kelley said he revised his staff report by adding a sentence allowing them an opportunity to be heard.

Mr. Kleinman said there were two changes in the staff report.

Mr. Kelley noted that both changes dealt with the same issue of allowing the opponents time to be heard.

Councilman Daniels said he wanted to proceed with the matter tonight.

Councilwoman Strong said she wanted to proceed tonight.

Councilwoman Stark said she was ready to proceed tonight.

Councilman Prince said the Council should allow the full seven days.

Councilman Harris said, "let's hear it tonight."

Councilman Nolder agreed to hear it tonight.

Mayor Taylor stated that Jeff Kleinman's objection for the record was duly noted and the Council will proceed with the hearing.

APPLICANT- Mark Greenfield, representing the applicant Fred Kahut introduced Roger Reif and asked to reserve five minutes for rebuttal.

Mr. Greenfield stated that in March 1994, the Council voted 5-1, to approve the application and adopted findings. He noted that the findings were challenged and LUBA did not say the development could not go in the proposed location. LUBA's position was that the City did not explain in detail how the decision complies with the cited standards. He said a remand that is not fully explanatory is common and in particular when there is a "shot gun approach" where several issues are raised on one or two of the details, or not refined. He stated that is what happened in this matter, and it is typical.

Mr. Greenfield cited Policy 1, " Canby shall guide the course of growth and development so as to separate conflicting or incompatible uses while grouping compatible uses." He stated that the findings adopted by the City referred only "generally" to Policy 1. Mr. Greenfield pointed out that the policy states that "Canby shall guide the course of growth..." and not the applicant and for that reason it should not have applied that as a review criteria for an application. He said the City guided the course of growth when it zoned the property M-1,

and it did it when it adopted the code allowing the proposed use as a Conditional Use. Mr. Greenfield referred to page 48 of the Comprehensive Plan, there are findings about Policy 1, which state, "the Land Use Map is the main technique to minimize conflicts." Therefore, the Policy was applied before the application was filed. The applicant believes that the Policy does not apply at all and asks that the "Council so find."

Mr. Greenfield pointed out that this is not a plan amendment or zone change, if it were then the Policy would clearly apply. He added, even if the policy did apply, if you look at the implementation measures listed under that policy, it refers to conditions of approval to minimize or mitigate conflicts. He stated that is exactly what the City did in adopting 49 conditions of approval. He said the City didn't need to apply the policy, but it did by adopting the conditions of approval.

Mr. Greenfield referred to Code Section 16.49.040 (1)(b), , "The proposed design of the development is compatible with the design of other developments in the same general vicinity." LUBA says that the findings do not specifically address that standard, and he pointed out that his brief for Mr. Kahut cited findings that the conclusions could support that the design is compatible. It is the City's role to state that in the findings, not the attorney's role to state it in a brief. Again, the applicant agrees with the proposed staff findings as to the meaning of the word "compatibility," it requires that the use be designed in a manner appropriate with the zone, i.e., for an industrial use; that it complies with the development standards in the zone; and that it considers and minimizes or mitigates conflicts between land uses within and outside the zoning district. There was substantial testimony and findings by the Council to that affect. Mr. Greenfield stated that, as the Council previously found, however, not with the specificities that LUBA requires, the proposed use does all that is requested and the findings note that there is substantial evidence to support the findings of compatibility both within the zoning district and in terms of other uses in other districts.

"Basically, LUBA told the City to consolidate its findings on these issues, and give its interpretations and supporting facts," said Mr. Greenfield. He added that the proposed staff findings do that. Mr. Greenfield stated that, "before, the findings were too general and often scattered throughout the findings document. That has been corrected through the proposed staff findings. Before, the interpretation of these policies was missing, that has been corrected through the proposed staff findings. Before, the facts that support the interpretation were scattered, again through the original findings document from last March. Again, that has been corrected in the proposed findings."

Mr. Greenfield stated, "With the underlying decision not reversed, but simply sent back for corrected findings, and with the technical corrections made, we ask that you approve this application." Mr. Greenfield saved the remainder of his time for rebuttal.

Mayor Taylor informed Mr. Greenfield that he had 8 minutes.

APPELLANT - Jeff Kleinman, representing the Quality Life Committee and all the named petitioners in this manner, said that Mark had done a good job in "minimizing" LUBA's decision and he disagreed with that perception. He also apologized in advance that he would appear direct, but this is due to the short time allowance.

Mr. Kleinman asked, "Where are we back too?" He added, "that initially this was going to be heard first on what alternatives would be pursued for further City Council action, and we were dismayed to discover that the other alternatives, than the approval of these pre-packaged findings that were presumably written by Mr. Greenfield were addressed in two tiny paragraphs, and one was not even discussed tonight." He added, "there is the alternative of remand, with or without new evidence; the alternative, by Mr. Spanovich the new Planning Director, and that is to attempt a mediation dispute, which was in the written materials and was not discussed tonight." Mr. Kleinman felt that mediation was clearly the best alternative, in light of the fact that a further appeal would appear inevitable, and a mediation devise should be considered. He said he felt his clients were back to "standing in the middle of the S.P. mainline waiting for the Starlight to run over them." He said the only difference between that and this being processed in this manner...usually the Starlight will give you a 2 to 3 hour grace period, and if anything, this train is a little bit ahead of schedule. Mr. Kleinman said that one of the clients said, if only fifteen minutes were allowed, they should just get in front of the Council and ask for fifteen minutes of silence in commemoration for the position the appellants have tried to take in this case.

Mr. Kleinman stated that there were a couple matters to discuss on a couple issues on two assignments of errors from LUBA. He noted that on two others LUBA said they were right, however, it was not necessary to send it back and that is whether the findings could affect Mrs. Jones property. He added that one of the assignments of error was withdrawn.

Mr. Kleinman addressed the third assignment of error, he noted that Policy 1 of the Comprehensive Plan is the issue, which states:

"Canby shall guide the course of growth and development so as to separate conflicting or incompatible use while grouping compatible uses."

Mr. Kleinman said if you look at what LUBA said, everything up to page seven, paragraph 10 of the proposed findings is not responsive to LUBA's order on remand. He stated that LUBA said the City has identified Policy 1 as relevant, and for Mr. Kahut to say, through his attorney, to come on appeal and say it shouldn't have been, is not permitted because the City staff and City Council have already decided that it is relevant. So if you are going to decide it is not relevant, it better be done real clearly and not do this "wishy-washy stuff," you should just say it. However, what LUBA said, the City must respond to the allegations of incompatibility specifically raised by petitioners during the local hearing and explain its bases for concluding that Policy 1 is satisfied through this proposed development. The City must respond specifically, to the appellants allegations of incompatibility which pertain to the proximity to Trost School and to residential subdivisions, and to issues of noise, traffic, odor,

vectors and vermin and safety problems and nuisances. He added that the proposed findings "gloss over" these things and they are not supported, and in fact, none of these findings are supported by substantial evidence in the record.

On the subject of noise, the findings are contradictory. They say, the only noise will come from trucks, and there will be other noise on the site and those noise sources will be reduced. He added that it was "not eliminated" but "reduced", and he pointed out that it was a direct contradiction within 2 or 3 sentence of one another. He said the findings in the record do not deal with noise from the recycling auto traffic that will come down Township for "drop-off" recycling. He said the appellants are not worried about the safety of the applicants truck drivers, they are trained, however, it is the auto traffic issue they are concerned about, and it is not addressed in the findings.

Mr. Kleinman said that on all of the issues, the findings rely upon conclusions based upon the existing operation of the applicant and the record shows you can not make a direct comparison, since that is a little recycling center and the matter of processing is totally different and it is not a transfer station. So, to the extent that the findings continuously rely on the current operation, they are wrong.

He added that the very same comparison is used to justify the appellants concerns about odors, vectors and vermin. It has no relevance. As to traffic, if the findings are adopted, you rely upon the applicants traffic study that does not take into account the auto traffic on Township of individuals bringing recyclables to the site, and that is where the cross traffic with the school is, on Township.

Mr. Kleinman stated that the proposed findings say that unlike landfills, there will be no long term storage of materials on the site is simply erroneous. The record is clear, based on the applicant, that recyclables will be processed as what can best be described as a continuous clattering, industrial operation and they will be stored on the site. They will be gathered in barrels and stored on the site until market conditions are ripe or right for the sale of these "precious" items. He stated that the City will have our "own in-town commodity exchange on this site, an exchange of waste materials." He added that they cited this to LUBA, it's in the record, the applicant says they will hold them there until it is time to sell. It is a business for profit, and there will be storage on the site all the time.

Mr. Kleinman said the other assignment of error, the sixth assignment, LUBA asked the City to define the standards set out in Code Section 16.49.040 (1)(b), that says:

"The proposed design of the development is compatible with the design of other developments in the same general vicinity">

He said the proposed findings, don't do it and are clearly wrong in this regard and so is any interpretation set out there. Neither the staff's proposed interpretation, which is the applicant's proposed interpretation, nor the references in that portion of the findings to evidence in the

record even discuss or touch upon the subject of the design of other developments in the same general vicinity, which the ordinance refers to. It's entirely skirted in a very elegant way, but not one that is going to withstand scrutiny. You can't interpret this to say something other than what it says, the proposed design of the development is compatible with other developments. You have to at least talk about it. He stated, "that in terms of the school and the residential developments, the design of this building is not addressed. No, it does not have to be identical or look like a house or a school, but it has to be compatible." Mr. Kleinman said there is a difference between compatible and identical and it is not in these proposed findings. The interpretation that is before you is clearly wrong and the findings that follow are not supported by substantial evidence or any evidence in the record on this subject. The record contains no evidence from anybody that the design is compatible with the design of other developments. So, if you really want to "ship" this thing through, that needs to be revisited. I don't think you will find anything in the record, and that is a good reason to re-open this or try to resolve it by mediation, which he added is the preferably approach. Mr. Kleinman said he was inclined to agree that a lot of emotional stuff has been done and there is no need to burden the body with hearing it again, however, there needs to be some process that takes into account the deficiencies and the existing decision in the proposed supplemental findings, and the concerns of a large part of this community.

Lastly, Mr. Kleinman said there is another legal provision that applies here, and therefore submitted an affidavit into the record on this particular subject. He stated that the law is, "and I'll cite to you counsel, Louisiana Pacific vs Umatilla County, which is 28 Oregon LUBA 32, a 1994 case that, while you cannot introduce into the record new matters unless they are requested on things that were decided by LUBA already, that we are permitted to raise issues on this remand that could not have been raised in the initial appeal to LUBA." He added, "that rarely happens." Mr. Kleinman said, "What would have been impossible for us to raise? Very little, but there was one thing." He said he had an affidavit to submit from Mr. Gerber, who was the person in his private capacity not as a Planning Commissioner, who was directly involved in this...."we had attempted to bring before you, as page 15 on our initial notice of appeal from the Planning Commission way back when.....

Mr. Greenfield stated "Objection, I'm going to object to your effort to get before this Council, information you could not get before because it was not allowed,. because the hearing was on the record. You tried to, and it was struck the first time. You lost that issue at LUBA and you cannot raise it now."

Mr. Kleinman replied that, "I did not lose that substantive....."

Mr. Greenfield said, "You withdrew the issue."

Mr. Kleinman stated, "No, I did not withdraw the issue. The substantive issue was never heard by LUBA. We only raised the procedural issue of our request to be heard on this issue which had only occurred after the Planning Commission record was closed, to have that come before you on a de novo hearing, and that was sliced off the notice of appeal by counsel.

That's not the issue here, now we are here on remand....."

Mayor Taylor stopped the dialogue and the clock as well. The Mayor stated, "I'm not a judge, and my concern is that if we go forward, I need to check with my counsel, that we are not setting ourselves up, and that's my question, are we setting ourselves up for another technical violation of something by accepting the affidavit over on the corner of this desk, or looking at it?"

Mr. Kleinman said, "Or rejecting it, that is the other question because....."

Mayor Taylor again asked if we were setting ourselves up for that

Attorney Kelley said that without knowing what is in the affidavit, he could not advise the Council as to whether the Council should look at it or not. He added, "Mr. Kleinman has not said anything to me previously because....."

Mayor Taylor said, "Let's hold it right here."

Mr. Kelley added, "Probably because he knew I would object to it and do what I did the last time....."

Mayor Taylor asked for a halt and stated, "as we go forward here, if we don't see it before we make a decision on whether we should see it or not, can Mr. Kleinman finish his comments and then you can review it and tell us whether, in fact, that prejudices."

Mr. Kelley said he presumed that Mr. Kleinman was going to make an argument on the content of the affidavit.

Mayor Taylor called for a five minute break at 8:45 P.M. for Attorney Kelley to read the affidavit. The regular session was reconvened at 8:54 P.M.

Mayor Taylor asked Mr. Kelley if the affidavit presented a technical issue for the Council.

Mr. Kelley said it presented a very legal technical issue and he did not know the answer. He added that he had one attorney telling him one thing and another attorney telling him another thing, and he did not know the correct answer except perhaps for LUBA stating which answer is correct. Mr. Kelley said he would try to explain the matter. "The affidavit of Mr. Gerber is an affidavit containing several here-say statements from him about an individual in regard to their view of the application of Mr. Kahut. And this information was made available to Mr. Gerber after the close of the first evidentiary hearing. If the Council recalls, and I don't know how much you are aware of, but initially Mr. Kleinman filed a motion requesting that you rehear and hear this particular piece of evidence. I said the record is closed. He tried then to put it into the notice of appeal, I excised it from the notice of appeal. He told me I couldn't do that, and I said, take me to LUBA. Because, I don't believe you can go through

the back door putting new evidence into a record intentionally. New evidence into a record that you know is already closed by filing a notice of appeal and by stating this is the reason I want to appeal this. So, when we go to LUBA, he withdrew his assignment of error, claiming that I wrongfully excised the material. Now, he claims that he did not raise the issue before LUBA of new evidence. The case he cites says, 'if there is new evidence that comes out after the record is closed and it goes back to the hearing body, under certain circumstances, that new evidence can be introduced into the record.' However, and that is where the rub lies, Mr. Kleinman feels he has established those circumstances legally in light of the case that he cites. Mr. Greenfield's interpretation of that case is that he has not established the ground rules for bringing that new evidence into this particular case. I don't know. It is a decision that is just not clear, in terms of what the language of the case he cites means. He interprets one way, Mr. Greenfield interprets it another way."

Mayor Taylor asked if the bottom line is, "if we accept the affidavit that it might give us additional information and then we can argue whether we can have that information or not."

Mr. Kelley said, "Whether it is relevant, -----whether you wish to address, -----whether the applicant wishes an opportunity to rebut it or you can make a decision that, no, we do not want to take any additional evidence into the record." He pointed out that this was a decision of the Council. He added that he felt that hearing the Council's earlier decision that indicated they did not want anymore procedural problems, this presents a dilemma if you agree with Mr. Kleinman. You'll hear about it from Mr. Greenfield. And if you agree with Mr. Greenfield's position, you'll hear about it from Mr. Kleinman. Mr. Kelley recommend the Council accept the evidence, if you're not going to hear about it from the other attorney. But he will object. This is a no win situation.

Mayor Taylor asked if they could note the position and do either "x or y."

Mayor Taylor polled the Council on whether to accept the affidavit or not:

Nolder-Not accept.

Harris- Let's hear it.

Prince- Let's hear it, however he added that he thought the Council was to accept new evidence as an alternative.

Mr. Greenfield asked if could address the issue.

Mr. Kelley suggested the Council listen to both attorneys.

Mr. Kleinman said there was no problem with Mr. Kelley's interpretation of the situation. He said there was a certain event that occurred after the Planning Commission voted, which was after the record closed, and it only occurred after and directly because of the Planning Commission's vote. And what that other party did, in reaction to the Planning Commission's vote, is very, very relevant to one of the sections of the Conditional Use Ordinance, Section 16.50.010 (D). It ties directly in. He added that this is not sandbagging. He further added,

"that the issue he raised at LUBA was simply the procedure. John chose to keep this away from you completely, which I disagree with. But that is not the issue here, the case I have presented, says that one of the things you can address on remand is issues that could not have been raised in the first appeal. And, we couldn't raise this particular part of your Conditional Use Ordinance and these facts because we were not permitted to do so, because the record was closed. A very relevant thing happened after the record was closed and that is what we think we are entitled to present under this case and that is all we are asking you to do. We have an affidavit, I can do about a two minute summary if you choose to allow that. And that is really the issue."

Mayor Taylor asked Mr. Greenfield to comment.

Mr. Greenfield, said that Mr. Kleinman is correct the information came up after the Planning Commission record was closed. He stated, "it may have been relevant to the case, but the fact of the matter is that the Planning Commission record was closed and your ordinance say that matters before this body are on the record. Mr. Kelley told Mr. Kleinman that if he wanted to make a request of this body for a limited de novo to try to get this evidence in the last time, he could make that request. As I understand it, and I think you recognize that I was not a part of this case the first time around, Mr. Kleinman did not make that request. He waived his ability to exhaust his administrative remedies, he didn't do it. This evidence, had he tried, possibly could have come in before, but it didn't. He had the opportunity, he failed to follow up. Mr. Kleinman is now trying to get it in, again he is trying to do the same thing that he didn't do the last time. And, he is saying that it is relevant to one of these issues. Well, there are probably thousands of pieces of evidence that are arguably relevant to one of these two issues, but your code says the record is closed and hearings are on the record. You have decided this evening, that you do not need to open up the record. Again, this is a continuation and LUBA has held, that matters on remand are a continuation of the original proceedings, so this is still actually one proceeding, and this matter is still on the record. If you let this in, you will be violating your code, and if you violate your code, you are prejudicing our interests and we will object. And the harm, the prejudice will not be to him, because he has tried to get something in the back door, to boot strap it, and he just simply can't do that. The prejudice would be to us."

Mr. Kleinman said, "that when it came up the first time and John withheld that page from our notice of appeal, what he told me I could do would be to get up and tell you there is some subject matter that I would like a partial de novo hearing on. But, he told me, number one, he would not allow me to say what it was, period. And, number two, that we don't have that procedure anyway. You are not permitted to hear it de novo. He and I are in agreement on that. That's why it's here now, and it is here now because there is case law from LUBA that says if you couldn't raise it the first time, then it can be brought back after remand, And, like I said before, very rarely is there something you really couldn't bring up the first time. There may be something you were to pokey to find. You might say, if I have more time I would have discovered this, and we had another issue like that and I am not going to tell you what it was, but we are not bringing it back to you. It was something that could have been

done before that we wanted you to hear and John probably, properly said, forget it. But, this is one of those very, very rare cases where something that we contend is highly relevant only occurred, not did we not find out about it until after the record closed, it only happened after. Under this LUBA case, regardless of what Mark says, and regardless of what your code says, LUBA says you can, on remand here this stuff and that is our position."

Mayor Taylor polled the Council on the matter of the record being closed:

Nolder - the record is closed.

Harris - want to hear it.

Prince - want to hear it.

Stark - the records are closed.

Strong - records are closed.

Daniels - records are closed.

Mayor Taylor stated that the Council notes the objection, however, the Council will not look at the affidavit.

Jeff Kleinman stated that he had made his presentation. However, he did say, "as clever and crafty as the findings that have been prepared and put on the express track are, they do not fully, or nearly address the instructions that LUBA gave you and are not supported by substantial evidence on the record."

Mr. Kleinman apologized for his directness, and said he was available for questions.

REBUTTAL - Mark Greenfield said he would respond to a few of Mr. Kleinman's directives.

Mr. Greenfield pointed out that in regards to "mediation," his client pursued mediation and was told the terms on which it could occur were simply impossible. He noted that when you are representing 50-80 people as Mr. Kleinman is, all of them should agree. However, there are comments on the record that this use should not be in Canby, this use should not be in the industrial park..... he didn't think it could have been mediated without Mr. Kleinman withdrawing from the matter because of a difference of opinion among his clients.

Mr. Greenfield referred to the comments on noise and traffic. Mr. Greenfield disagreed with Mr. Kleinman's reading of the proposed findings, on the issue of traffic. He said it was addressed by LUBA. Even though Mr. Kleinman raised it at LUBA, he lost that issue at LUBA

In regards to the issue of design, Mr. Greenfield pointed out that Mr. Kleinman maintains that the findings do not describe the design of the different uses and what they look like. Mr. Greenfield said that LUBA doesn't mean, and the interpretations in the findings does not say, that it has to look like a school or residential building. However, if it were a PUD in a residential area you might want to consider the looks, but these are different uses in a

different zoning area and the findings adequately interpret what compatibility means and it doesn't require a detailed analysis of what those uses look like. He added that it is not necessary to get into architectural design, which is what Mr. Kleinman is trying to get at.

Mr. Greenfield said that LUBA required that the findings have to explain in more detail what these provisions mean and how they are met. LUBA did not say the decision was wrong, only that the explanation was not specific enough. Mr. Greenfield said, "We think the proposed findings remedy that. We think they provide the proper interpretation and the proper explanation."

Mr. Greenfield reminded Council that the site is zoned M-1, and the use is allowed in that zone. He added that the City has adopted findings that the Logging Road Industrial Park is desirable for industrial use, the applicant's proposed use. The Logging Road Industrial Park was formulated to be a place for industries that would not be appropriate in other areas in the City. He added that those findings were not challenged by LUBA, or to the extent if they were challenged, they were never overturned by LUBA.

Finally, Mr. Greenfield said there was significant testimony in the record supporting the proposal, in terms of its design as being appropriate for this kind of use. In terms of its design as really taking "the extra step" to minimize conflict with the adjoining properties. He added that Mr. Kahut is a long time member of the community; he performs a valuable service to the community; he has put a lot of time into the proposed project, including citing the project at another location which was turned down; he made a "community outreach" effort on the project; and he has agreed to 49 conditions of approval. Mr. Greenfield stated that this was the right location and it should be approved. Mr. Greenfield asked that the City Council approve the project with a tentative approval so the findings could be reviewed by the City Attorney for total compliance to the issues, with adoption later.

Mayor Taylor stated that the Council could deliberate and decide tonight; the Council can think about it for a while longer then deliberate and decide; and after that decision it will determine what the next steps are.

DELIBERATION - Councilman Daniels asked the Attorney if there were a need to review the conditions further. Mr. Kelley said he would like to revisit the findings.

Councilman Prince said his concern was that the Council was on a "fast track," and he was expecting more testimony on what compatibility was and he did not get that. He said he was not in favor of the definition that an industrial use next to a residential neighborhood is compatible. He added that this would be setting a dangerous precedent for the City since we have a lot of industrial land that borders single-family residential area. Councilman Prince said the Council were not addressing the community's concerns about the project, in that there are certain industrial uses that are not compatible and in this case it is not compatible.

Councilman Nolder asked if we should make a motion to present to LUBA the findings.

Mayor Taylor said the Council can give directions to staff in regard to what they want to see in the findings.

Attorney Kelley said staff is seeking a tentative decision one way or the other; and direction as to what the Council wants in the findings that will come back to the Council at the next regular meeting.

Mayor Taylor reviewed again, the types of response both pro and con that could be made by the Council.

****Councilman Daniels moved that based on the stated Findings, Conclusions & Order that the City Council on the remand from LUBA, again find that the application meets all the applicable review standards and thereby tentatively approves CUP 94-05/DR 94-14/LLA 94-08, with the conditions identified in the previous order and that these conditions be reviewed by the prevailing party and to be returned to the next regular Council meeting. Motion seconded by Councilwoman Stark.**

DISCUSSION - Councilman Prince reiterated that this sets a precedent that almost any industrial project, conditional use or not, can be located next to any residential area. He added that in the future he will try to change that to some type of buffer zoning.

Councilman Daniels argued that this does not set precedent, the Council looks at the merits of each issue. He added that the Council developed the industrial park and set criteria at that time.

****The motion on the floor to approve the findings was approved 5-1, with Councilman Prince voting nay.**

Jeff Kleinman, for the record, reserved the right to be heard based on the Friends of the Metolious vs. Jefferson County case.

Mayor Taylor recessed the session at 9:23 p.m. reconvening at 9:28 p.m.

ORDINANCES & RESOLUTIONS: Ordinance No. 941 -Administrator Jordan reminded the Council that this was the second reading on an ordinance drafted by request of the Police Department,

****Councilman Harris moved to adopt Ordinance No. 941, AN ORDINANCE ESTABLISHING THE PURPOSE, PROCESS, LIMITS AND TIMING OF INVENTORIES OF PERSONAL PROPERTY TO BE CONDUCTED BY MEMBERS OF THE CANBY POLICE DEPARTMENT; AND DECLARING AN EMERGENCY. Motion seconded by Councilwoman Strong and approved by roll call vote, 6-0.**

Ordinance No. 942 - Administrator Jordan stated that this ordinance was a second reading

ordinance to purchase the HVAC for the library.

****Councilman Daniels moved to adopt Ordinance No. 942, AN ORDINANCE AUTHORIZING THE PURCHASE OF HEATING VENTILATING AND AIR CONDITIONING (HVAC) EQUIPMENT FROM ROTH HEATING THROUGH THE STATE OF OREGON PURCHASING DIVISION; AND DECLARING AN EMERGENCY. Motion seconded by Councilman Harris and approved 6-0, by roll call vote.**

Resolution No. 597 - Jim Wheeler explained that both resolutions are very similar for two projects, one on S. Pine and one on N. Pine for dedication of right-of-way for street purposes. He noted that right-of-ways are usually handled through a subdivision, however, these projects were not part of a subdivision or partition and the acceptance becomes the Council's jurisdiction. The dedications are to widen the subject streets.

****Councilman Prince moved to adopt Resolution No. 597, A RESOLUTION TO ACCEPT DEDICATION OF LAND FOR SOUTH PINE STREET RIGHT-OF-WAY PURPOSES. Motion seconded by Councilman Harris and approved 6-0.**

****Councilman Harris moved to adopt Resolution No. 598, A RESOLUTION TO ACCEPT DEDICATION OF LAND FOR NORTH PINE STREET RIGHT-OF-WAY PURPOSES. Motion seconded by Councilwoman Stark.**

Councilman Harris pointed out that N. Pine intersected with a "Portland-Eugene Eastern Railroad at one time." He asked if there really was a railroad that connected in that area. He was informed there was and the "grade" is still there.

****Resolution No.598 was approved 6-0.**

MANAGER'S REPORT: Administrator Jordan reviewed the following items:

- * the City of Canby will become a "pilot" project for DEQ with a test site at the City Shop location. This was made possible with the help of Councilman Nolder and will become effective about March 1st, with a tentative schedule for Saturday operation.
- * Sprague Controls building is nearly complete and will employ 88 people.
- * discussions continue for a regional water facility and a study has been commissioned, with 2 of the proposed 3 sites in the Canby area.
- * the County Charter Committee will meet at the N. Clackamas Aquatic Center in Milwaukie tomorrow night. Mr. Jordan handed out a copy of a Wilsonville Resolution endorsing the committee endeavors. The committee is proposing to file for the May ballot. Attorney Kelley said that Happy Valley supports "from B' regarding districting and the election of the chair by members of the Commission. The Council

was invited to inform staff what they wanted in the way of a formal comment on the position of the Charter process.

- * the Hispanic Recreation Program has been created with efforts from Canby Kids, Community School, Camp Fire and the City, and an employee is now on board for six months, funded by the ETBS program. Mr. Jordan said the ESL program at CUHS will be suggesting other activities, other than athletic.

- * Mr. Jordan passed out information with statistics regarding building permits in the City, noting that there were 160 permits this calendar year, noting that in 1995 there were more multi-family and manufactured home permits.

COUNCILORS' ISSUES: Councilman Harris informed the Council that he had participated in the interview process for the Police Department, with the Canby Police Reserve applicants. He noted that the Reserve Officers donate their time and he was very impressed with the quality of the Reserve Officers.

Councilman Harris noted that Officer Skipper arrested a graffiti artist and he felt this was very good police work.

Councilman Nolder emphasized to the citizens that the DEQ test station that has been promised to Canby will have a success or failure based on use.

Councilman Daniels noted that Shirley Strong and himself have been on the Management Compensation Committee and he was ready to move on the issue.

******Councilman Daniels moved to approve the Management/Compensation Plan on a three-year structure as presented in the earlier workshop of the evening. Motion seconded by Councilwoman Strong.

DISCUSSION - Councilman Prince felt it was "front loading" and was not sure the money was in the budget.

Councilman Harris expressed reservation about the proposal, specifically the concept setting the goal of the average of what other cities are paying their managers.

Councilman Nolder noted that there has never been a structure for management, and he felt this was a good plan and was needed.

Councilman Daniels felt the cost of living used in the past was not good, and the proposal would be more equitable.

Mayor Taylor stated that the overall performance system and acknowledgement of performance is a very good part of the proposal.

****The motion for the Management/Compensation 3-Year Schedule was approved 4-2, with Councilors Prince and Harris voting nay.**

Local Safety Public Coordinating Council, a body formed of various County people who will design implementation and plans regarding SB 1145, in response to Ballot Measure 11, is designing important work in coordination with the Criminal Justice System in Clackamas County; and Mayor Taylor is resigning from that Council and an elected official needs to replace him. Any Councilor interested should let the Mayor know.

OTHER REPORTS OR ANNOUNCEMENTS: Administrator Jordan invited everyone to a Christmas Party at his home on Friday, December 15th.

Chief Giger stated that Clackamas County has opened their juvenile processing center, for status offenses and crimes. The juveniles will now be taken to that department and dealt with immediately. In the past there has been a 3 week to 3 month wait to deal with these type of situations.

Councilman Daniels commented that he recently observed people painting over a graffiti area. Chief Giger said there were more juveniles waiting to take their turn in painting.

ACTION REVIEW:

1. CREG will be informed that Councilman Prince is the alternate to that group.
2. Ordinance No. 941 and No. 942, will be implemented.
3. Resolution 597 & 598 will be recorded for street dedication.
4. The Findings will be brought back to the Council regarding the Kahut Transfer Station application.
5. The Management/Compensation proposal will be implemented.

****Councilman Prince moved to go into Executive Session under ORS 192.660 (1)(f), to consider records exempt from public inspection. Motion seconded by Councilman Harris and approved 6-0.**

Mayor Taylor recessed the regular session at 9:55 p.m. to go into Executive Session. The regular session was reconvened at 10:40 p.m. and immediately adjourned.

**EXECUTIVE SESSION
DECEMBER 6, 1995.**

Present: Mayor Taylor, Councilors Prince, Harris, Nolder, Stark, Strong and Daniels, Michael Jordan, Sarah Jo Chaplen, Cam Sivesind, John Kelley and Jack Hammond.

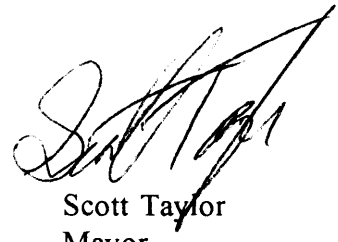
Mayor Taylor called the session to order at 10:03 p.m. in the CUB conference room

ORS 192.660 (10(f)) - The Council discussed exempt records regarding CTA.

Mayor Taylor adjourned the session at 10:35 p.m.

A handwritten signature in cursive script, appearing to read "Marilyn Perkett". The signature is fluid and somewhat stylized, with a large loop at the end.

Marilyn Perkett
City Recorder

A handwritten signature in cursive script, appearing to read "Scott Taylor". The signature is more angular and less fluid than the one to its left, with a prominent diagonal stroke.

Scott Taylor
Mayor

PROCLAMATION

WHEREAS, Toys for Tots, originated for the purpose of providing toys for less fortunate children in our community; and

WHEREAS, it is recognized that greater public awareness and involvement is needed to provide and promote joy in each household in this community; and

WHEREAS, the Canby Chapter of Kiwanis, has undertaken the project of collecting and distributing toys to these children, during the time from December 11th through December 17th; and

WHEREAS, The Kiwanis need your help by providing new and like new articles that may be placed in the Christmas bags; and

WHEREAS, drop boxes for these donations may be found at the Canby Public Library, Canby Utility Board, Canby Police Department, Canby Fire Department, North Willamette Telecom, Canby Telephone Association and other Kiwanis barrels distributed throughout the Canby business community.

NOW, THEREFORE, I, Scott Taylor, Mayor of the City of Canby, Oregon, do hereby proclaim the week of December 11 - 17, 1995 as

TOYS FOR TOTS WEEK

and call upon the citizens of this City to observe this time by participating in this toy drive helping to provide the assurance that each child may have a "twinkle in their eye" this Holiday Season.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the City of Canby to be affixed this 6th day of December in the year of our Lord One Thousand Nine Hundred and Ninety-Five.

*Scott Taylor
Mayor*

1

CANBY CITY COUNCIL
REGULAR SESSION
DECEMBER 6, 1995

Mayor Scott Taylor presiding. Council members present: Dennis Nolder, Terry Prince, Roger Harris, Cheryl Stark, Shirley Strong and Walt Daniels.

Also present: Administrator Michael Jordan, Assistant to Administrator Sarah Jo Chaplen, City Attorney John Kelley, City Recorder Marilyn Perkett, Police Chief Jerry Giger, Assistant City Planner Jim Wheeler, Library Director Beth Saul, Roger Reif, Jeff Kleinman, Mark Greenfield, Steve Donovan, Fred Kahut, Tom & Jeff Brandt, Bernie Strom, Chrism Kelleher, Pam Thompson, Judy Brown, Larry Boatright, Robert & Belva Clark, Karen Jackson, Paul Bell, Pam & Chuck Walker, Bill Dickinson, Rick Bair, Gordon Wanner, Derok Hills, Mark & Ena Riseling, Donna Jean McManamon, Mark & Carole Wheeler, Joan Jones, Bernie & Kathy Levy, Chris & Diane Kloser, Steve & Carla Sather, Pat Nellen, Jim Maples, Margauriete Overholser, Brad Gerber, Nan Olson, Ron Tatone, Gertrude Thompson, Nancy Wilmes, Mike Donovan and Cam Sivesind.

Mayor Taylor called the session to order at 7:30 p.m., followed by the flag salute and a moment of silence.

Roll call of the Council showed a quorum to be present.

MINUTES OF PREVIOUS SESSIONS: **Councilman Prince moved to approve as distributed the minutes of the Workshop Session and Regular Session of November 15, 1995. Motion seconded by Councilwoman Stark and approved 6-0.

CITIZEN INPUT ON NON-AGENDA ITEMS: Tom Brandt, Leader of Scout Troop 58 - Mr. Brandt introduced Scouts Jeff Brandt and Bernie Strom and expressed concern regarding matters at the Canby Community Park on the Molalla River. He specifically noted the fact that the park has been locked due to the pond excavation project, and has caused his Scouts some long waits in the rain prior to entering the park.

Bernie Strom read a letter describing their concerns and suggested that the chain be cut in two sections so the City could have a key to one section and the Scouts a key to a second lock on the other section.

Councilman Daniels asked how the Scouts currently gained access to the park and their building. Mr. Brandt stated that they go to the Police Department and pick up a key, which takes from 5 to 25 minutes, depending on the Police workload.

Mayor Taylor thanked them for bringing the matter to the Council, and specifically for

suggesting a resolution to the problem.

Library P.I.E. Program - Beth Saul introduced Bernie Levy, the inventor of the "Partner's In Excellence" campaign to raise funds for the library.

Mr. Levy introduced Frank Cutsforth from Cutsforth's Thriftway, who presented a check to the library for the store's share of money from their participation in the P.I.E. Program. Mr. Levy added that Roth's IGA store participated in the P.I.E. program and had a check to present to the Library.

PROCLAMATION: Toys for Tots - Mayor Taylor proclaimed the week of December 11 - 17, 1995 as Toys for Tots Week in the City of Canby. Members from the Kiwanis group gathered toys and canned goods from the Council and staff for their annual holiday event.

COMMUNICATIONS: None presented.

NEW BUSINESS: Accounts Payable - **Councilman Daniels moved to pay accounts payable in the amount of \$407,720.08. Motion seconded by Councilman Prince.

Councilman Daniels commented that \$208,892.50 of the accounts payable were allocated to pay off sewer bonds.

**The payables were approved 6-0, by roll call vote.

Adult Center Rental Amendment, - Nan Olson, Adult Center Director, informed the Council that the new addition of the building is almost ready to use, which is why the amendment to the rental agreement is necessary.

**Councilman Harris moved to adopt the Adult Center Rental Agreement Amendment, drafted November 8, 1995. Seconded by Councilwoman Strong and approved 6-0.

Mrs. Olson reminded everyone that "meals on wheels" drivers would be needed in the event of adverse weather conditions and she invited people to contact the center who wished to donate their time for this worthy cause.

C REG Alternate - Mayor Taylor advised the Council that it was his opinion that Councilman Prince was the alternate to the C REG meetings. Councilman Prince agreed and staff will notify the proper people regarding future meetings.

AGENDA CHANGE - At this time, Mayor Taylor suggested a change in the agenda to accommodate the audience.

UNFINISHED BUSINESS: LUBA Remand on Kahut Application - Attorney Kelley reported that LUBA had remanded the decision in the Canby Quality of Life Committee vs.

City and Kahut, back to the City Council to review two issues of assignments of error raised by the petitioners.

LUBA cited the third and sixth assignments of error as needing to be addressed on the remand:

Third Assignment - the City failed to make adequate findings that Policy 1 of the Land Use Element Goal regarding compatibility has been complied with: "Canby shall guide the course of growth and development so as to separate conflicting or incompatible uses while grouping compatible uses."

Sixth Assignment - the City failed to define or interpret in its findings the meaning of "compatibility" as it is used in the Land Development & Planning Ordinance (LPDO) 16.49.040 (1)(b), which states, "The proposed design of the development is compatible with the design of other developments in the same general vicinity."

Attorney Kelley stated that the Council had a couple options regarding the remand:

- the matter could be remanded back to the Planning Commission for their interpretations;
- the Council can make those interpretations, without remanding back to the Commission; or
- the Council can re-open the matter for new evidence or it can return the matter to the Commission to re-open for new evidence.

Attorney Kelley pointed out that only two (2) Planning Commissioners are currently on the Commission that initially heard this matter. He added that staff believes there is sufficient information without opening the record for new evidence; and staff believes it need not go back to the Commission since it would be ultimately back to the Council on an appeal. He added that the Council has been provided with draft findings for Council review.

Attorney Kelley informed the Council that if they decide to hear the matter tonight, there is LUBA case law that allows that the applicant and appellants have an opportunity to comment on the proposed findings and the two assignments of error that LUBA has remanded back to the City.

Mayor Taylor asked each of the Council members for their comments on the matter:

Councilman Prince - since LUBA upheld the two assignments he felt it should be re-opened and not go back to the Planning Commission.

Councilman Harris - agreed with Councilor Prince that the Council should hear the

case, however, he did not wish to re-open the matter since there has been exhaustive testimony and discussion on the matter.

Councilman Nolder agreed with Councilor Harris and said it should be done at Council level and enough testimony had been provided.

Councilman Daniels said he had enough testimony to make a decision tonight.

Councilwoman Strong agreed with Mr. Nolder and Mr. Harris and said she did not need to hear anymore testimony.

Councilwoman Stark said there has been a lot of documentation and listening to tapes of testimony and she was ready to make a decision tonight.

Councilman Prince reiterated should be re-opened to hear the two issues on the Council level.

Mayor Taylor said it was a majority of the Council, 5-1, that preferred not to re-open the matter and they would now proceed with the matter.

****Councilman Harris moved to not re-open the LUBA remand matter on the Kahut application for new evidence and that the matter be kept at the Council level rather than remanding it to the Planning Commission. Seconded by Councilwoman Stark and approved 6-0.**

Mayor Taylor asked the hearing body if they had any conflict of interest regarding the matter:

Daniels - none and plan to participate.

Strong - none and plan to participate.

Stark - none and plan to participate.

Prince - none and plan to participate.

Harris - none and plan to participate.

Nolder - none and plan to participate.

Mayor - none and plan to participate.

Mayor Taylor next asked the hearing body to declare any ex parte contact and visits to the site:

Nolder - has drove by the site. The audience was asked if they wished to question Mr. Nolder. No response.

Harris - has drove by the site. The audience was asked if they wished to question Mr. Harris. No response.

Prince - declared that he had spoke with Mr. Gerber about whether a decisions regarding the findings would be on the agenda and he mentioned the options that were available to the Council. He also drove by the site. The audience was asked if they had questions of Mr. Prince. No response.

Mayor Taylor declared he had drove by the site on numerous occasions. The audience was asked if they wished to question the Mayor. No response.

Stark - declared she has had no contact but has drove by the site. The audience was asked if there were any questions of Mrs. Stark. No response.

Mayor Taylor stated that the matter came up during some neighborhood meetings and he noted that he could not comment. The audience was asked if there were any questions of the Mayor. No response.

Strong - stated that she has drove by the site. The audience was asked if they had any questions for Mrs. Strong. No response.

Daniels - said he had not exparte contact, however, had drove by the site. The audience was asked if they had questions for Mr. Daniels. No response.

Attorney Kelley reiterated the remand opinion from LUBA regarding the third and sixth assignments of error that the City failed to address adequately. Mr. Kelley reminded the Council that LUBA case law states that when a governing body makes an interpretation of its Land Development Ordinance, all parties must have an opportunity to comment to the City Council on the issues.

Attorney Kelley stated that a total of fifteen (15) minutes will be allotted to each party for their presentation, followed by deliberation by the hearing body. He further stated that if a decision is not made tonight, a date certain will be set.

Jeff Kleinman, stated that he had an objection for the record.

Mark Greenfield asked to hear Mr. Kleinman's objection.

Mr., Kleinman, representing Canby Quality of Life Committee and all the named petitioners to LUBA, said to preserve their objection on the record the staff report was to be available seven (7) days ahead of the hearing. And, the final staff report, with all of the revisions, was not available, till six (6) days ahead. They felt they were prejudiced by that and therefore, this matter should be continued.

Attorney Kelley asked Mr. Kleinman under what statutory authority he was relying on his request.

Mr. Kleinman responded that he did not have the exact statute to cite but it is set out in Chapter 197 of the ORS. There is a requirement that the staff report for a land use hearing shall be available seven days ahead, and further, in the public notice that was mailed by the City in this mater, it states that the staff report will be available seven days ahead.

Attorney Kelley asked if Mr. Kleinman had any precedent for the fact that this matter is a remand and not a land use hearing and in light of the case of Wentland vs. the City of Portland and Sanchez vs. Clatsop County, that says, on remand you do not have to repeat the statutory procedures that were required earlier

Mr. Kleinman said he did not believe that either of the two cases cited contemplate the decision of LUBA and Friends of the Metolious vs. Jefferson County, that when a matter comes back on remand, and if it is just for the question of additional findings or interpretations, then the prevailing party at LUBA has a right to comment. So he did not think it was applicable. Secondly, he added based upon the notice that was mailed by the City saying there would be seven days, the City has elected to follow the statutory procedure and should not now decide not to do so.

Mr. Kelley said, "I think the choice was made." Attorney Kelley read the following quote from Sanchez vs. Clatsop County:

"absent code provisions to the contrary when a local government decision is remanded by LUBA, local government is not required to repeat the procedures applicable to the initial proceedings unless LUBA's remand specifically requires that those procedures be followed."

Mr. Kleinman said that given the nature

Mayor Taylor interjected that he wanted to check with the Council to see if they wanted a set- over on this subject matter or proceed at this time.

Mark Greenfield asked if he could comment on the matter.

Mayor Taylor noted that the Council and himself are "laymen" and LUBA will ultimately make the decision on which attorney is correct in their argument. However, he noted that he was hoping the Council could resolve this issue.

Mark Greenfield said that Mr. Kelley is correct in regards to the case he is referring to, however, there are other cases that deal with the shorten time for issuing the staff report that say it is harmless error, and based on this case is the case of Forest Park Estate Joint Venture vs Multnomah County. Mr. Greenfield said he anticipated some sort of procedural issue from Mr. Kleinman. He added that the applicant is willing to take their chances and go forward, as they believe there is no procedural error.

Councilman Daniels asked if there is a time limit to respond back to LUBA. Mr.,Kelley said he thought the time frame was ninety days.

Councilman Nolder asked if one day would make a difference to Mr. Kleinman.

Mayor Taylor stated that there is a "potential" procedure contesting He asked the Council if they wished to procedure, to make sure that issue is not relevant.

Councilman Prince stated that LUBA is very clear in regards to procedure matters, which could prejudice the case. He said it is important to give people due process to assimilate the

documents, adding that staff has had plenty of time to get this report out.

Attorney Kelley stated that a staff report was out on time, Mr. Kleinman called and said the staff report does not allow the opponents an opportunity to be heard. At that time, Mr. Kelley said he revised his staff report by adding a sentence allowing them an opportunity to be heard.

Mr. Kleinman said there were two changes in the staff report.

Mr. Kelley noted that both changes dealt with the same issue of allowing the opponents time to be heard.

Councilman Daniels said he wanted to proceed with the matter tonight.

Councilwoman Strong said she wanted to proceed tonight.

Councilwoman Stark said she was ready to proceed tonight.

Councilman Prince said the Council should allow the full seven days.

Councilman Harris said, "let's hear it tonight."

Councilman Nolder agreed to hear it tonight.

Mayor Taylor stated that Jeff Kleinman's objection for the record was duly noted and the Council will proceed with the hearing.

APPLICANT- Mark Greenfield, representing the applicant Fred Kahut introduced Roger Reif and asked to reserve five minutes for rebuttal.

Mr. Greenfield stated that in March 1994, the Council voted 5-1, to approve the application and adopted findings. He noted that the findings were challenged and LUBA did not say the development could not go in the proposed location. LUBA's position was that the City did not explain in detail how the decision complies with the cited standards. He said a remand that is not fully explanatory is common and in particular when there is a "shot gun approach" where several issues are raised on one or two of the details, or not refined. He stated that is what happened in this matter, and it is typical.

Mr. Greenfield cited Policy 1, " Canby shall guide the course of growth and development so as to separate conflicting or incompatible uses while grouping compatible uses." He stated that the findings adopted by the City referred only "generally" to Policy 1. Mr. Greenfield pointed out that the policy states that "Canby shall guide the course of growth..." and not the applicant and for that reason it should not have applied that as a review criteria for an application. He said the City guided the course of growth when it zoned the property M-1,

and it did it when it adopted the code allowing the proposed use as a Conditional Use. Mr. Greenfield referred to page 48 of the Comprehensive Plan, there are findings about Policy 1, which state, "the Land Use Map is the main technique to minimize conflicts." Therefore, the Policy was applied before the application was filed. The applicant believes that the Policy does not apply at all and asks that the "Council so find."

Mr. Greenfield pointed out that this is not a plan amendment or zone change, if it were then the Policy would clearly apply. He added, even if the policy did apply, if you look at the implementation measures listed under that policy, it refers to conditions of approval to minimize or mitigate conflicts. He stated that is exactly what the City did in adopting 49 conditions of approval. He said the City didn't need to apply the policy, but it did by adopting the conditions of approval.

Mr. Greenfield referred to Code Section 16.49.040 (1)(b), , "The proposed design of the development is compatible with the design of other developments in the same general vicinity." LUBA says that the findings do not specifically address that standard, and he pointed out that his brief for Mr. Kahut cited findings that the conclusions could support that the design is compatible. It is the City's role to state that in the findings, not the attorney's role to state it in a brief. Again, the applicant agrees with the proposed staff findings as to the meaning of the word "compatibility," it requires that the use be designed in a manner appropriate with the zone, i.e., for an industrial use; that it complies with the development standards in the zone; and that it considers and minimizes or mitigates conflicts between land uses within and outside the zoning district. There was substantial testimony and findings by the Council to that affect. Mr. Greenfield stated that, as the Council previously found, however, not with the specificities that LUBA requires, the proposed use does all that is requested and the findings note that there is substantial evidence to support the findings of compatibility both within the zoning district and in terms of other uses in other districts.

"Basically, LUBA told the City to consolidate its findings on these issues, and give its interpretations and supporting facts," said Mr. Greenfield. He added that the proposed staff findings do that. Mr. Greenfield stated that, "before, the findings were too general and often scattered throughout the findings document. That has been corrected through the proposed staff findings. Before, the interpretation of these policies was missing, that has been corrected through the proposed staff findings. Before, the facts that support the interpretation were scattered, again through the original findings document from last March. Again, that has been corrected in the proposed findings."

Mr. Greenfield stated, "With the underlying decision not reversed, but simply sent back for corrected findings, and with the technical corrections made, we ask that you approve this application." Mr. Greenfield saved the remainder of his time for rebuttal.

Mayor Taylor informed Mr. Greenfield that he had 8 minutes.

APPELLANT - Jeff Kleinman, representing the Quality Life Committee and all the named petitioners in this manner, said that Mark had done a good job in "minimizing" LUBA's decision and he disagreed with that perception. He also apologized in advance that he would appear direct, but this is due to the short time allowance.

Mr. Kleinman asked, "Where are we back too?" He added, "that initially this was going to be heard first on what alternatives would be pursued for further City Council action, and we were dismayed to discover that the other alternatives, than the approval of these pre-packaged findings that were presumably written by Mr. Greenfield were addressed in two tiny paragraphs, and one was not even discussed tonight." He added, "there is the alternative of remand, with or without new evidence; the alternative, by Mr. Spanovich the new Planning Director, and that is to attempt a mediation dispute, which was in the written materials and was not discussed tonight." Mr. Kleinman felt that mediation was clearly the best alternative, in light of the fact that a further appeal would appear inevitable, and a mediation devise should be considered. He said he felt his clients were back to "standing in the middle of the S.P. mainline waiting for the Starlight to run over them." He said the only difference between that and this being processed in this manner...usually the Starlight will give you a 2 to 3 hour grace period, and if anything, this train is a little bit ahead of schedule. Mr. Kleinman said that one of the clients said, if only fifteen minutes were allowed, they should just get in front of the Council and ask for fifteen minutes of silence in commemoration for the position the appellants have tried to take in this case.

Mr. Kleinman stated that there were a couple matters to discuss on a couple issues on two assignments of errors from LUBA. He noted that on two others LUBA said they were right, however, it was not necessary to send it back and that is whether the findings could affect Mrs. Jones property. He added that one of the assignments of error was withdrawn.

Mr. Kleinman addressed the third assignment of error, he noted that Policy 1 of the Comprehensive Plan is the issue, which states:

"Canby shall guide the course of growth and development so as to separate conflicting or incompatible use while grouping compatible uses."

Mr. Kleinman said if you look at what LUBA said, everything up to page seven, paragraph 10 of the proposed findings is not responsive to LUBA's order on remand. He stated that LUBA said the City has identified Policy 1 as relevant, and for Mr. Kahut to say, through his attorney, to come on appeal and say it shouldn't have been, is not permitted because the City staff and City Council have already decided that it is relevant. So if you are going to decide it is not relevant, it better be done real clearly and not do this "wishy-washy stuff," you should just say it. However, what LUBA said, the City must respond to the allegations of incompatibility specifically raised by petitioners during the local hearing and explain its bases for concluding that Policy 1 is satisfied through this proposed development. The City must respond specifically, to the appellants allegations of incompatibility which pertain to the proximity to Trost School and to residential subdivisions, and to issues of noise, traffic, odor,

vectors and vermin and safety problems and nuisances. He added that the proposed findings "gloss over" these things and they are not supported, and in fact, none of these findings are supported by substantial evidence in the record.

On the subject of noise, the findings are contradictory. They say, the only noise will come from trucks, and there will be other noise on the site and those noise sources will be reduced. He added that it was "not eliminated" but "reduced", and he pointed out that it was a direct contradiction within 2 or 3 sentence of one another. He said the findings in the record do not deal with noise from the recycling auto traffic that will come down Township for "drop-off" recycling. He said the appellants are not worried about the safety of the applicants truck drivers, they are trained, however, it is the auto traffic issue they are concerned about, and it is not addressed in the findings.

Mr. Kleinman said that on all of the issues, the findings rely upon conclusions based upon the existing operation of the applicant and the record shows you can not make a direct comparison, since that is a little recycling center and the matter of processing is totally different and it is not a transfer station. So, to the extent that the findings continuously rely on the current operation, they are wrong.

He added that the very same comparison is used to justify the appellants concerns about odors, vectors and vermin. It has no relevance. As to traffic, if the findings are adopted, you rely upon the applicants traffic study that does not take into account the auto traffic on Township of individuals bringing recyclables to the site, and that is where the cross traffic with the school is, on Township.

Mr. Kleinman stated that the proposed findings say that unlike landfills, there will be no long term storage of materials on the site is simply erroneous. The record is clear, based on the applicant, that recyclables will be processed as what can best be described as a continuous clattering, industrial operation and they will be stored on the site. They will be gathered in barrels and stored on the site until market conditions are ripe or right for the sale of these "precious" items. He stated that the City will have our "own in-town commodity exchange on this site, an exchange of waste materials." He added that they cited this to LUBA, it's in the record, the applicant says they will hold them there until it is time to sell. It is a business for profit, and there will be storage on the site all the time.

Mr. Kleinman said the other assignment of error, the sixth assignment, LUBA asked the City to define the standards set out in Code Section 16.49.040 (1)(b), that says:

"The proposed design of the development is compatible with the design of other developments in the same general vicinity">

He said the proposed findings, don't do it and are clearly wrong in this regard and so is any interpretation set out there. Neither the staff's proposed interpretation, which is the applicant's proposed interpretation, nor the references in that portion of the findings to evidence in the

record even discuss or touch upon the subject of the design of other developments in the same general vicinity, which the ordinance refers to. It's entirely skirted in a very elegant way, but not one that is going to withstand scrutiny. You can't interpret this to say something other than what it says, the proposed design of the development is compatible with other developments. You have to at least talk about it. He stated, "that in terms of the school and the residential developments, the design of this building is not addressed. No, it does not have to be identical or look like a house or a school, but it has to be compatible." Mr. Kleinman said there is a difference between compatible and identical and it is not in these proposed findings. The interpretation that is before you is clearly wrong and the findings that follow are not supported by substantial evidence or any evidence in the record on this subject. The record contains no evidence from anybody that the design is compatible with the design of other developments. So, if you really want to "ship" this thing through, that needs to be revisited. I don't think you will find anything in the record, and that is a good reason to re-open this or try to resolve it by mediation, which he added is the preferably approach. Mr. Kleinman said he was inclined to agree that a lot of emotional stuff has been done and there is no need to burden the body with hearing it again, however, there needs to be some process that takes into account the deficiencies and the existing decision in the proposed supplemental findings, and the concerns of a large part of this community.

Lastly, Mr. Kleinman said there is another legal provision that applies here, and therefore submitted an affidavit into the record on this particular subject. He stated that the law is, "and I'll cite to you counsel, Louisiana Pacific vs Umatilla County, which is 28 Oregon LUBA 32, a 1994 case that, while you cannot introduce into the record new matters unless they are requested on things that were decided by LUBA already, that we are permitted to raise issues on this remand that could not have been raised in the initial appeal to LUBA." He added, "that rarely happens." Mr. Kleinman said, "What would have been impossible for us to raise? Very little, but there was one thing." He said he had an affidavit to submit from Mr. Gerber, who was the person in his private capacity not as a Planning Commissioner, who was directly involved in this...."we had attempted to bring before you, as page 15 on our initial notice of appeal from the Planning Commission way back when....."

Mr. Greenfield stated "Objection, I'm going to object to your effort to get before this Council, information you could not get before because it was not allowed,. because the hearing was on the record. You tried to, and it was struck the first time. You lost that issue at LUBA and you cannot raise it now."

Mr. Kleinman replied that, "I did not lose that substantive....."

Mr. Greenfield said, "You withdrew the issue."

Mr. Kleinman stated, "No, I did not withdraw the issue. The substantive issue was never heard by LUBA. We only raised the procedural issue of our request to be heard on this issue which had only occurred after the Planning Commission record was closed, to have that come before you on a de novo hearing, and that was sliced off the notice of appeal by counsel.

That's not the issue here, now we are here on remand....."

Mayor Taylor stopped the dialogue and the clock as well. The Mayor stated, "I'm not a judge, and my concern is that if we go forward, I need to check with my counsel, that we are not setting ourselves up, and that's my question, are we setting ourselves up for another technical violation of something by accepting the affidavit over on the corner of this desk, or looking at it?"

Mr. Kleinman said, "Or rejecting it, that is the other question because....."

Mayor Taylor again asked if we were setting ourselves up for that

Attorney Kelley said that without knowing what is in the affidavit, he could not advise the Council as to whether the Council should look at it or not. He added, "Mr. Kleinman has not said anything to me previously because....."

Mayor Taylor said, "Let's hold it right here."

Mr. Kelley added, "Probably because he knew I would object to it and do what I did the last time....."

Mayor Taylor asked for a halt and stated, "as we go forward here, if we don't see it before we make a decision on whether we should see it or not, can Mr. Kleinman finish his comments and then you can review it and tell us whether, in fact, that prejudices."

Mr. Kelley said he presumed that Mr. Kleinman was going to make an argument on the content of the affidavit.

Mayor Taylor called for a five minute break at 8:45 P.M. for Attorney Kelley to read the affidavit. The regular session was reconvened at 8:54 P.M.

Mayor Taylor asked Mr. Kelley if the affidavit presented a technical issue for the Council.

Mr. Kelley said it presented a very legal technical issue and he did not know the answer. He added that he had one attorney telling him one thing and another attorney telling him another thing, and he did not know the correct answer except perhaps for LUBA stating which answer is correct. Mr. Kelley said he would try to explain the matter. "The affidavit of Mr. Gerber is an affidavit containing several here-say statements from him about an individual in regard to their view of the application of Mr. Kahut. And this information was made available to Mr. Gerber after the close of the first evidentiary hearing. If the Council recalls, and I don't know how much you are aware of, but initially Mr. Kleinman filed a motion requesting that you rehear and hear this particular piece of evidence. I said the record is closed. He tried then to put it into the notice of appeal, I excised it from the notice of appeal. He told me I couldn't do that, and I said, take me to LUBA. Because, I don't believe you can go through

the back door putting new evidence into a record intentionally. New evidence into a record that you know is already closed by filing a notice of appeal and by stating this is the reason I want to appeal this. So, when we go to LUBA, he withdrew his assignment of error, claiming that I wrongfully excised the material. Now, he claims that he did not raise the issue before LUBA of new evidence. The case he cites says, 'if there is new evidence that comes out after the record is closed and it goes back to the hearing body, under certain circumstances, that new evidence can be introduced into the record.' However, and that is where the rub lies, Mr. Kleinman feels he has established those circumstances legally in light of the case that he cites. Mr. Greenfield's interpretation of that case is that he has not established the ground rules for bringing that new evidence into this particular case. I don't know. It is a decision that is just not clear, in terms of what the language of the case he cites means. He interprets one way, Mr. Greenfield interprets it another way."

Mayor Taylor asked if the bottom line is, "if we accept the affidavit that it might give us additional information and then we can argue whether we can have that information or not."

Mr. Kelley said, "Whether it is relevant, -----whether you wish to address, -----whether the applicant wishes an opportunity to rebut it or you can make a decision that, no, we do not want to take any additional evidence into the record." He pointed out that this was a decision of the Council. He added that he felt that hearing the Council's earlier decision that indicated they did not want anymore procedural problems, this presents a dilemma if you agree with Mr. Kleinman. You'll hear about it from Mr. Greenfield. And if you agree with Mr. Greenfield's position, you'll hear about it from Mr. Kleinman. Mr. Kelley recommend the Council accept the evidence, if you're not going to hear about it from the other attorney. But he will object. This is a no win situation.

Mayor Taylor asked if they could note the position and do either "x or y."

Mayor Taylor polled the Council on whether to accept the affidavit or not:

Nolder-Not accept.

Harris- Let's hear it.

Prince- Let's hear it, however he added that he thought the Council was to accept new evidence as an alternative.

Mr. Greenfield asked if could address the issue.

Mr. Kelley suggested the Council listen to both attorneys.

Mr. Kleinman said there was no problem with Mr. Kelley's interpretation of the situation. He said there was a certain event that occurred after the Planning Commission voted, which was after the record closed, and it only occurred after and directly because of the Planning Commission's vote. And what that other party did, in reaction to the Planning Commission's vote, is very, very relevant to one of the sections of the Conditional Use Ordinance, Section 16.50.010 (D). It ties directly in. He added that this is not sandbagging. He further added,

"that the issue he raised at LUBA was simply the procedure. John chose to keep this away from you completely, which I disagree with. But that is not the issue here, the case I have presented, says that one of the things you can address on remand is issues that could not have been raised in the first appeal. And, we couldn't raise this particular part of your Conditional Use Ordinance and these facts because we were not permitted to do so, because the record was closed. A very relevant thing happened after the record was closed and that is what we think we are entitled to present under this case and that is all we are asking you to do. We have an affidavit, I can do about a two minute summary if you choose to allow that. And that is really the issue."

Mayor Taylor asked Mr. Greenfield to comment.

Mr. Greenfield, said that Mr. Kleinman is correct the information came up after the Planning Commission record was closed. He stated, "it may have been relevant to the case, but the fact of the matter is that the Planning Commission record was closed and your ordinance say that matters before this body are on the record. Mr. Kelley told Mr. Kleinman that if he wanted to make a request of this body for a limited de novo to try to get this evidence in the last time, he could make that request. As I understand it, and I think you recognize that I was not a part of this case the first time around, Mr. Kleinman did not make that request. He waived his ability to exhaust his administrative remedies, he didn't do it. This evidence, had he tried, possibly could have come in before, but it didn't. He had the opportunity, he failed to follow up. Mr. Kleinman is now trying to get it in, again he is trying to do the same thing that he didn't do the last time. And, he is saying that it is relevant to one of these issues. Well, there are probably thousands of pieces of evidence that are arguably relevant to one of these two issues, but your code says the record is closed and hearings are on the record. You have decided this evening, that you do not need to open up the record. Again, this is a continuation and LUBA has held, that matters on remand are a continuation of the original proceedings, so this is still actually one proceeding, and this matter is still on the record. If you let this in, you will be violating your code, and if you violate your code, you are prejudicing our interests and we will object. And the harm, the prejudice will not be to him, because he has tried to get something in the back door, to boot strap it, and he just simply can't do that. The prejudice would be to us."

Mr. Kleinman said, "that when it came up the first time and John withheld that page from our notice of appeal, what he told me I could do would be to get up and tell you there is some subject matter that I would like a partial de novo hearing on. But, he told me, number one, he would not allow me to say what it was, period. And, number two, that we don't have that procedure anyway. You are not permitted to hear it de novo. He and I are in agreement on that. That's why it's here now, and it is here now because there is case law from LUBA that says if you couldn't raise it the first time, then it can be brought back after remand, And, like I said before, very rarely is there something you really couldn't bring up the first time. There may be something you were to pokey to find. You might say, if I have more time I would have discovered this, and we had another issue like that and I am not going to tell you what it was, but we are not bringing it back to you. It was something that could have been

done before that we wanted you to hear and John probably, properly said, forget it. But, this is one of those very, very rare cases where something that we contend is highly relevant only occurred, not did we not find out about it until after the record closed, it only happened after. Under this LUBA case, regardless of what Mark says, and regardless of what your code says, LUBA says you can, on remand here this stuff and that is our position."

Mayor Taylor polled the Council on the matter of the record being closed:

Nolder - the record is closed.

Harris - want to hear it.

Prince - want to hear it.

Stark - the records are closed.

Strong - records are closed.

Daniels - records are closed.

Mayor Taylor stated that the Council notes the objection, however, the Council will not look at the affidavit.

Jeff Kleinman stated that he had made his presentation. However, he did say, "as clever and crafty as the findings that have been prepared and put on the express track are, they do not fully, or nearly address the instructions that LUBA gave you and are not supported by substantial evidence on the record."

Mr. Kleinman apologized for his directness, and said he was available for questions.

REBUTTAL - Mark Greenfield said he would respond to a few of Mr. Kleinman's directives.

Mr. Greenfield pointed out that in regards to "mediation," his client pursued mediation and was told the terms on which it could occur were simply impossible. He noted that when you are representing 50-80 people as Mr. Kleinman is, all of them should agree. However, there are comments on the record that this use should not be in Canby, this use should not be in the industrial park..... he didn't think it could have been mediated without Mr. Kleinman withdrawing from the matter because of a difference of opinion among his clients.

Mr. Greenfield referred to the comments on noise and traffic. Mr. Greenfield disagreed with Mr. Kleinman's reading of the proposed findings, on the issue of traffic. He said it was addressed by LUBA. Even though Mr. Kleinman raised it at LUBA, he lost that issue at LUBA

In regards to the issue of design, Mr. Greenfield pointed out that Mr. Kleinman maintains that the findings do not describe the design of the different uses and what they look like. Mr. Greenfield said that LUBA doesn't mean, and the interpretations in the findings does not say, that it has to look like a school or residential building. However, if it were a PUD in a residential area you might want to consider the looks, but these are different uses in a

different zoning area and the findings adequately interpret what compatibility means and it doesn't require a detailed analysis of what those uses look like. He added that it is not necessary to get into architectural design, which is what Mr. Kleinman is trying to get at.

Mr. Greenfield said that LUBA required that the findings have to explain in more detail what these provisions mean and how they are met. LUBA did not say the decision was wrong, only that the explanation was not specific enough. Mr. Greenfield said, "We think the proposed findings remedy that. We think they provide the proper interpretation and the proper explanation."

Mr. Greenfield reminded Council that the site is zoned M-1, and the use is allowed in that zone. He added that the City has adopted findings that the Logging Road Industrial Park is desirable for industrial use, the applicant's proposed use. The Logging Road Industrial Park was formulated to be a place for industries that would not be appropriate in other areas in the City. He added that those findings were not challenged by LUBA, or to the extent if they were challenged, they were never overturned by LUBA.

Finally, Mr. Greenfield said there was significant testimony in the record supporting the proposal, in terms of its design as being appropriate for this kind of use. In terms of its design as really taking "the extra step" to minimize conflict with the adjoining properties. He added that Mr. Kahut is a long time member of the community; he performs a valuable service to the community; he has put a lot of time into the proposed project, including citing the project at another location which was turned down; he made a "community outreach" effort on the project; and he has agreed to 49 conditions of approval. Mr. Greenfield stated that this was the right location and it should be approved. Mr. Greenfield asked that the City Council approve the project with a tentative approval so the findings could be reviewed by the City Attorney for total compliance to the issues, with adoption later.

Mayor Taylor stated that the Council could deliberate and decide tonight; the Council can think about it for a while longer then deliberate and decide; and after that decision it will determine what the next steps are.

DELIBERATION - Councilman Daniels asked the Attorney if there were a need to review the conditions further. Mr. Kelley said he would like to revisit the findings.

Councilman Prince said his concern was that the Council was on a "fast track," and he was expecting more testimony on what compatibility was and he did not get that. He said he was not in favor of the definition that an industrial use next to a residential neighborhood is compatible. He added that this would be setting a dangerous precedent for the City since we have a lot of industrial land that borders single-family residential area. Councilman Prince said the Council were not addressing the community's concerns about the project, in that there are certain industrial uses that are not compatible and in this case it is not compatible.

Councilman Nolder asked if we should make a motion to present to LUBA the findings.

Mayor Taylor said the Council can give directions to staff in regard to what they want to see in the findings.

Attorney Kelley said staff is seeking a tentative decision one way or the other; and direction as to what the Council wants in the findings that will come back to the Council at the next regular meeting.

Mayor Taylor reviewed again, the types of response both pro and con that could be made by the Council.

****Councilman Daniels moved that based on the stated Findings, Conclusions & Order that the City Council on the remand from LUBA, again find that the application meets all the applicable review standards and thereby tentatively approves CUP 94-05/DR 94-14/LLA 94-08, with the conditions identified in the previous order and that these conditions be reviewed by the prevailing party and to be returned to the next regular Council meeting. Motion seconded by Councilwoman Stark.**

DISCUSSION - Councilman Prince reiterated that this sets a precedent that almost any industrial project, conditional use or not, can be located next to any residential area. He added that in the future he will try to change that to some type of buffer zoning.

Councilman Daniels argued that this does not set precedent, the Council looks at the merits of each issue. He added that the Council developed the industrial park and set criteria at that time.

****The motion on the floor to approve the findings was approved 5-1, with Councilman Prince voting nay.**

Jeff Kleinman, for the record, reserved the right to be heard based on the Friends of the Metolious vs. Jefferson County case.

Mayor Taylor recessed the session at 9:23 p.m. reconvening at 9:28 p.m.

ORDINANCES & RESOLUTIONS: Ordinance No. 941 -Administrator Jordan reminded the Council that this was the second reading on an ordinance drafted by request of the Police Department,

****Councilman Harris moved to adopt Ordinance No. 941, AN ORDINANCE ESTABLISHING THE PURPOSE, PROCESS, LIMITS AND TIMING OF INVENTORIES OF PERSONAL PROPERTY TO BE CONDUCTED BY MEMBERS OF THE CANBY POLICE DEPARTMENT; AND DECLARING AN EMERGENCY. Motion seconded by Councilwoman Strong and approved by roll call vote, 6-0.**

Ordinance No. 942 - Administrator Jordan stated that this ordinance was a second reading

ordinance to purchase the HVAC for the library.

****Councilman Daniels moved to adopt Ordinance No. 942, AN ORDINANCE AUTHORIZING THE PURCHASE OF HEATING VENTILATING AND AIR CONDITIONING (HVAC) EQUIPMENT FROM ROTH HEATING THROUGH THE STATE OF OREGON PURCHASING DIVISION; AND DECLARING AN EMERGENCY. Motion seconded by Councilman Harris and approved 6-0, by roll call vote.**

Resolution No. 597 - Jim Wheeler explained that both resolutions are very similar for two projects, one on S. Pine and one on N. Pine for dedication of right-of-way for street purposes. He noted that right-of-ways are usually handled through a subdivision, however, these projects were not part of a subdivision or partition and the acceptance becomes the Council's jurisdiction. The dedications are to widen the subject streets.

****Councilman Prince moved to adopt Resolution No. 597, A RESOLUTION TO ACCEPT DEDICATION OF LAND FOR SOUTH PINE STREET RIGHT-OF-WAY PURPOSES. Motion seconded by Councilman Harris and approved 6-0.**

****Councilman Harris moved to adopt Resolution No. 598, A RESOLUTION TO ACCEPT DEDICATION OF LAND FOR NORTH PINE STREET RIGHT-OF-WAY PURPOSES. Motion seconded by Councilwoman Stark.**

Councilman Harris pointed out that N. Pine intersected with a "Portland-Eugene Eastern Railroad at one time." He asked if there really was a railroad that connected in that area. He was informed there was and the "grade" is still there.

****Resolution No.598 was approved 6-0.**

MANAGER'S REPORT: Administrator Jordan reviewed the following items:

- * the City of Canby will become a "pilot" project for DEQ with a test site at the City Shop location. This was made possible with the help of Councilman Nolder and will become effective about March 1st, with a tentative schedule for Saturday operation.
- * Sprague Controls building is nearly complete and will employ 88 people.
- * discussions continue for a regional water facility and a study has been commissioned, with 2 of the proposed 3 sites in the Canby area.
- * the County Charter Committee will meet at the N. Clackamas Aquatic Center in Milwaukie tomorrow night. Mr. Jordan handed out a copy of a Wilsonville Resolution endorsing the committee endeavors. The committee is proposing to file for the May ballot. Attorney Kelley said that Happy Valley supports "from B' regarding districting and the election of the chair by members of the Commission. The Council

was invited to inform staff what they wanted in the way of a formal comment on the position of the Charter process.

- * the Hispanic Recreation Program has been created with efforts from Canby Kids, Community School, Camp Fire and the City, and an employee is now on board for six months, funded by the ETBS program. Mr. Jordan said the ESL program at CUHS will be suggesting other activities, other than athletic.

- * Mr. Jordan passed out information with statistics regarding building permits in the City, noting that there were 160 permits this calendar year, noting that in 1995 there were more multi-family and manufactured home permits.

COUNCILORS' ISSUES: Councilman Harris informed the Council that he had participated in the interview process for the Police Department, with the Canby Police Reserve applicants. He noted that the Reserve Officers donate their time and he was very impressed with the quality of the Reserve Officers.

Councilman Harris noted that Officer Skipper arrested a graffiti artist and he felt this was very good police work.

Councilman Nolder emphasized to the citizens that the DEQ test station that has been promised to Canby will have a success or failure based on use.

Councilman Daniels noted that Shirley Strong and himself have been on the Management Compensation Committee and he was ready to move on the issue.

******Councilman Daniels moved to approve the Management/Compensation Plan on a three-year structure as presented in the earlier workshop of the evening. Motion seconded by Councilwoman Strong.

DISCUSSION - Councilman Prince felt it was "front loading" and was not sure the money was in the budget.

Councilman Harris expressed reservation about the proposal, specifically the concept setting the goal of the average of what other cities are paying their managers.

Councilman Nolder noted that there has never been a structure for management, and he felt this was a good plan and was needed.

Councilman Daniels felt the cost of living used in the past was not good, and the proposal would be more equitable.

Mayor Taylor stated that the overall performance system and acknowledgement of performance is a very good part of the proposal.

****The motion for the Management/Compensation 3-Year Schedule was approved 4-2, with Councilors Prince and Harris voting nay.**

Local Safety Public Coordinating Council, a body formed of various County people who will design implementation and plans regarding SB 1145, in response to Ballot Measure 11, is designing important work in coordination with the Criminal Justice System in Clackamas County; and Mayor Taylor is resigning from that Council and an elected official needs to replace him. Any Councilor interested should let the Mayor know.

OTHER REPORTS OR ANNOUNCEMENTS: Administrator Jordan invited everyone to a Christmas Party at his home on Friday, December 15th.

Chief Giger stated that Clackamas County has opened their juvenile processing center, for status offenses and crimes. The juveniles will now be taken to that department and dealt with immediately. In the past there has been a 3 week to 3 month wait to deal with these type of situations.

Councilman Daniels commented that he recently observed people painting over a graffiti area. Chief Giger said there were more juveniles waiting to take their turn in painting.

ACTION REVIEW:

1. CREG will be informed that Councilman Prince is the alternate to that group.
2. Ordinance No. 941 and No. 942, will be implemented.
3. Resolution 597 & 598 will be recorded for street dedication.
4. The Findings will be brought back to the Council regarding the Kahut Transfer Station application.
5. The Management/Compensation proposal will be implemented.

****Councilman Prince moved to go into Executive Session under ORS 192.660 (1)(f), to consider records exempt from public inspection. Motion seconded by Councilman Harris and approved 6-0.**

Mayor Taylor recessed the regular session at 9:55 p.m. to go into Executive Session. The regular session was reconvened at 10:40 p.m. and immediately adjourned.

**EXECUTIVE SESSION
DECEMBER 6, 1995.**

Present: Mayor Taylor, Councilors Prince, Harris, Nolder, Stark, Strong and Daniels, Michael Jordan, Sarah Jo Chaplen, Cam Sivesind, John Kelley and Jack Hammond.

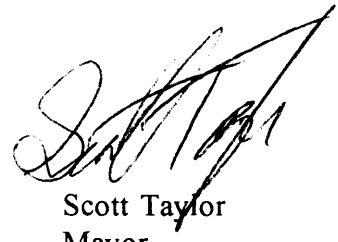
Mayor Taylor called the session to order at 10:03 p.m. in the CUB conference room

ORS 192.660 (10(f)) - The Council discussed exempt records regarding CTA.

Mayor Taylor adjourned the session at 10:35 p.m.

A handwritten signature in cursive script, reading "Marilyn Perkett". The signature is fluid and somewhat stylized, with a large loop at the end of the last name.

Marilyn Perkett
City Recorder

A handwritten signature in cursive script, reading "Scott Taylor". The signature is more compact and angular than the one to its left, with a sharp upward stroke at the end.

Scott Taylor
Mayor

PROCLAMATION

WHEREAS, Toys for Tots, originated for the purpose of providing toys for less fortunate children in our community; and

WHEREAS, it is recognized that greater public awareness and involvement is needed to provide and promote joy in each household in this community; and

WHEREAS, the Canby Chapter of Kiwanis, has undertaken the project of collecting and distributing toys to these children, during the time from December 11th through December 17th; and

WHEREAS, The Kiwanis need your help by providing new and like new articles that may be placed in the Christmas bags; and

WHEREAS, drop boxes for these donations may be found at the Canby Public Library, Canby Utility Board, Canby Police Department, Canby Fire Department, North Willamette Telecom, Canby Telephone Association and other Kiwanis barrels distributed throughout the Canby business community.

NOW, THEREFORE, I, Scott Taylor, Mayor of the City of Canby, Oregon, do hereby proclaim the week of December 11 - 17, 1995 as

TOYS FOR TOTS WEEK

and call upon the citizens of this City to observe this time by participating in this toy drive helping to provide the assurance that each child may have a "twinkle in their eye" this Holiday Season.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the City of Canby to be affixed this 6th day of December in the year of our Lord One Thousand Nine Hundred and Ninety-Five.

*Scott Taylor
Mayor*

1


CANBY CITY COUNCIL
WORKSHOP SESSION

PRESENT: Mayor Taylor, Councilors Nolder, Prince, Harris, Stark, Strong and Daniels, Administrator Jordan, Sarah Jo Chaplen, Karen Rider, Beth Saul and Cam Sivesind.

The Council met in workshop session at 6:00 p.m. in the CUB conference room.

Administrator Jordan and the Management Compensation committee presented information to the Council regarding the a proposed plan for Management Compensation and Performance Appraisal schedules...

Mayor Taylor adjourned the workshop session at 7:25 p.m.



Marilyn K. Perkett
City Recorder



Scott Taylor
Mayor