

CANBY CITY COUNCIL
SPECIAL MEETING
SEPTEMBER 11, 1991

Mayor Shawn Carroll presiding. Council members present: Scott Taylor, Keith Stiglbauer, Maureen Miltenberger, Terry Prince, Walt Daniels and Robert Smith.

Also present: City Attorney John Kelley, City Planner Robert Hoffman, City Recorder Marilyn Perkett, Attorney Neil Kagan, Attorney Susan Boyd, Milt Dennison, Heinz Rudolf and several citizens. (The sign-in sheets will become a part of the minutes of this meeting.)

Mayor Carroll called the meeting to order at 7:30 p.m., in the Canby Adult Center. The flag salute was observed.

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

Mayor Carroll explained that this was a continuation on the hearing for CUP 91-01/DR 91-02.

Mayor Carroll asked for each Councilperson to disclose any exparte contact or conflict of interest since the last meeting.

Councilman Daniels expressed none.

Questions were requested and none voiced.

Councilman Smith expressed no exparte involvement.

Questions, none were asked.

Councilman Prince said he had no exparte contact since the last meeting.

Questions, none were asked.

Councilman Taylor said he had an exparte conversation with his vet who said he wished we would build more schools. Mr. Taylor felt that contact had not affected his ability to review the facts or make a decision.

Mr. Kagan, asked if any facts whatsoever in respect to the case were discussed.

Mr. Taylor replied, "no, sir."

Councilwoman Miltenberger had one additional site visit with her family and felt it had not changed her feelings at all.

Mayor Carroll expressed no exparte contact and had not read any of the local newspapers.

Questions were asked of Ms. Miltenberger, none were voiced.

Questions were asked of the Mayor, none were voiced.

Councilman Stiglbauer was not at the last meeting and said he had participated in Executive Session discussions regarding the issue and would not disclose those discussions; he had seen articles in the local paper; visited the site once with his family; and had no other exparte contact and no conflict of interest and could make a decision regarding the

merits of the appeal.

Mr. Kagan again requested disclosure of Executive Session minutes and objected to the entire Council refusing to disclose those discussions. He said that the law does require that exparte contact can be disclosed.

Attorney Kelley indicated that the law does not require you to disclose Executive Session discussions, even assuming they might be characterized as exparte contact. He cautioned against disclosing such information.

Councilman Stiglbauer expressed that he did not want to disclose Executive Session information. He said to prepare for the hearing he listened to Planning Commission tapes of June 17th and June 26, 1991; watched a video tape of the August 28th hearing; read Mr. Kagan's letters of August 15 and 26th; and staff response to those letters dated September 5, 1991.

Attorney Kelley reviewed the appeal procedure. The Planning Commission creates the record for the appeal, the City Council then acts upon that record and cannot hear any new evidence at this time. The Council must follow criteria of the Municipal Code Section 16.88.140, which he read. At this time Mr. Kelley said that he and Mr. Hoffman were ready to respond to procedural and substantive issues raised by the appellants Attorney and once they are discussed we can go into a question and answer period by the hearing body toward a decision. Attorney Kelley pointed out the decision options to the City Council, they may adopt the same Findings and Conclusions as the Planning Commission; they may overturn the Planning Commission and make findings in compliance with Code Section 16.88.140; they may remand the decision back to the Planning Commission with directions as to what issues need clarification; or they may continue the matter to a later date for a decision. If the matter is continued, tonight is the only notice that will be made.

Mayor Carroll noted that written response were prepared by Attorney Kelley and City Planner Hoffman and he asked if the Council wished to discuss these in detail. The general consensus of the Council was to "high-lite" the points of question.

Attorney Kelley addressed the procedural issues:

#1 - Authority to Apply - Mr. Kagan implied that the City Administrator did not have the authority to sign the application for the school district to apply for a CUP, however, Mr. Kelley felt there was no limitation to the City Administrator's authority with respect to this type of issue. The City Charter grants the City Administrator general supervisory powers over all City property and he did have the authority in question.

#2 - Exparte Contact - Mr. Kelley said he reviewed the Planning Commission tape of June 26th, and Mr. Westcott reported a telephone conversation with someone who wanted to discuss the issue and he referred them to staff. Mr. Kelley felt there was no exparte contact, however, he did disclose the contact and the audience did not question him further about the contact.

#3 - Continuance - Mr. Kelley referred to the "computerized formatted" mock-ups of the original diagrams of access schemes presented by the district which Mr. Kagan felt was new evidence. Mr. Kelley said there was nothing different about the schemes except they had been placed on boards, colorized and a different format, but the information on them was the same.

Mr. Kagan implied that the Traffic Analysis Report was not a part of the staff report, however, it was referenced in the staff report and was available.

One of the appellants asked that the record be left open, it was left open, no one came in to review anything and no additional evidence was submitted.

Mr. Kelley felt that the three topics he addressed had no merit and did not require that the matter be remanded back to the Planning Commission.

Robert Hoffman, City Planner, addressed the substantive issues:

Conditional Use Application - A number of the allegations referred to the fact that the staff report was not a part of the final order. After reviewing the record, Mr. Hoffman said it was clear that the motion, tape and minutes are consistent and the May 31, 1991, staff report was incorporated into the Planning Commission's Findings, Conclusions and Order.

#1 - The two examples cited for the Commission's failure to adopt conditions to ensure compliance with criteria. The first, regarding that a Traffic Report indicated a traffic signal was needed at 99E and Territorial is addressed by "Condition #2" of the order. The consultant recommended that "further consideration be given to improve this intersection."

The appellants alleged there is lack of conditions regarding the need for additional parking. Mr. Hoffman said the need is already provided for by the applicant and the minutes state that parking requirements and overflow parking has been provided.

#2 - Staff believes the allegation of inadequate public services is false. The staff report, page 16, states that the required facilities exist and public services will adequately be met. The forms sent to service providers states, "if you do not reply, the staff will assume you approve the application." Some service providers requested some conditions and the Commission did incorporate those suggestions into their findings. Also, the minutes reflect the following statement, "No replies regarding difficulty serving the site or sewer capacity were received."

#3 - In regards to the allegation that the Commission made inadequate findings, facts or legal conclusions, it is common for the Commission to rely on staff reports. Also, the Commission did their own fact gathering to arrive at conclusions.

#4 - Insubstantial Evidence to Make Findings that Criteria Has Been Met, has several allegations to be answered.

In regards to the consistency with the Comp Plan, both Environmental Policy 2-R and 3-R, are addressed in the staff report. Implementation measures for policy 3-R, apply only for industrial development.

In regards to Title 16, specifically the "off-street loading facility", the section references a part of the Site and Design Review Ordinance which is 23 pages. Staff review is covered in the staff report and was recommended for approval. A line-by-line textual review of the ordinance requirements is not practical or required.

In terms of the parking lots and access issues this was reviewed by staff. After conclusion that the Logging Road might not be available the Commission adopted what they considered the best alternative.

Also, condition #4 provides for sidewalks; and Condition #1 incorporates the Conditions of MLP 91-04 and Condition #8 of the MLP requires sidewalks along Territorial Road prior to occupancy of the school.

In terms of the Public Facilities and Services Adequate to Meet the Needs of the Development, conditions are not required if the normal usual procedures will ensure that the requirements will be met. Condition #2 provides for improvements needed at 99E and Territorial and the overflow parking area.

Site and Design Review - Mr. Hoffman addressed several issues:

#1, To meet approval criteria the appellant Attorney alleges that conditions cannot be used. However, in the ordinance Part III, Section 3, it states, "A Site and Design Review approval may include restrictions and conditions...", therefore, clearly conditions are permitted.

#2, Implications that the Planning Commission NOT the City Planner must approve the Site and Landscaping Plan, the Commission **DID** approve the proposed landscaping. Condition #6, says the final landscape plan shall be reviewed and approved by the City Planner for consistency with the conditions of approval for this application. Administration enforcement is clearly the responsibility of the City Planner and consistency with conditions is clearly an administrative function.

#3, Regarding Findings, Facts, and Legal Conclusions Not Adequate, this is a 7 page list referenced by the appellant Attorney and to answer this would be an onerous requirement to answer in detail and is not required. The City Planner has reviewed the plan and assured the Commission that they meet the requirements. Final plans will be reviewed.

#4, Necessary and Appropriate Findings Supported by Evidence, the appellants attorney states they were not adequate. Many are extremely detailed and not appropriate for the current level and stage of design for the school in the opinion of the staff and action of the Commission. The current level and stage does meet the requirements.

In regards to Effect on Needed Housing, page 15 of the staff report does discuss this aspect and lists effects believed likely and this was included in the Commission's Findings, Conclusions and Order.

In regards to Tree Cutting, only City owned land and easements are controlled under the tree cutting ordinance. In fact, the property owner **MAY** apply for approval to cut trees in addition to those allowed under the City Tree Ordinance. Permits are not required to cut trees on privately owned property, except for easements.

If more detailed design review is needed, the City Council could add a condition to the approval requiring such a review.

It was also alleged that the Public Works Director cannot be asked to approve sidewalks or conditions. However, the conditions specifically asked the Public Works Director to review: Right-of-Way designs and construction designs; design of road and intersection; and signage to control circulation at the exit and entrance. These are detailed engineering and construction details and the Commission is in no position to approve this level of detail.

Mr. Hoffman suggested that the City Council deny the request.

Attorney Kelley asked that the memo dated September 5, 1991, from himself and the City Planner be submitted into the record. Council agreed. Also, a memorandum of law from Susan Boyd, legal counsel for the school district, was requested to be submitted into the record.

Mr. Kagan objected to Susan Boyd's memo being entered into the record, because the process at the last meeting allowed for the district to present argument and they chose not to and this would go beyond process established at the last meeting.

Attorney Kelley disagreed, however, he did withdraw Susan Boyd's memo. Council agreed.

Mr. Kagan said, despite what staff had related, there were serious defects including jurisdictional, procedural and substantive defects in the Commission's decision. Mr. Kagan said he would address some of the issues, however, that does not mean he was conceding those he does not address.

In respect to authority of the City Administrator to authorize the application, he disagreed that the City Charter allowed for an outside entity to apply for an application of City owned property. However, even if there was authority he maintained there was no evidence in the record to allow for this matter. Because the Planner was "personally" assured that the City Administrator gave the district the authority to apply is not adequate, the decision must be made on the record not on personal assurance. The form says that documented evidence must be supplied and there was none, therefore the Commission did not have jurisdiction to consider the application.

In respect to the exparte contact, Mr. Kagan said that Mr. Westcott did receive a phone call, however, it doesn't say whether he referred that person to staff immediately or if he listened. Mr. Westcott had to disclose what was said. Also, those present were not solicited to ask questions of Mr. Westcott.

The May 31st staff report referenced the traffic report, however, a reference is not sufficient. There is also no evidence who submitted the traffic report but it was in support of the case and therefore a continuance should have been given so his clients could have reviewed that report and respond.

Mr. Kagan said there was a comment regarding needed improvements at Territorial and 99E, however it was not specific that a traffic signal is a needed improvement. Only findings can establish what is needed and nothing is in the findings to say a traffic signal is needed.

In regards to the position of the staff that no condition was needed to assure there would be adequate parking facilities because the facts demonstrated there were adequate facilities, that's not what the Commission found. The Planning Commission found that only by imposing conditions the requirements would be satisfied. There was also a discrepancy between the staff report and Planning Commission order, so in this situation the Planning Commission statement controls. The Commission said we can only approve this CUP by imposing conditions for all the criteria and it didn't make any exceptions. It did not say we have to impose conditions to satisfy parking, and in fact no condition was imposed to satisfy the need for additional parking. There is no evidence in the record to how much overflow parking was provided.

In regards to the 23 line paragraph regarding surface and groundwater protections, there was nothing for protection of surface and groundwater through conditions, only that those standards must be met. There was no evidence or conditions to say those standards would be met. The same apply in regards to the pollution standards. Staff said the pollution standards would be judged at a later time, perhaps by other governmental agencies. The ordinance said a finding must be made to make sure those standards are met and they never made that finding. The point was made that implementation has to be made with only industrial development, if this is the case, that means the City is not interested about meeting pollution standards for other types of development.

Mr. Kagan reiterated that if there was no response from service providers, then evidence was not provided that services were adequate.

In regards to the Site and Design approval, Mr. Kagan said the Commission could not substitute conditions for criteria, only that they can impose "additional" conditions. The Commission did approve the site plan, but the staff said the final site plan has not been approved. The ordinance does not make a distinction between preliminary or final plans, it says the Planning Commission must approve the plan. They delegated that responsibility to staff and they do not have that authority. It was noted that many of the Site and Design Review Ordinance criteria were too detailed and it is too much to expect the Commission to go through that detail. Mr. Kagan said the City wrote the standards and the Commission must identify each criteria and decide why each standard is met or not met.

In regards to the fact that the plan identifies which trees are to be maintained, he pointed to the schematic and said it was only a generalized version and the ordinance said specific identification must be made.

There is no evidence in the record, only a conclusion in the staff report, that there will be no effect on adequate housing. Again, he reiterated that evidence was not entered on the issue.

Mr. Kagan quoted from Canby Municipal Code Section 16.10.070, (B) (6), which says sidewalks must be constructed to City standards, except when the final street design and grade have not been established, in that case the sidewalk shall be constructed by a design to meet approval of the Site and Design Review Board. In this case, the final street design has not been established, therefore the Site and Design Review Board must approve it and they do not have the authority to delegate to the Public Works Director.

In summary, Mr. Kagan said the Planning Commission did not have the authority to hear this issue and therefore their decision should be reversed. Also, there are so many procedural and substantive errors. The course for the City to follow is to remand it back to the Commission so they can comply with the law.

Mayor Carroll asked if there were questions for Mr. Kagan, none were voiced.

Councilman Taylor asked if either Mr. Kelley or Mr. Hoffman had any rebuttal to Mr. Kagan and was told they had none.

Councilman Daniels and Smith had no questions of staff or Mr. Kagan.

Councilman Prince asked staff about the traffic light at 99E and Territorial, how we could impose and off-site traffic light when it is not in the City, Mr. Hoffman said if there was a need present we could impose reasonable conditions to see that it is solved. However, the traffic consultant did not precisely impose a traffic light at that intersection, he only said one is warranted. We have asked that this development and other developments participate in finding a solution for this problem intersection. It will be very expensive and one development could not afford the proper solution. Off-site requirements are permitted but must be reasonable according to contribution.

Councilman Stiglbauer and Councilwoman Miltenberger had no questions.

Mayor Carroll said that he would ask each Councilor for a yes or no vote on whatever their decision is, and a reason for their vote.

****Councilman Taylor moved that the City Council find in support of the Planning Commission Findings on CUP 91-01/DR 91-02.**

Attorney Kelley reviewed the code criteria conditions.

****Mr Taylor continued, we confirm the findings of the Planning Commission and all criteria were met as listed in Municipal Code 16.88.140, Subsection (C), 1, 2, & 3. Motion seconded by Councilman Prince.**

Mayor Carroll reviewed the motion and asked for each Councilman for their vote.

Mr. Kelley again reviewed the code for more clarification and asked if findings should be prepared and returned to the next meeting for adoption. Council concurred.

Councilman Daniels asked if we vote for the motion, where do the findings of fact come into play?

Attorney Kelley said the motion was to uphold the decision of the Planning Commission and staff would return with the appropriate findings for review.

Councilman Daniels - Yeah, I feel the Planning Commission did address all the criteria and did come up with the facts as presented and they have done the job well.

Councilman Smith - Yeah, the Planning Commission upheld their responsibilities and their findings according to law.

Councilman Prince - Yes, the Planning Commission did uphold and address all the criteria.

Councilman Taylor - Yes, the staff report deals appropriately with the concerns addressed and the findings of the Planning Commission were accurate and acceptable.


Councilwoman Miltenberger - Yes, the Planning Commission did uphold their responsibilities and the staff report was adequate in response to questions raised.

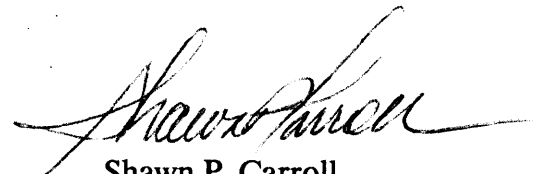
Councilman Stiglbauer - Yes, after review of the record and the three criteria in the Municipal Code to overturn the record, I don't see anything in the record that we could overturn the decision on.

****The vote was passed 6-0, to uphold the Planning Commission's decision to approve the application of CUP 91-01/DR 91-02.**

Mayor Carroll asked if anything else was to come before the Council, nothing was presented.

Mayor Carroll adjourned the meeting at 845 p.m.


Marilyn K. Perkett
City Recorder


Shawn P. Carroll
Mayor