



**City of Sherwood  
PLANNING COMMISSION  
Sherwood City Hall  
22560 SW Pine Street  
Sherwood, OR 97140  
September 28, 2010 – 7 PM**

**Business Meeting – 7:00 PM**

- 1. Call to Order/Roll Call**
  - 2. Agenda Review**
  - 3. Consent Agenda**
  - 4. Staff Announcements**
  - 5. Council Announcements (Mayor Keith Mays, Planning Commission Liaison)**
  - 6. Community Comments** (*The public may provide comments on any non-agenda item*)
  - 7. Old Business:**
    - a. Continued Public Hearing – Sherwood Cannery Square Plaza  
The applicant has requested a site plan approval for a 12,000 square foot public plaza at the northeastern corner of Pine Street and Columbia Street. This is also the Final Development Plan for this portion of the approved Sherwood Cannery Square PUD. The applicant has also included a phasing plan for the remainder of the PUD with this Final Development Plan proposal.
  - 8. Comments from Commission**
  - 9. Adjourn the Business Meeting**
- Next Meeting: October 12, 2010 – Code Clean Up Phase II work session**

**Work Session – Following business meeting**

1. Code Clean Up Phase II (discuss listening session feedback and begin discussing commercial use classifications)



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## MEMORANDUM

City of Sherwood  
22560 SW Pine St.  
Sherwood, OR 97140  
Tel 503-625-5522  
Fax 503-625-5524  
[www.ci.sherwood.or.us](http://www.ci.sherwood.or.us)

**Mayor**  
Keith Mays

**Council President**  
Dave Heironimus

**Councilors**  
Dave Grant  
Linda Henderson  
Lee Weislogel  
Del Clark  
Robyn Folsom

**City Manager**  
Jim Patterson

**DATE:** September 14, 2010  
**TO:** Planning Commission  
**FROM:** Julia Hajduk, Planning Manager  
**SUBJECT:** New evidence submitted into the record for the Sherwood Cannery Square Plaza

At the September 7, 2010 Planning Commission hearing on the Sherwood Cannery Square Plaza, the Commission left the written record open for 7 days for the submittal of new evidence or testimony. Below is a list of documents received within that time period:

**Exhibit F** - LUBA decision on the Cannery PUD issued 9/10/10.

Staff Comment: This document shows that the decision of the Council is affirmed and, therefore no revisions to the findings or conditions in the Plaza site plan are needed.

**Exhibit G** - Revised Phasing Plan submitted by Capstone development revised 9/8/10 (received 9/14/10)

Staff Comment: Upon receipt of the revised phasing plan and consideration of the timing of completion of the streets construction for the Subdivision, it is recommended that Condition 1 under the "Prior to Issuance of a Certificate of Occupancy" be revised to state: "All public improvements needed to serve the Plaza including water, storm and sanitary sewer, and on-street parking shall be completed, inspected and approved, as applicable, by the City, CWS, TVF&R and other applicable agencies." This will allow the Plaza to be occupied even if all streets associated with the subdivision are not complete provided the improvements needed to serve the plaza are in place.

**Exhibit H** - E-mail from Jim Claus dated 9/14/10

**Exhibit I** - E mail from Susan Claus dated 9/14/10

**Exhibit J** - "Process to Divide Land in Sherwood" flow chart submitted by Susan Claus

**Exhibit K** - Engineering Permit Process Packet submitted by Susan Claus

**Exhibit L** - LUBA Record for the Cannery PUD LUBA appeal (due to the size, this record is not being copied but is available for viewing at City Hall)

There is now a 7 day comment period to anyone to comment on the new evidence submitted into the record. This comment period closes at 5:00 PM on September 21, 2010.

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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

SUSAN CLAUS, ROBERT JAMES CLAUS,  
and SANFORD M. ROME,  
*Petitioners,*

vs.

CITY OF SHERWOOD,  
*Respondent,*

and

CAPSTONE PARTNERS, LLC,  
*Intervenor-Respondent.*

LUBA No. 2010-017

SUSAN CLAUS, ROBERT JAMES CLAUS,  
and SANFORD M. ROME,  
*Petitioners,*

vs.

CITY OF SHERWOOD,  
*Respondent.*

LUBA No. 2010-023

FINAL OPINION  
AND ORDER

Appeal from City of Sherwood.

Susan Claus, Robert James Claus, and Stanford Rome, filed the petition for review and argued on their own behalf.

Christopher D. Crean, Portland, filed a joint response brief and argued on behalf of respondent. With him on the brief were Heather R. Martin and Beery Elsner & Hammond, LLP.

Steven P. Hultberg, Bend, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Ball Janik, LLP.

RECEIVED

SEP 13 2010

BALL JANIK LLP

SEP10'10 PM12:23 LUBA

Exhibit F

1 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member;  
2 participated in the decision.

3  
4  
5  
6  
7

AFFIRMED

09/10/2010

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving a planned unit development  
4 (PUD), comprehensive plan map and zoning map amendments, a 10-lot subdivision, and an  
5 amendment to the city's transportation system plan (TSP).

6 **FACTS**

7 This appeal involves the proposed redevelopment of a former industrial site into a  
8 mixed-use PUD known as Cannery Square. The subject 6.4-acre site is owned by the  
9 Sherwood Urban Renewal Agency (SURA). The SURA board consists of the seven city  
10 council members, although the city council and SURA are legally distinct entities. In 2008,  
11 intervenor-respondent Capstone Partners, LLC (intervenor) signed a purchase and sale  
12 agreement with SURA to redevelop the site. The agreement obligates intervenor to use  
13 commercially reasonable efforts to obtain necessary zoning, planned unit development and  
14 subdivision approvals from the city.

15 On August 7, 2009, intervenor filed an application with the city seeking PUD  
16 approval for 101 residential units, application of a PUD overlay to the comprehensive plan  
17 map and zoning maps, a 10-lot subdivision, and an amendment to the city TSP to change the  
18 functional classification of an adjoining street. The planning commission held hearings on  
19 November 10, 2009 and December 12, 2009, at which petitioners testified and submitted  
20 written materials in opposition. On January 26, 2010, the planning commission forwarded a  
21 recommendation to the city council that the council approve the application with a number of  
22 conditions, including reduced residential density.

23 The city council held a public hearing on the application on February 2, 2010, at  
24 which petitioners testified. At the beginning of the February 2, 2010 hearing, city staff  
25 announced that proponent and opponent testimony would be limited to three minutes per  
26 person. Petitioner Robert Claus spoke for three minutes, was interrupted by the mayor, and

1 objected to the city's failure to allow him five minutes of oral testimony. At the end of the  
2 February 2, 2010 hearing, the mayor closed the proponent/opponent testimony phase, and  
3 continued the hearing to February 16, 2010, for applicant rebuttal and council deliberations.  
4 Petitioners requested in writing that the city council allow additional public testimony, oral  
5 and written, but the city council took no action on that request. At the February 16, 2010  
6 continued hearing, intervenor's representative submitted rebuttal testimony, and the  
7 evidentiary record was closed. The city council entered into deliberations, and voted 6-1 to  
8 approve the application, with modified conditions of approval. At a March 2, 2010 meeting,  
9 the city council adopted a revised ordinance approving the application, including 101  
10 residential units. This appeal followed.

11 **MOTION TO STRIKE**

12 At oral argument on August 19, 2010, petitioner Robert James Claus submitted to the  
13 Board a 39-page document consisting of pages copied from a PowerPoint presentation that  
14 petitioners had prepared for oral argument. Petitioner Sandford Rome submitted a six-page  
15 document consisting of his proposed oral argument to LUBA. The Board received both  
16 documents, subject to respondents' objections. Both petitioners then presented oral  
17 argument.

18 The city and intervenor move to strike portions of the written documents and oral  
19 argument petitioners presented at the August 19, 2010 hearing. With respect to the written  
20 documents, respondents argue that LUBA's rules do not authorize parties to present written  
21 argument or documents to the Board at oral argument, with the limited exception of copies of  
22 materials already in the record or materials created during oral argument (such as drawings  
23 on a whiteboard). OAR 661-010-0040(5).<sup>1</sup> Specifically, respondents object to pages 1-4, 9,

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<sup>1</sup> OAR 660-010-0040(5) provides:



1 10-13, 15-17, 19-31, 34-39 of petitioner Claus' submittal, and all six pages of petitioner  
2 Rome's submittal, as not consisting of documents copied from the record.

3 We agree with respondents that pages 1-4, 9, 10-13, 15-17, 19-31, 34-39 of petitioner  
4 Claus' submittal, and all six pages of petitioner Rome's submittal are extra-record documents  
5 that we may not consider under our rules. The remaining pages of petitioner Claus' submittal  
6 appear to be copies of documents from the record, and those pages are accepted.

7 With respect to petitioners' oral argument, respondents argue that some of their  
8 testimony raised new issues not raised in the petition for review and recited facts outside the  
9 record. OAR 661-010-0040(1) (LUBA shall not consider issues raised for the first time at  
10 oral argument); ORS 197.835(2)(a) (LUBA's review is confined to the record). Petitioners  
11 dispute that characterization of their oral testimony. Given the difficulty in resolving that  
12 dispute, and the difficulty in "striking" portions of oral testimony, we consider respondents'  
13 motion to simply request that LUBA focus its review on the issues framed in the petition for  
14 review, the evidence cited in the record, and the portions of the oral argument that discuss  
15 those issues and evidence. *NAAVE v. Washington County*, 59 Or LUBA 153, 156 (2009).  
16 That request is granted.

17 The motion to strike is granted, in part.

#### 18 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

19 Petitioners argue that the city council erred in failing to disclose *ex parte*  
20 communications received when the city council members participated as the SURA board at  
21 meetings approving and modifying the purchase and sale agreement between SURA and  
22 intervenor. Further, petitioners argue that the existence of a contract between SURA and  
23 intervenor created conflicts of interest, and that the city council members were biased in

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"Demonstrative exhibits presented at oral argument shall be limited to copies of materials already in the record, including reductions or enlargements, or materials created during the party's presentation at oral argument."

1 favor of the PUD application, and incapable of making a decision based on the evidence and  
2 testimony submitted during the land use proceeding on the PUD application.

3 **A. Ex Parte Communications**

4 Petitioners argue that the challenged decision must be reversed due to undisclosed *ex*  
5 *parte* communications.<sup>2</sup> Although petitioners do not cite it, their argument is presumably  
6 based on ORS 227.180(3), which provides:

7 “No decision or action of a planning commission or city governing body shall  
8 be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a  
9 member of the decision-making body, if the member of the decision-making  
10 body receiving the contact:

11 “(a) Places on the record the substance of any written or oral *ex parte*  
12 communications concerning the decision or action; and

13 “(b) Has a public announcement of the content of the communication and  
14 of the parties’ right to rebut the substance of the communication made  
15 at the first hearing following the communication where action will be  
16 considered or taken on the subject to which the communication  
17 related.”

18 Petitioners argue that at the first city council hearing on the PUD application the city  
19 council members failed to disclose that they sit on the SURA board, and that the SURA  
20 board had previously authorized SURA to enter into a purchase and sale agreement and  
21 memorandum of understanding for the Cannery Square property. However, petitioners do  
22 not explain why the presence of the city council members on the SURA board, or the SURA  
23 board’s actions in authorizing a contract or contract modifications between SURA and  
24 intervenor, constitute *ex parte* communications that must be disclosed under  
25 ORS 227.180(3). Petitioners identify no communications whatsoever between intervenor and

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<sup>2</sup> Petitioners do not explain why reversal rather than remand would be the appropriate remedy for failure to disclose an *ex parte* communication. Generally, if LUBA concludes that a local government decision maker failed to disclose an *ex parte* communication in violation of ORS 227.180(3), the remedy is to remand the decision to the local government to provide disclosure, opportunity for rebuttal, and adoption of a new decision based on all evidence properly before the decision-makers. *Opp v. City of Portland*, 38 Or LUBA 251, *aff’d* 171 Or App 417, 16 P3d 520 (2000).

1 the SURA board or any city council member that could be subject to ORS 227.180(3).<sup>3</sup>  
2 Absent a more developed argument, petitioners' contentions that the city council failed to  
3 disclose *ex parte* communications with intervenor do not provide a basis for reversal or  
4 remand.

5 **B. Conflict of Interest**

6 Petitioners next argue that the contract between intervenor and SURA represents a  
7 conflict of interest for the individual city council members who voted to approve the PUD  
8 application. We understand petitioners to argue that under the contract intervenor could seek  
9 damages against SURA if SURA breached its contractual obligations, the city council  
10 members sit on the SURA board and presumably are motivated to avoid lawsuits against  
11 SURA, and therefore city council approval of the PUD application represents a conflict of  
12 interest.

13 There are any number of problems with that theory, not the least of which is that  
14 petitioners identify nothing in the contract that would obligate either SURA or the city (which  
15 is not a party to the contract) to ensure that the PUD application is approved. The city points  
16 out that the contract places the burden on intervenor to obtain all required land use approvals,  
17 and nothing cited to us in the contract suggests that failure to obtain land use approvals could  
18 represent a breach of contract by SURA. Even more to the point, ORS 222.020(1) defines  
19 "conflict of interest" in relevant part as an action by a public official the effect of which is to  
20 provide some "private pecuniary benefit or detriment" to the official or a relative. Petitioners  
21 make no attempt to explain how approval of the PUD application could provide any *private*  
22 pecuniary benefit or detriment to any city council member.

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<sup>3</sup> LUBA previously denied petitioners' request to consider extra-record evidence, the minutes of a November 3, 2009 SURA board meeting in which the SURA board approved modifications to the 2008 contract to purchase the Cannery Square property from SURA. *Claus v. City of Sherwood*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2010-017/023, Order, July 14, 2010). As explained in our order, we denied the motion in part because petitioners identified nothing in the SURA minutes indicating that any communication occurred between intervenor and the SURA board.

1           **C.     Bias**

2           Finally, petitioners argue that the city council members, and in particular the mayor,  
3 were biased in favor of the PUD application, and incapable of making a decision based on the  
4 evidence in the record.

5           To demonstrate bias, a party must show that the decision maker prejudged the  
6 application and did not reach a decision by applying relevant standards based on the evidence  
7 and argument presented during the proceedings. *Spiering v. Yamhill County*, 25 Or LUBA  
8 695, 702 (1993). With respect to the city council members in general, petitioners cite nothing  
9 suggesting that any city council member was biased, other than the fact that some current city  
10 council members were on the SURA board in 2008 when it authorized sale of the Cannery  
11 Square property to intervenor, and the current city council members were on the SURA board  
12 in November 2009 when it authorized a minor modification to the contract. Those  
13 circumstances fall far short of demonstrating bias on the part of any individual city council  
14 member or the city council as a whole.

15           Petitioners come somewhat closer to the mark with respect to the mayor. Petitioners  
16 cite to a newspaper interview with the mayor dated December 4, 2009, in which the mayor  
17 discussed the November 2009 contract modification and stated “Yes, we’d like to be further  
18 along, but we are still very happy with Capstone and we’re making progress.” Record 993.  
19 In addition, petitioners argue that the mayor testified at a Metro Council meeting on January  
20 20, 2010, just prior to the city council hearings on the PUD application, and reportedly  
21 indicated that the Cannery Square project “would soon begin.” Petition for Review 24.  
22 Petitioners contend that these statements indicate that the mayor had prejudged the PUD  
23 application and was incapable of rendering a decision by applying relevant standards based  
24 on the evidence and argument presented during the proceedings.

25           In *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 178 (2007), we explained  
26 that:

1 "Local quasi-judicial decision makers, who frequently are also elected  
2 officials, are not expected to be entirely free of any bias. To the contrary, local  
3 officials frequently are elected or appointed in part because they generally  
4 favor or oppose certain types of development. *1000 Friends of Oregon v.*  
5 *Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987); *Eastgate Theatre v.*  
6 *Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978). Local  
7 decision makers are expected, however, to (1) put whatever bias they may  
8 have to the side when deciding individual permit applications, and (2) engage  
9 in the necessary fact finding and attempt to interpret and apply the law to the  
10 facts as they find them so that the ultimate decision is a reflection of their  
11 view of the facts and law rather than a product of any positive or negative bias  
12 the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of*  
13 *Central Point*, 49 Or LUBA 697, 709-10 (2005)."

14 Thus, that the mayor made pre-hearing public statements that could be construed as  
15 supporting the PUD application does not, by itself, suffice to demonstrate reversible bias.  
16 The question is whether petitioners have demonstrated that the mayor failed to engage in  
17 necessary fact-finding and apply the law to the facts, and instead based his vote on a  
18 predisposition in favor of the application. Petitioners cite to nothing in the record of the city  
19 council hearings or elsewhere suggesting that the mayor failed to base his vote on the facts  
20 found or on application of the city's land use regulations to those facts. Petitioners'  
21 allegations of bias do not provide a basis for reversal or remand.

22 The first and second assignments of error are denied.

### 23 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

24 Petitioners contend that the mayor violated petitioners' rights of free speech under the  
25 First Amendment to the United States Constitution, by limited petitioners' testimony before  
26 the city council and rejecting petitioners' request to re-open the record. Further, we  
27 understand petitioners to argue that the mayor's actions represent animus toward petitioners  
28 that resulted in a tribunal that was not impartial.

#### 29 **A. Three Minute Limit on Testimony**

30 Under rules adopted by the city council, public testimony is generally limited to five  
31 minutes. However, at the beginning of the February 2, 2010 city council hearing, staff

1 announced that proponent and opponent testimony would be limited to three minutes per  
2 person, presumably due to the large number of persons who signed up to testify. Record 127.  
3 Part-way through the hearing petitioner Robert Claus was called to testify and first handed  
4 the city council copies of written documents. Claus then spoke for three minutes, at which  
5 point the mayor indicated that Claus had run out of time. Petitioner protested that the mayor  
6 had given other parties five minutes to testify. After further colloquy, petitioner stepped  
7 down.<sup>4</sup>

8 On appeal, we do not understand petitioners to argue that the mayor in fact gave other  
9 parties five minutes to testify, or at least petitioners cite no evidence to that effect. Nor do  
10 petitioners argue that the city lacked the authority to limit testimony to three minutes.  
11 Instead, petitioners argue that the mayor cut petitioner Claus' testimony off at three minutes  
12 because the mayor wished to prevent Claus from testifying further about the contract between  
13 intervenor and SURA and about allegations of bias and conflict of interest. Petitioners

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<sup>4</sup> Petitioners offer a transcription of that colloquy, presumably based on the audio recording of the February 2, 2010 hearing:

[Claus]: “\* \* \* I’ve still got two minutes.

[Mayor]: “Nope.

[Claus]: “What are you trying to tell me? You’re cutting it off at what, Keith?

[Mayor]: “It was announced at three minutes.”

[Claus]: “It’s what?”

[Mayor]: “Three minutes.”

[Claus]: “You’ve allowed everybody else five.”

[Mayor]: “I show discretion, that’s why I’m asking you to wrap it up.”

[Claus]: “So you’re cutting it off at three and I want it totally noted you’re cutting me off at three because this is going to go to LUBA eventually I’m going to get the pleasure of seeing you in court and make no mistake about it Mays, that’s where you’re headed, cop or no cop.”

[Mayor]: “Thank you.” Petition for Review 26-27.

1 contend that the mayor's action constitutes content-based censorship in violation of the First  
2 Amendment.

3 The city responds, and we agree, that petitioners have not demonstrated that the  
4 mayor treated petitioner Claus any differently from other parties with respect to time  
5 allocation, or that the mayor's attempt to hold Claus to the announced three-minute time limit  
6 was based on the content of Claus' testimony.

7 **B. Request to Re-open the Record**

8 Petitioners next argue that the mayor erred in rejecting petitioners' requests to re-open  
9 the evidentiary record to respond to "new evidence" that was submitted at the February 2,  
10 2010 hearing. Petitioners first cite to evidence that *they* submitted at the February 2, 2010  
11 hearing, and appear to argue that they are entitled to request that the record be left open so  
12 that petitioners can respond to their own testimony. If that is petitioners' position, we reject  
13 it.

14 Petitioners also argue that during intervenor's initial presentation at the February 2,  
15 2010 hearing, intervenor submitted a Power Point presentation found at Record 249-88 that  
16 petitioners allege includes "new evidence" regarding parking standards and traffic impacts.  
17 Citing to Sherwood Municipal Code (SMC) 16.72.050(3), petitioners argue that if "new  
18 evidence" is submitted at a continued hearing they are entitled to request an opportunity to  
19 respond to that new evidence.<sup>5</sup> The city responds that SMC 16.72.050 implements

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<sup>5</sup> SMC 16.72.050(3) provides, in relevant part:

"A. Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence or testimony regarding the application. The local Hearing Authority shall grant such request by continuing the public hearing pursuant to paragraph (B) of this section or leaving the record open for additional written evidence or testimony pursuant to paragraph (C) of this section.

"B. If the hearing authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven (7) days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence and testimony. If new written evidence is submitted

1 ORS 197.763(6)(a)-(c), and applies only to hearings continued from the initial evidentiary  
2 hearing, in this case the first planning commission hearing. The city argues that the February  
3 2, 2010 city council hearing was neither the initial evidentiary hearing nor a hearing  
4 continued from the initial evidentiary hearing, and the city council hearing was therefore not  
5 subject to SMC 16.72.050. We agree with the city that petitioners have not established the  
6 February 2, 2010 city council hearing was a hearing to which SMC 16.72.050 applies. It  
7 might well be that, even where SMC 16.72.050 does not govern, the city would commit  
8 procedural error in accepting into the record late in the proceedings what is indisputably new  
9 evidence without providing other parties an opportunity to respond to that new evidence,  
10 under *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973); *see also*  
11 ORS 197.763(6)(e) (applicant's final written argument shall not include new evidence).  
12 However, the city argues, and we agree, that petitioners have not demonstrated that anything  
13 in intervenor's written presentation during the February 2, 2010 hearing constitutes "new  
14 evidence."

15 The third and fourth assignments of error are denied.

16 **FIFTH ASSIGNMENT OF ERROR**

17 Petitioners argue that the decision adopting the PUD zone overlay must be reversed,  
18 because the city's action is not consistent with Statewide Planning Goal 1 (Citizen  
19 Involvement). Goal 1 is to "develop a citizen involvement program that insures the

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at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven (7) days to submit additional written evidence or testimony for the purpose of responding to the new written evidence.

"C. If the Hearing Authority leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven (7) days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the Hearing Authority shall reopen the record pursuant to subsection F of this Section."



1 opportunity for citizens to be involved in all phases of the planning process.” Under Goal 1,  
2 the city must adopt a citizen involvement program, or CIP.

3 Petitioners argue that “Goal 1 was not met in this Cannery application,” but do not  
4 explain why. The city argues, and we agree, that because the city’s decision does not amend  
5 the city’s acknowledged CIP, the only way petitioners can demonstrate that the decision  
6 violates Goal 1 is to demonstrate that the city failed to comply with the acknowledged CIP.  
7 *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998). Petitioners  
8 make no effort to explain why the procedures followed in the present case violate the city’s  
9 CIP.

10 The fifth assignment of error is denied.

#### 11 **SIXTH ASSIGNMENT OF ERROR**

12 Petitioners request reversal under the first five assignments of error. The sixth  
13 assignment of error is styled as an alternative, and briefly sets out six arguments for remand.  
14 The third, fourth and fifth arguments simply repeat arguments made under the preceding  
15 assignments of error and are rejected for the same reasons set out above. We address the  
16 first, second and sixth arguments.

17 Petitioners argue first that the city erred in failing to notify participants to the planning  
18 commission hearing that testimony submitted to the planning commission would not  
19 necessarily be made part of the record before the city council. However, petitioners cite no  
20 local or statutory requirements that local governments provide such notice.

21 Next, petitioners argue that under SMC 16.40.060(C)(7)(a), a commercial PUD must  
22 consist of at least five acres.<sup>6</sup> According to petitioners, SURA owns the 6.4-acre PUD site,

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<sup>6</sup> SMC 16.40.060(C)(7)(a) provides:

“Minimum area for a Commercial PUD shall be five (5) acres. Development of a Commercial PUD of less than five (5) acres may be allowed if the PUD can be developed consistent with the intent and standards of this Chapter, as determined by the Commission.”

1 but under the contract between SURA and intervenor, the portion that intervenor can  
2 eventually acquire if it exercises all its options will not exceed five acres. Petitioners argue  
3 that "SURA should be a co-applicant for the PUD." Petition for Review 38. However, SMC  
4 16.40.060(C)(7)(a) is not concerned with ownership, and there is no dispute that the proposed  
5 PUD exceeds five acres in size. We do not understand petitioners' arguments on this point.

6 Finally, petitioners argue that "[s]ome of the conditions of approval for the Cannery  
7 PUD are fundamentally reversible including the Applicant's lack of meeting its burden of  
8 proof for the property's underlying zoning to be considered for a PUD." Petition for Review  
9 \_\_\_\_\_. However, the subsequent argument does not mention, or challenge, any conditions of  
10 approval. Instead, petitioners appear to dispute the city's finding of compliance with SMC  
11 16.040.020(C)(6), which requires a finding that "the PUD will have a beneficial effect on the  
12 area which could not be achieved using the underlying zoning district." The city adopted  
13 findings, at Record 15, explaining why it believed the PUD complies with SMC  
14 16.040.020(C)(6). Petitioners appear to disagree with that conclusion, but do not challenge  
15 the findings or the evidence supporting it. Petitioners' particular arguments are difficult to  
16 understand, and bear no obvious relationship to the question posed by SMC  
17 16.040.020(C)(6). The closest petitioners come is to argue that the underlying zoning would  
18 not allow 101 apartment units, but petitioners do not explain what that has to do with whether  
19 "the PUD will have a beneficial effect on the area which could not be achieved using the  
20 underlying zoning district." Petitioners' arguments are simply too inadequately developed to  
21 address. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

22 The sixth assignment of error is denied.

23 The city's decision is affirmed.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2010-017/023 on September 10, 2010, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Christopher D. Crean  
Beery Elsner & Hammond, LLP  
1750 SW Harbor Way Suite 380  
Portland, OR 97201-5164

Dana L. Krawczuk  
Ball Janik LLP  
101 SW Main Street, Suite 1100  
Portland, OR 97204

Robert James Claus  
22211 SW Pacific Hwy  
Sherwood, OR 97140

Susan Claus  
Robert James Claus  
22211 SW Pacific Highway  
Sherwood, OR 97140

Dated this 10th day of September, 2010.

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Kelly Burgess  
Paralegal

  
Kristi Seyfried  
Executive Support Specialist

**5/14/10**  
**Revised September 14, 2010**

**Sherwood Cannery Square**  
**Estimated Phasing Schedule**

Sherwood Cannery Square is a public/private partnership between the City of Sherwood Urban Renewal Agency (“URA”) and Capstone Partners LLC (“Capstone”) which is being developed under a Planned Unit Development (PUD 09-01) and Subdivision (SUB 09-02), each approved by Sherwood City Council on March 2, 2010 (Ordinance 2010-004). The URA currently owns all the land included in the PUD including the building on Tax Lot 2S132 BD 900 (shown as Lot 2 on the approved preliminary subdivision plat dated 9-4-09) which is referred to herein as the Machine Works Building (“Machine Works”). The URA is responsible for building the public infrastructure (public streets required by the Subdivision and plaza) which will be dedicated to the City of Sherwood when improvements are completed. The Machine Works will be redeveloped for use as a Community/Arts Center and possibly some retail space to be leased to third parties, and will remain in either URA or City ownership. Capstone will manage the development of this work, and will also be responsible for purchasing the balance of the property (nine lots) and developing it. The nine private lots will be developed with either commercial or residential buildings over time as market conditions warrant, i.e. when adequate demand for space and capital for construction are available. Portions of the project subject to Final Development Plan (“FDP”) approval through the Sherwood Planning Commission includes the following as identified on the phasing plan map<sup>1</sup>:

- Cannery Square plaza
- Machine Works
- 7 commercial lots (may be combined into a smaller number of construction phases)
- 2 residential lots (may be combined into one construction phase)

A development phasing plan and schedule was required as a condition of approval of the PUD, and is to be submitted as part of the initial FDP approval. Committing to a schedule for a multi-phased project with a duration of many years is essentially impossible given the variety of unpredictable variables that might affect it. However, the following is our current expectation for the phased development. As to schedule, we are reasonably confident of the timing the near term phases, but have been necessarily conservative in projecting timing for the subsequent phases.

---

<sup>1</sup> The Phasing Plan Map is the same as submitted with the preliminary development plan PUD 09-01

Construction Scope or PhasePhase to Start No Later Than

<b>Phase No.</b>	<b>Phase or Construction Scope</b>	<b>Construction to Commence by the Following Date</b>
N/A	Public Streets (required by Subdivision but not a "phase" per the PUD)	October 2010
1	Cannery Square Plaza (conditioned by PUD to be completed prior to occupancy of the West, South, East, East Residential and West Residential Phases)	June 2011
2	Machine Works Phase – Shell Renovation	June 2011, dependent on timing of existing tenant vacating premises
3	At least one commercial or residential phase comprised of any one of the West, South, East, West Residential or East Residential Phases, or any combination thereof.	June 2013
4-11	The remaining commercial and residential phases as identified on the Phasing Plan, either individually or in any combination.	June 2018, start of last remaining phases

5/14/10  
Revised September 14, 2010

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### **Sherwood Cannery Square Estimated Phasing Schedule**

Sherwood Cannery Square is a public/private partnership between the City of Sherwood Urban Renewal Agency ("URA") and Capstone Partners LLC ("Capstone") which is being developed under a Planned Unit Development (PUD 09-01) and Subdivision (SUB 09-02), each approved by Sherwood City Council on March 2, 2010 (Ordinance 2010-004). The URA currently owns all the land included in the PUD including the building on Tax Lot 2S132 BD 900 (shown as Lot 2 on the approved preliminary subdivision plat dated 9-4-09) which is referred to herein as the Machine Works Building ("Machine Works"). The URA is responsible for building the public infrastructure (public streets required by the Subdivision and plaza) which will be dedicated to the City of Sherwood when improvements are completed. The Machine Works will be redeveloped for use as a Community/Arts Center and possibly some retail space to be leased to third parties, and will remain in either URA or City ownership. Capstone will manage the development of this work, and will also be responsible for purchasing the balance of the property (nine lots) and developing it. The nine private lots will be developed with either commercial or residential buildings over time as market conditions warrant, i.e. when adequate demand for space and capital for construction are available. Portions of the project subject to Final Development Plan ("FDP") approval through the Sherwood Planning Commission includes the following as identified on the phasing plan map<sup>1</sup>:

- Cannery Square plaza
- Machine Works
- 7 commercial lots (may be combined into a smaller number of construction phases)
- 2 residential lots (may be combined into one construction phase)

A development phasing plan and schedule was required as a condition of approval of the PUD, and is to be submitted as part of the initial FDP approval. Committing to a schedule for a multi-phased project with a duration of many years is essentially impossible given the variety of unpredictable variables that might affect it. However, the following is our current expectation for the phased development. As to schedule, we are reasonably confident of the timing the near term phases, but have been necessarily conservative in projecting timing for the subsequent phases.

---

<sup>1</sup> The Phasing Plan Map is the same as submitted with the preliminary development plan PUD 09-01

Construction Scope or Phase

Phase to Start No Later Than

Phase No.	Phase or Construction Scope	Construction to Commence by the Following Date
N/A	Public Streets (required by Subdivision but not a "phase" per the PUD)	<u>October 2010</u>
1	Cannery Square Plaza (conditioned by PUD to be completed prior to occupancy of the West, South, East, East Residential and West Residential Phases)	<u>June 2011</u>
2	Machine Works Phase – Shell Renovation	<u>June 2011</u> , dependent on timing of existing tenant vacating premises
3	At least one commercial or residential phase comprised of any one of the West, South, East, West Residential or East Residential Phases, or any combination thereof.	June 2013
4-11	The remaining commercial and residential phases as identified on the Phasing Plan, either individually or in any combination.	June 2018, start of last remaining phases

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**Julia Hajduk**

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**From:** ClausSL@aol.com  
**Sent:** Tuesday, September 14, 2010 11:54 AM  
**To:** PlanningCommission  
**Subject:** Re: Additional submittal to the Cannery record SP 10-02 and CUP 10-01

**Case File No.** SP 10-02 and CUP 10-01  
**Tax Map/Lot:** Tax lots 150, 151, 200, 800 and 900 on tax map 2S132BD.  
**Applicant:** Capstone Partners LLC  
1015 NW 11<sup>th</sup> Ave, Suite 243  
Portland, OR 97209

Dear Planning Commission--

I am forwarding this email from Tom Pessiemi regarding the record for the Cannery PUD to be included as part of the . I entered testimony into the record and asked for notification of any time periods that the record would be left open. It is hardly fair to receive a notification for the record being left open just one day before it is being closed. I have been traveling quite a bit, came in last night and have to leave town again this morning. I am requesting that the Planning Commission extend the time period for the record to be open since I have only received one day's notice. I have several materials for the record and to comment on.

I am also registering my objections to this hearing as the administrative action with LUBA is not yet complete. No one knows what LUBA will do. You are putting a tremendous burden on citizens by saying that you can conduct a new hearing on a PUD that is under appeal-- when you yourselves do not have the LUBA decision. Staff admits that they cannot tell the Planning Commission how the administrative appeal will be resolved. Mr. Pessimeir says that "in the event that the LUBA appeal decision requires additional findings, analysis or action, the Planning Commission will address that on the evening of the 28<sup>th</sup> and determine if additional continuances are required." It is not only the staff that will want to address the administrative appeal-- I would like to address it too in front of the planning commission and as part of any subsequent land use hearing that is part of the Cannery PUD. I have materials to submit but do not know yet how to make my comments and which materials I will be submitting because the administrative appeal is still in process.

I am submitting some materials today, but have others also to submit once the administrative appeal has been determined.

Sincerely,

Jim Claus

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From: pessemiart@ci.sherwood.or.us  
To: ClausSL@aol.com, Romeco1@juno.com  
CC: hajdukj@ci.sherwood.or.us  
Sent: 9/13/2010 9:56:24 A.M. Pacific Daylight Time  
Subj: Cannery record

Thank you for submitting written comments on the Sherwood Cannery Square Plaza. Your comments have been entered into the record and were distributed to the Planning Commission. In your letter you requested to be notified of the Commission's decision/parameters on leaving the record open.



The Planning Commission held a hearing and closed the hearing portion but left the written record open for 7 days for the submittal of any new testimony (ending at 5:00 PM 9/14), 7 days for anyone to respond to new information submitted into the record (no new testimony – ending at 5:00 PM on 9/21) and 7 days for final applicant written response (no new testimony – ending at 5:00 PM on 9/28). The Planning Commission hearing will continue with deliberations by the Commission on September 28<sup>th</sup> at 7:00 PM. In the event that the LUBA appeal decision requires additional findings, analysis or action, the Planning Commission will address that on the evening of the 28<sup>th</sup> and determine if additional continuances are required.

Tom Pessemier, P.E.  
Community Development Director  
503-925-2302

[pessemier1@ci.sherwood.or.us](mailto:pessemier1@ci.sherwood.or.us)



This email may contain confidential information or privileged material and is intended for use solely by the above referenced recipient. Any review, copying, printing, disclosure, distribution, or other use by any other person or entity is strictly prohibited and may be illegal. If you are not the named recipient, or believe you have received this email in error, please immediately notify the City of Sherwood at (503) 625-5522 and delete the copy you received.

=====  
My original letter to the Planning Commission last week-- asking to be notified by staff. A quote from my Sept 7th letter: "I would also ask for the opportunity to respond to the staff report and the applicant's submittals as well as to the testimony that is being received at the hearing. Please let me know the parameters of the record being left open so I can respond. The staff can contact me through my wife's email address."

**TO: Sherwood Planning Commission  
c/o Sherwood Planning Department  
22560 SW Pine Street  
Sherwood, Oregon 97140**

**FR: Jim Claus**

**DT: 7 September 2010**  
**RE: Cannery PUD September 7, 2010 hearing**

=====

**Case File No.** SP 10-02 and CUP 10-01  
**Tax Map/Lot:** Tax lots 150, 151, 200, 800 and 900 on tax map 2S132BD.  
**Applicant:** Capstone Partners LLC  
1015 NW 11<sup>th</sup> Ave, Suite 243  
Portland, OR 97209

=====

Dear Commissioners:

I am away on business and will not return before the combined hearing tonight. I would like to request that the hearing record be kept open for comments on this entire hearing including the site plan and conditional use permit for the proposed Cannery PUD and the Final Development Plan for "this portion of the approved Sherwood Cannery Square PUD (PUD 09-01). There is also a final phasing plan for the remainder of the PUD.

I have a series of materials that I wish to submit to the record for the Planning Commission's consideration and deliberations on these applications.

The Cannery PUD appeal is still in process of being heard at LUBA. This hearing tonight is premature and is more of the staff and attorneys pushing the process to the city's and the Urban Renewal District's benefit as well as Capstone.

The city has contracted with Capstone for an 8% oversight fee on these public improvements. Not only does Capstone not have to pay for the improvements-- the urban renewal agency is paying Capstone, paying for the materials, and utilizing land bought from the city by the Urban Renewal Agency.

Capstone has options to buy or not to buy finished RC zoned pads at a fixed rate over several years. None of the financial costs or even a financial overview of the project for the citizens are detailed in the staff report, the applicant's materials, the final development plan, the site plan or the conditional use permit-- yet the citizens and the Planning Commission are being asked again to approve conditions and plans that will cost our town a lot of money.

I would also ask for the opportunity to respond to the staff report and the applicant's submittals as well as to the testimony that is being received at the hearing. Please let me know the parameters of the record being left open so I can respond. The staff can contact me through my wife's email address.

**Julia Hajduk**

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**From:** ClausSL@aol.com  
**Sent:** Tuesday, September 14, 2010 1:02 PM  
**To:** PlanningCommission  
**Subject:** Re: Comments SP 10-02 and CUP 10-01

Case File No. SP 10-02 and CUP 10-01  
Tax Map/Lot: Tax lots 150, 151, 200, 800 and 900 on tax map 2S132BD.

Dear Planning Commission members--

The partial process outlined in the initial hearing with the Cannery site plan is flawed. I have submitted some materials on another file that show significant detail on "the process" and am asking you to review those materials and ask that we have some understanding on what "the process" will be for the Cannery PUD since the applicant is asking for significant, extended phasing plans.

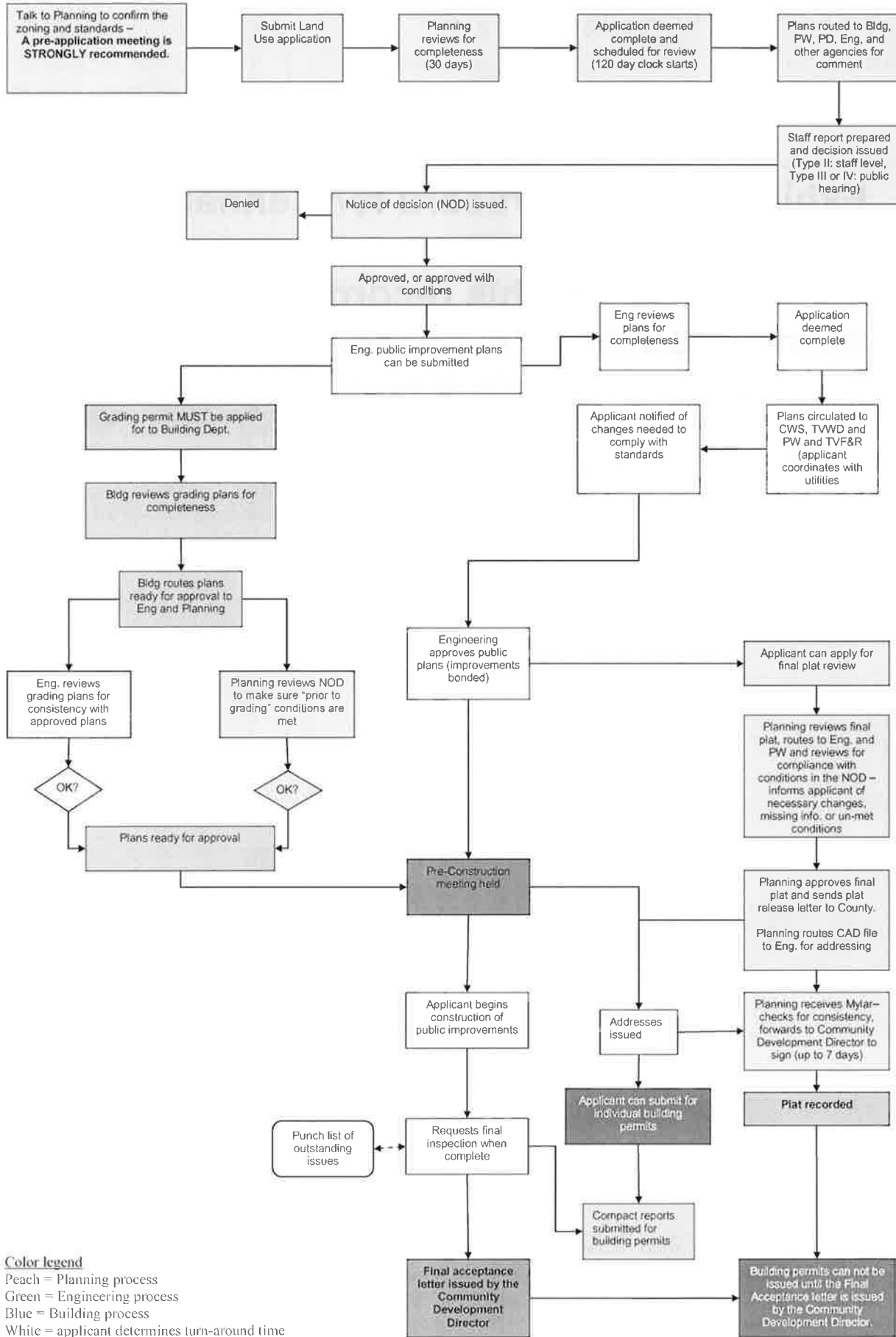
How can we allow building of a plaza without all the administrative details in sync with the building? What is the time table for the conditions of approval syncing with the building of the plaza.? What about other projects already in the queue?

I have several other comments, but I am also objecting to this hearing as premature before the administrative appeal process is completed for the overall Cannery PUD. Please allow the citizens time to submit written materials for this application after the administrative appeal process is complete.

Sincerely,

Susan Claus

# Process to Divide Land in Sherwood (Subdivision and Partition)



**Color legend**

- Peach = Planning process
- Green = Engineering process
- Blue = Building process
- White = applicant determines turn-around time
- Bold box = critical milestone

**Exhibit L – LUBA record for Cannery PUD**

**Due to the size of this record, it is unable to be included in the electronic record but is available for viewing at City Hall**

# **APPROVED MINUTES**

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**City of Sherwood, Oregon**  
**Planning Commission Minutes**  
**September 28, 2010**

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**Commission Members Present:**

Chair Allen  
Jean Lafayette  
Russell Griffin  
Lisa Walker  
Michael Cary

**Staff:**

Julia Hajduk, Planning Manager  
Heather Austin, Senior Planner  
Karen Brown, Recording Secretary

**Commission Members Absent:**

Raina Volkmer

**Council Liaison – Mayor Mays**

**Call to Order/Roll Call** – Chair Allen called the meeting to order. Chair Allen asked for a moment of silence in honor of City Councilman Del Clark.

1. **Agenda Review – Sherwood Cannery Square Plaza continuation**
2. **Consent Agenda – None**
3. **Staff Announcements – No announcements made**
4. **City Council Comments – Mayor Mays** announced that the Memorial Service for Councilman Del Clark was to be held Saturday October 10<sup>th</sup> at 2:00 at the Sherwood High School Gym. Friday, the 8<sup>th</sup> through Sunday the 10<sup>th</sup>, with the Governors permission, the flags in the community will be flying at half-mast. At a recent League of Oregon Cities’ meeting the City of Sherwood received two awards: One gold for our Wellness Promotion and a silver for Safety Awareness.
5. **Community Comments – none given**
6. **Old Business** - the continuation of SP 10-02/CUP 10-01. Commissioner Lafayette disclosed potential exparte contact in the form of a conversation with a friend regarding bike lockers in the square, but does not feel that will affect her ability to participate.

Clarification was given regarding the motion made at the last meeting. The motion made missed providing an opportunity for additional comments or response. Public notice was posted correctly and the length of time given did not change. Within the first 7 days Exhibits F – L were submitted. The record will not need to be re-opened.

Based on information submitted and Commission comments; three changes are being recommended. The improvements associated with the Plaza must be complete prior to Certificate of Occupancy for the Plaza.

A potential revised finding has been drafted better responding to the CWS comments and can be found on page 10. Mitigation required by CWS as part of their Service Provider letter must be complete prior to occupancy of the Plaza.

Another revised condition was written to more clearly grant permission for parking prior to construction on the empty lots. The condition says “provide for temporary parking areas within the PUD until parking lots are constructed with future phases to accommodate needed parking during large festivals and events.”

Other revisions reflect the LUBA decision affirming the original PUD and updates to the public comment section reflecting that additional written and verbal testimony have been received.

Regarding the TSP amendments; since the LUBA decision affirmed the original decision it essentially is affirmed by DLCD.

The Economic Development Manager has indicated that the funding for the East bound right turn lane from Oregon Street to Lincoln Street will come from the Urban Renewal Agency and funds are available.

Julia suggested 3 different motions: one for the revised pattern book, one for the phasing plan which would become part of the preliminary PUD file for future reference and then the site plan and CUP approval.

Discussion continued regarding the implications of approving the phasing plan. Concerns were discussed regarding what steps would need to be taken by the developer if they did not meet the phases established including the possibility of coming back to the Commission for new approval.

Deliberation began regarding the revised materials submitted, there were no major concerns.

Commissioner Lafayette made the first motion to approve the revised pattern book as it has been submitted with this application. The motion was seconded by Commission Griffin. A vote was taken and all were in favor. The motion passed.

Commissioner Lafayette made a second motion to approve the applicant’s revised phasing plan as submitted in Exhibit G incorporating staff comments that begin on page 5. Commissioner Walker seconded motion. A vote was taken and all were in favor. The motion passed.

Deliberation continued regarding edits and changes that have been made and if everyone was comfortable with the final wording including revisions saying “the subdivision SUB 09-02 plat must be recorded including meeting all conditions required of subdivision plat approval in PUD 09-01.

Commissioner Lafayette made the final motion to approve SP 10-02/CUP 10-01. Commissioner Cary seconded motion. A vote was taken and all were in favor. The motion passed.

**The next meeting is scheduled for October 12, 2010.**

**Chair Allen** closed the public hearing and the Commission moved into work session.  
End of minutes.