



City of Sherwood PLANNING COMMISSION

Stewart Senior/Community Center
855 N. Sherwood Boulevard

February 20, 2001 - 7:00 PM

A G E N D A

1. **Call to Order/Roll Call**
2. **Consent Agenda – Approval of 02-06-01 PC Minutes**
3. **Agenda Review**
4. **Community Comments** *are limited to items NOT on the printed Agenda.*
5. **Public Hearings:** (Commissioners declare conflict of interest, ex-parte contact, or personal bias) **Public Hearings** before the City Council and other Boards and Commissions shall follow the procedure identified in Resolution 98-743, adopted June 9, 1998 (copies available on table):
 - A. **SUB 99-8 Nottingham Phase 1 Preliminary Plat, Condition E7** (*Dave Wechner, Planning Director*)
 - B. **SP 00-16/CUP 00-07 Sherwood Crossroads Service Station Site Plan & Conditional Use (cont'd from 02-06-01 PC Mtg, hearing & record open):** request to construct an attendant kiosk and 8 (eight) fueling islands to be operated by Safeway, located at 16330 SW Borchers Drive, Tax Lot 300, Map 2S 1 29B. (*Keith Jones, Associate Planner*)
 - C. **SP 00-17 Sherwood Crossroads Bank Site Plan (cont'd from 02-06-01 PC Mtg, hearing & record open):** request to construct a 4,500 sq ft bank building with drive-thru located at 16330 SW Borchers Dr, Tax Lot 300, Map 2S 1 29B. (*Keith Jones, Associate Planner*)
 - D. **PUD 00-01 Kalyca Rim PUD:** a request by Joe Green for a 28-unit townhome planned unit development located east of Hwy 99W and south of the Gleneagle Condominiums, Tax Lots 1500, 3801, 7800, 8100, 8800, 8900, Map 2S 1 30DD. (*Dave Wechner, Planning Director*)
6. **New Business**
 - A. **Report from Council Liaison** (*Ken Shannon*)
7. **Adjourn**

**ITEMS NOT COMPLETED BY 11:00 PM WILL BE CONTINUED
TO THE NEXT REGULARLY SCHEDULED MEETING**

APPROVED MINUTES

City of Sherwood, Oregon
Planning Commission Minutes
February 20, 2001

1. Call to Order/Roll Call

Chair Adrian Emery called the meeting to order at 7:00 PM.

Commission Members present:

Adrian Emery
Jeff Schroeder
Patrick Allen
Jeff Fletcher
Jean Lafayette
Ken Shannon
Lee Weislogel

Staff:

Dave Wechner, Planning Director
Keith Jones, Associate Planner
Terry Keyes, City Engineer
Roxanne Gibbons, Recording Secretary

2. Approval of Minutes – February 6, 2001

Chair Emery asked if there were any additions or corrections to the minutes. Lee Weislogel noted that on page 2, the name “Craig” Harris should be Roger Harris. There were no further comments.

Adrian Emery moved the Planning Commission accept the February 6, 2001 Planning Commission minutes as corrected. Seconded by Jeff Schroeder.

Vote for Passage of Motion: 7-Yes, 0-No, 0-Abstain

3. Agenda Review

Dave Wechner noted the following for the Commission’s consideration:

- Agenda Item 5D, PUD 00-01 Kalyca Rim PUD - the applicant has requested a continuance. Mark Hoyt, representing the applicant, is present to make a formal request for the continuance. Mr. Wechner recommended this item be heard first under public hearings.
- Agenda Item 5A, SUB 99-8 Nottingham Phase 1 Preliminary Plat - there is a request that this item be set further back under the public hearings. This request did not come from the applicant, but from one of the citizens who wished to testify.

4. Community Comments

There were no comments.

5. Public Hearings

The Commission agreed to hear the public hearings in the following order: Agenda Item 5D first, followed by 5B, 5C and 5A.

5D. PUD 00-01 Kalyca Rim PUD

Chair Emery asked if the applicant wished to provide any comments.

Mark Hoyt, Attorney, representing Joe Green, owner, 429 Court St, NE, Salem, Oregon 97301, addressed the Commission. They are proceeding tonight over the applicant's objections. Their position is that this application was not properly required by the City and should not be processed.

- He has taken the administration of this application over from the architect, Mr. Mentrum. The application had some problems under the stewardship of Mr. Mentrum. They feel that the application has not been adequately presented to the Staff.
- The applicant is requesting a continuance to July 17, 2001 to allow time for the applicant to meet with Staff to determine what additional information is necessary to fully evaluate it and then compile the information for presentation to the Staff and Planning Commission. The 120-day deadline would be waived from February 20, 2001 to July 17, 2001.
- The City Attorney, Shannon Johnson, prepared a memo stating he and Mr. Hoyt agreed to the 120-day calculation.
- The property for this development is very unique. Portions of the property are located within the flood plain. Staff has raised some legitimate concerns regarding the development. The applicant has not had an opportunity, due to some prior miscommunication, to meet with Staff and sort through the issues.

Mr. Shannon asked for further clarification regarding this history of this application. Mr. Hoyt responded:

- The application was originally filed as a site plan in early 1997. Staff determined the application should be submitted as a planned unit development (PUD). The applicant filed the PUD application in November 1997. Staff initially wrote a letter of incompleteness to Mr. Mentrum. Shortly, thereafter, there was a turnover with Planning Staff and there was no further action on the 1997 application.
- Mr. Mentrum represents he was asked by the City to file a new application, which he did in February 2000.
- The applicant subsequently filed a Writ of Mandamus on the 1997 application. The City was successful in having this action dismissed.

Mr. Shannon asked if the applicant was going to come back with a PUD. He said a PUD has to be 5 acres and this site is 3.81 acres. He had never seen such an incomplete application submittal. He said the Commission should deny the application before them tonight.

Mr. Hoyt said they are asking for a continuance to address the very concerns Mr. Shannon is talking about.

A citizen from the audience said he would like to speak in objection to a continuance on behalf of his client, an adjacent property owner.

Ms. Lafayette agreed with Mr. Shannon. She asked where the applicant was planning to get access to the site. There is a lot of information missing from the material the Commission received.

Mr. Hoyt stated his applicant's position is that they will be able to submit the additional information during this continuance.

Mr. Allen said his first thought was the same as Mr. Shannon's. However, he would defer to the advice of the City Attorney to allow the continuance. He suggested the Commission hear from anyone in attendance who wished to speak on this application.

Mr. Fletcher and Chair Emery agreed with Mr. Allen. Chair Emery asked Staff for clarification regarding opening the public hearing.

Dave Wechner said the Commission could hear the request for a continuance that would not open the public hearing. If the Commission wished to take any testimony, they would need to open the public hearing, hear the testimony and then continue the hearing to a date specific.

Mr. Hoyt said he would not object to hearing testimony limited to the continuance.

Chair Emery opened the public hearing on PUD 00-01 Kalyca Rim PUD for the purpose of hearing any objection to the request by the applicant for a continuance. He asked the Commissioners to declare any ex-parte contact. There were no Commissioner disclosures. Chair Emery asked if Staff wished to provide a report.

Mr. Wechner said there is a request for a continuance and recommended that the Commission hear public testimony limited to this request. He noted that the process for a Type IV application requires two hearings. The first hearing is a recommendation from the Commission to the City Council. This application was originally scheduled for a public hearing in May 2000, but the Writ of Mandamus essentially stopped the 120-day clock. The Judgment on the mandamus action was filed on January 8, 2001 at which time the 120-day clock started again. Staff and the City Attorney met with the applicant and Mr. Hoyt to discuss the application and clarify the issues. In the absence of a request for a continuance by the applicant during this time period it was necessary to process the application. At this time, the City Council is scheduled to hear this application on February 27, 2001.

A. Richard Vial, representing the Gleneagle Condominium Association, 12725 SW 66th Avenue, Suite, 107, Portland, Oregon 97223, addressed the Commission. He noted:

- The Gleneagle Association lies immediately adjacent to the east of the proposed site. They have monitored this application since 1997.
- He would oppose the continuance because the seemingly endless life that this application has taken on is costing the Association money every time they have to prepare for a hearing that does not occur.
- They believe the application is ill-fated for two reasons:

- The applicant is proposing access through the Condominiums. The Association has never been approached regarding permission to do this and the documents do not provide for this permission.
- In August 2000, they wrote to the developer indicating that the proposed application showed a large chunk of the parking area, which was originally conveyed as “common area” to the owners of the Condominium units, was also being used for the application itself. They did not receive a response to this letter.
- The Condominium Association continues to spend money on matters that need to be dealt with. They would like the Commission to hold the public hearing and make a decision on the application tonight. Based on the Staff Report recommendation, this would be a denial.
- In response to Mr. Allen’s question, he said the Association does not have a position on the application itself, if access and use of part of the Association “common area” were not issues.

Mr. Hoyt reiterated that the applicant could address and resolve the access issues within the timeframe of the continuance. He said Mr. Vial did send them a letter to which they have not yet responded.

Patrick Allen moved the Planning Commission continue PUD 00-01 Kalyca Rim PUD to the July 17, 2001 Regular Planning Commission meeting, as requested by the applicant and under the terms as outlined by the City Attorney in his memo dated February 20, 2001. This request will extend the 120-day deadline. Seconded by Jeff Fletcher.

Vote for Passage of Motion: 6-Yes, 1-No (Shannon), 0-Abstain

The Commission encouraged Mr. Hoyt to submit a complete application when they review it on July 17, 2001.

Chair Emery read the hearings disclosure statement and advised that the public hearing for this application was continued from February 6, 2001.

5B. SP 00-16/CUP 00-07 Sherwood Crossroads Service Station Site Plan and Conditional Use

Chair Emery called for the Staff Report. Keith Jones referred the Commission to the Staff Report dated February 13, 2001, a complete copy of which is contained in the City Planning Files.

- He entered a letter and petition dated February 12, 2001 from Robert Nashif and signed by the neighbors into the record. The Commission had previously received a copy of this letter.
- At the last hearing, a major issue was the proximity of the proposed service station to the neighborhood on Borchers Drive. The applicant agreed to switch the location of the gas station and bank. Now the gas station is proposed to be located about 320 feet from the residential neighborhood. Staff feels this move mitigates any impacts on the neighborhood.
- Staff finds that the “demonstrable public need” criteria is difficult to define. The applicant has asked if “public need” can be defined as “market need”.
- The Planning Commission should determine the definition of public need for the proposal, keeping in mind the following questions:

- If there is a public need for the gas station, why is there strong opposition from the neighborhood.
- Considering past decisions, including the approval of the Chevron, Texaco and BP, market demand was used as justification. However, the Space Age Fuels decision did not interpret public demand as market demand. Is public need defined as market demand?
- If the Commission determines that the applicant has shown that the demonstrable public need is met, Staff would recommend approval of the application with conditions.
- Staff recommends the following changes to the proposed conditions:
 - Delete Condition A5, regarding the sign on the west elevation of the fueling canopy not being illuminated.
 - Delete Condition D1, the disabled accessible space needs to be moved to the east side of the site. This applied to the first proposal prior to the location of the station being moved.
 - Delete Condition D1, regarding the rockery wall.
 - Delete Condition F2, regarding the time for fuel deliveries.

Ms. Lafayette asked with regard to Condition A2, if the most recent plans should be identified as those dated February 6, 2001. Mr. Jones agreed.

Mr. Allen asked if the Hearings Officer decision set a precedent for interpretation that the Commission should follow. Mr. Wechner said the Commission and Council are charged with setting policy for land use. Generally, this is a legislative action by the Commission making a policy recommendation for the Council's consideration. The Hearings Officer is charged with interpreting the Development Code. Certainly, the Hearings Officer decision should be considered as an "expert opinion."

Mr. Allen asked if the Commission were to make a finding that "need" as outlined in the Code can be demonstrated by "market need" if the Hearings Officer be bound by this in hearing future conditional use applications. Mr. Wechner said this would be the case if the Commission decided to take their recommendation on a single action of a quasi-judicial hearing and make a recommendation to Council to codify this policy. The Hearings Officer would then be bound by the definition of public need and market need.

Mr. Allen said his understanding of the Hearings Officer decision regarding the Space Age Fuels application dealt with simple market supply and demand as market need as distinguished by the Hearings Officer as public need. He asked if the applicant for the Safeway Service station submitted material to meet some type of standard of demonstrating need other than market need or did it simply discuss market need in a different fashion.

Mr. Jones said the applicant identified the locations of existing gas stations, that the only zone that allows gas stations is in the Retail Commercial zone as a conditional use and how this proposed site would meet public need.

Mr. Allen said this would be something that is distinguished by geography as opposed to sales.

Mr. Jones said the applicant provided a market study done by Hobson-Ferrarini Associates that found Sherwood needs a certain number of pumps. This was defined in Table 1 of the report.

In response to Ms. Lafayette's question, Mr. Jones said because the access to the site and trip generation had not changed, outside agencies were not asked for further comments.

Mr. Weislogel asked for clarification regarding the hours of operation for the proposed gas station because the Safeway grocery store is open 24-hours a day. Mr. Jones said the hours of operation for the gas station were submitted by the applicant and they could address this question.

Mr. Schroeder referred to the February 6, 1996 Commission minutes that referenced one reason the Texaco was approved was because it was the only gas station between King City and Newberg. The proposed Safeway gas station would be the only gas station between Sherwood and Scholls. He sees this as a direct relationship between the two applications in meeting public need.

Mr. Wechner said part of what Staff concluded, considering the changes the applicant made in switching the bank and gas station location and screening, is there was still a question regarding the conditional use criteria D referencing "demonstrable public need".

Mr. Shannon said there was an existing, closed gas station with underground tanks that needed to be removed at the current Texaco site. Texaco submitted an application, that was approved, they cleaned up the site and removed the old tanks. This improved and modernized the site. It was quite an easy decision for the Commission to approve the Texaco application at that time.

Mr. Allen said a good example of trying to define public need is power plants in California. There is a lot of opposition to their siting, but clearly there is a demonstrable public need. He was not sure how you would ever answer the question of demonstrable public need.

Chair Emery asked if the applicant wished to provide additional testimony.

Michael Robinson, 900 SW 5th Avenue, Suite 2600, Portland, Oregon 97204-1268, representing Regency Realty, the applicant, addressed the Commission. He introduced Diane Phillips from Safeway and Gary Katsion, Kittelson & Associates, who were seated at the table with him.

- He provided additional copies of the Kittelson & Associates, February 15, 2001 response to the February 5, 2001 supplemental submission from Roger Harris and Charbonneau Engineering.
- He re-affirmed that the Commission is reviewing the February 6, 2001 revised site plan for this application.
- He thanked the Planning Staff for their hard work and in meeting with the applicant.

Diane Phillips, Real Estate Manger for Safeway, 16300 SE Evelyn Street, Clackams, Oregon 97015, addressed the Commission. She noted:

- She thanked the City of Sherwood for making the grand opening of the Safeway grocery a success. They are very happy with the new store and are pleased to be a part of the Sherwood Crossroads Shopping Center.
- Safeway and Regency want to continue to serve the Sherwood residents by offering the convenience of a fueling station. Their Public Affairs Manager says, “They feed the families, they feed the family pets and now they want to feed the family cars.”
- The concept of joining fuel with a full service grocery store is one of the latest changes in the grocery industry. Customer demand and need has brought about these changes.
- She discussed how the grocery industry has changed to meet customer demand.
- Fuel stations are the latest department in the evolution of the grocery industry. They function as the other Safeway departments. They have Safeway employees, management, equipment and inventory on Safeway-controller property. They also offer a discount with the Safeway Card.
- A little over a year ago, she testified on behalf of Safeway for the new grocery store. The approval was granted with the understanding and belief that Safeway would build a quality store as part of a quality shopping center. Both Regency and Safeway have lived up the expectations of the City and its residents,
- Tonight, they are requesting approval to proceed with construction of a fuel station. They anticipate that the proposed fuel station will be a benefit to the community, both economically and aesthetically.
- She thanked the Commission for their consideration of this request in meeting the City’s expectations for a quality development.

Gary Katsion, Principal, Kittelson & Associates, 610 SW Alder St, Suite 700, Portland, Oregon 97205, addressed the Commission. He referred the Commission to their February 15, 2001 report in response to supplemental submission from Harris Berne Christensen LLP dated February 5, 2001. He noted:

- The Transportation Impact Study that was prepared for this project has been reviewed by four (4) separate traffic engineering entities; the City, Washington County, State of Oregon and an independent traffic engineer, Lancaster Engineering.
- They all came to the same conclusion – the Shopping Center works. The addition of the gas station is 25 trips in one hour. This is not a significant change from the original approval for the shopping center. The bank was included in the original study.
- All of the improvements that were conditioned on the original development application have been built. They had to apply to Washington County for an access modification to allow the right-in, right-out, left-in driveway on Borchers Drive.
- The opposition testimony discussed three major points.
 - The Highway 99W/Scholls-Sherwood Rd intersection is one of the most studied intersections in the State of Oregon. The other studies are no relevant. They identified conditions that are not applicable to this application.
 - With regard to the left-turn queing to the site, Kittelson asked for the calculations that the opposition’s engineers based their statements on. These calculations are incorrect because they used an outdated, misapplied methodology that is not used by the profession any more.

- The Harris group took pictures of traffic being backed-up. Kittelson found out there was a malfunction of the controller on the days the pictures were taken. This was confirmed by ODOT and is documented in the Kittelson report. The controller has been fixed. Kittelson has gone out to the site during the PM peak hours, as well as over weekends, and there has not been any back-up of traffic.
- The Harris group questioned the standards used by Kittelson in determining trip generation. There is no other methodology for determining trip generation. Kittelson used the nationally accepted standards.
- The bottom line is that Kittelson and the developer want the system to work. Kittelson believes it will work and four other traffic engineers agree.

Mike Robinson addressed the Commission. He made further reference to the supplemental Kittelson traffic report and confirmation from ODOT that there was a controller malfunction. He noted:

- The only body that is entitled to make a binding interpretation of the Code is the City Council. The Council looks to the Commission and Hearings Officer to make recommendations.
- The Space Age Fuels application is different than the Safeway proposed gas station. The Space Age proposal would be a 24-hour convenience store and fueling station. The Safeway gas station would be open 5:00 AM to 12 Midnight.
- The Hearings Officer found the Space Age application failed to meet the public need standard as well as it failed to meet Criterion D, that the proposed site is the best site for meeting public need. The Hearings Officer said this application did not meet market demand, but he did not define “market demand”.
- The Safeway gas station does not have a problem with Criterion D. Staff has consistently stated the applicant has met this criteria.
- The applicant testified that public need is not only a use that fulfills market demand, but it is one that meets public purpose and convenience by design and location. The Safeway gas station proposal will be a part of an integrated shopping center.
- The Hobson-Ferrarini report, on page 4, identified that this type of shopping center meets the public need because it reduces trips.
- He said Mr. Shannon was correct about the Commission minutes regarding the Texaco application. On page 2 of the February 6, 1996 minutes for this application, there was considerable discussion about the rationale for market demand.
- All three Commission decisions (Chevron, Texaco and BP) had the common element of each Staff Report relying on market demand to show that the demonstrable public need had been met. In fact, the Chevron station Staff Report stated, “This is an indication there is both a need and a good business opportunity for continuation of the service.”
- The standards have not changed and the Commission has always known what public need is. He referred to the Texaco station being located on the closed Unocal station site and how this met public need. It is fair to say that part of the public need has always been market demand.
- Regency has responded to the past testimony by moving the Safeway service station away from Borchers Drive and further from the residential neighborhood. The current gas station location ranges from 257 feet to more than 350 feet from the residential neighborhood.

- The applicant has taken care of the impacts to the residential neighborhood. There will not be any off-site light or glare at the property line. The application also meets the noise standard. The bank building and landscaping will screen the service station.
- He said the analysis by Staff could be expanded.
- Most of the strong opposition was relative to the location of the gas station. If the standard is how many people are in opposition versus how many are in favor of something, then you would not need the criteria or Staff. This is not what interpreting the Code is all about, it is something more substantial.
- If a company like Chevron or Safeway is willing to invest their capital money to serve a need that they see, this shows there is a public need. They are the ones risking the investment to meet what they perceive as a public need. This is as much of a way of defining a public need as finding there is not a public need by virtue of the neighbor's opposition.
- The second criterion takes into account past decisions where market demand was used as justification for approval.
- If you are going to change the pattern, you should do so with proper consideration. People are entitled to rely on what the City has done in the past. If it is not a good criterion or standard, the City can go through a process to make changes.
- The Commission can find there is a market demand for this gas station, plus the fact the Safeway is an appropriately located shopping center and is a shopping center. You have a "one stop shopping" concept rather than an isolated service station.
- There has been a lot of testimony on this application. He distributed a copy of their presentation to the Commission dated February 20, 2001 for the record.
- The applicant is asking the Commission to approve the proposed Safeway gas station. They are comfortable with the condition for street lights, but were surprised to see this condition added three years after the subdivision approval.
- The applicant and their representatives are in attendance to answer any further questions from the Commission. If the Commission feels they have not met some of the criteria, please allow them the opportunity to respond to any questions.

Chair Emery asked if there was any other proposed testimony. There being none, Chair Emery recessed the hearing at 8:25 PM for a 5-minute break and reconvened the meeting at 8:30 PM.

Chair Emery asked if there were any opponents who wished to testify.

Mr. George Johnston, Marijo Johnston, and Mr. John Alto deferred their time to Roger Harris.

Roger Harris, 445 W. Division, Sherwood, Oregon 97140, and Seth Blumsack, Economic Insight, 3004 SW First Avenue, Portland, Oregon 97201, addressed the Commission. Mr. Harris noted:

- He agreed that the applicant and Staff are entitled to rely upon what the City has done in the past. This is why this decision is so critical. It truly will set a precedent on how conditional use permits are treated and the requirement to show public need. It will also set a precedent for further installation of retail gasoline service stations.

- They believe that market demand has always been a part of the showing public need, but it has only been one component. They have included in their submittal pertinent portions of the Hearings Officer findings on the Space Age Fuels application, identified as Exhibit A. He referred the Commission to page 4 of Exhibit A, “The Hearings Officer finds that there must be some difference between “public need” and “market demand”, otherwise the City Council would have used the phrase ‘market demand’ rather than the broader ‘public need’. It is tempting to use the benefits of increased competition (lower prices, more choice, etc.) as justifying the public need, however that would always justify a finding of public need any time a new business wanted conditional use approval. It appear the City Council was looking for something more than that when they created the public need standard.”
- They have provided in prior submissions the definition from Webster’s Dictionary of “demonstrable public need”. They have presented a plausible definition of what that would be. This is a part of the record.
- The applicant has failed, on any empirical basis, to show “demonstrable public need.”
- Not a single member of the Sherwood resident community has testified in favor of this application. If there were lines queuing up at the existing gas stations, there would be a public outcry from people saying we need this proposed gas station.
- With respect to the market study submitted by the applicant (Hobson-Ferrarini), how do you reconcile that the study concludes that Sherwood needs 20 additional pumps? Yet on the other hand, all of the anecdotal evidence and visual observations do not support this conclusion. They submitted as an exhibit, in their first report dated January 16, 2001, that the current three existing gas stations based on the Lundberg Survey were operating at something less than 50% capacity.
- They submitted the Hobson-Ferrarini Report to Economic Insight. Mr. Blumsack is present to provide testimony and discuss the memo identified as Exhibit B, dated February 20, 2001, Economic Insight’s critique of the Hobson-Ferrarini report. Exhibit C is a resume of Economic Insight and what they do. Their specialty is in the energy sector, in particular the gasoline and petroleum industry.
- He introduced Mr. Blumsack.

Seth Blumsack, Economic Insight, Inc., addressed the Commission. He is an economist with Economic Insight. He reviewed their February 20, 2001 memo, identified as Exhibit B. He noted:

- Economic Insight specializes in the study of energy and fuels, particularly electricity, natural gas, crude oil and petroleum. The Portland Area market for retail gasoline is something that their firm studies extensively for a number of clients and different occasions.
- They have created and maintained some rather large industry-level databases at the state and local level with respect to the retail market.
- He discussed “public need” versus “market need”. The position of the Hobson-Ferrarini memo, which is flawed, states that public need and market need are essentially the same thing. The memo fails even to show market need. It does not show there is sufficient demand to warrant the construction of an additional service station in the City of Sherwood.
- There are two key assumptions in the HF memo:
 - The memo claims that the potential sales of Sherwood’s gas stations amount to 86% of the total demand for gasoline by Sherwood residents (capture rate). They do not

cite any industry expert or group of experts as a source for this assumption. A capture rate of 86% might be appropriate for an isolated community such as Hood River or John Day.

- Sherwood is not an isolated community. As a consequence, gasoline stations in Portland are competing with stations along the I-5 and 99W corridor and as far as Beaverton and Gresham, based on convenience, price, brand name and the ancillary services provided.
- Any Sherwood resident who is not filling their tank in Sherwood is doing so because they chose to and not because they are forced to.
- The second unreasonable assumption in the HF report is that at any and all gas stations, 55% of the volume sold will be to passerby traffic. This is tantamount to saying if you build it, they will come. This does not reflect the realities of Sherwood or any other community.
- The methods of analysis in the HF report are flawed. All of the key variables in the model are denominated in dollars rather than gallons. Essentially, the HF report is equating revenue with demand. The model has the unusual feature where if you change the price per gallon (as shown on Exhibit H and Exhibit I of the Insight report), the result is it decreases the number of needed additional pumps in Sherwood.

Mr. Schroeder asked if Mr. Blumsack was saying that if Safeway offers gasoline for \$0.10 less a gallon, they are not going to be busier than the BP station.

Mr. Blumsack said consumers tend to be very loyal to brand name gasoline, according to the Lundberg Survey. Ninety-percent of the gasoline sold in Washington County comes from brand name gasoline stations, that is, gasoline stations operated by major oil companies such as Chevron, Texaco, Shell, and BP. The major brand name companies spend a lot of money and resources in maintaining the integrity of their brand name.

Mr. Schroeder said the Arco station in King City is a good example of a station that is always busy and it offers a competitive price for gasoline.

Mr. Blumsack continued with his testimony:

- The Insight report (Exhibits B and C), shows the Sherwood and Tri-County Area gallons per fueling place and fueling places per thousand people in 1991, 1996 and 1999, according to the Lundberg Census. He discussed the findings on these charts.
- Despite the claims of congestion, between 1991 and 1999, the gallons pumped per fueling station in Sherwood has decreased.
- Congestion at Sherwood's fueling stations is very low in the Tri-County area. (Exhibit C)

Mr. Harris said over the last 8-9 years, Sherwood has increased the number of fueling stations per thousand despite the rapid growth in Sherwood. The Insight Report reconciles what Sherwood has traditionally observed in their community. The critical point is that public need is far greater than market demand. Assuming you accept that public need and market demand are synonymous, the submission by the applicant fails to offer any demonstrable and critical evidence to show that. Integrity in public office has been a matter of public debate for a number

of years. It is critical that the Commission demand from the applicant the kind of integrity that was required of them early on. The applicant received approval for a subdivision based upon certain representations and promises. They are now asking for a conditional use permit that flies in the face of those assurances and past promises. Why did the Commission require the applicant to come back with future site plans rather than going to a Hearings Officer? The reason is obvious, the Commission wanted to make sure there was consistency and the applicant followed through on the representations made.

In response to Mr. Schroeder's question, Mr. Blumsack said Troutdale is on a major commuter and freight route (I-84) and there are a number of extremely high capacity fueling stations located there. The charts include diesel fuel and three grades of gasoline.

Jeff Kleinman, representing Robert Nashif, 1207 SW Sixth Avenue, Portland, Oregon 97204, addressed the Commission. He is a land use attorney with 27 years experience in Oregon. He noted:

- He was mystified by the descriptions of need, public need and market need that have been expressed to the Commission by the applicant. None of this makes very much sense to him.
- In addressing the issue of need, he referred the Commission to the points made by the Mr. Robinson and written copy dated February 20, 2001 that was distributed to the Commission.
- In reference to Item 6, "Since 1987 the Planning Commission has found public need met by market demand in Chevron, Texaco and BP applications; no reason to change now." The point the applicant seems to be making is that the more gasoline stations you add to fill the public need or market need, in particular, the more you need more.
- There were comments from members of the Commission that the test has not been very well defined in the past, but this does not mean that there is no test. The language of Criteria C and D of the Conditional Use provision is the traditional design language for public need and a proof that public need is best served by allowing the conditional use for the particular piece of property in question as compared to other properties.
- If the Commission accepts the applicant's undefined test for market need as that which the Commission approved in the past, will always justify it more, then the City of Sherwood motto should be changed to, "Home of endless gasoline stations and continuously unmet public need."
- The evidence in the record shows that the pre-existing stations are operating at 27% of capacity (as stated in the Lundberg Report).
- There has been testimony that the Safeway gas station would be a discount station. The conditions of approval do not and could not apply to price. You cannot assume this will be a discount station and you cannot condition it as one.
- Reference was made to the Texaco station and the fact that there was no station between King City and Newberg and because there is no station between Sherwood and Scholls, the Safeway station would meet a public need. In the past, the distance between King City and Newberg was a long way, but putting a station one inch closer on the map to Scholls than the existing stations does not meet very much of a public need.
- Very good evidence has been submitted by Economic Insight on the public need issue. The applicant's report from Hobson-Ferrarini assumes that Sherwood is not primarily a commuter community and there is a certain high rate of "capture" because no one goes anywhere. This

is not the case because a number Sherwood residents tend to commute to work and for other purposes. The report from Economic Insight is a much more thorough study by a much more experienced consulting and economics firm. It provides more data and statistics and would have a greater degree of credibility in this instance.

- The Economic Insight report says that under any definition of market need when defining public need as market need, the applicant has not met its burden of proof in this case.
- The Commission needs to look at the type of precedent that is being espoused by the applicant.
- The need expressed by the Safeway representative is a need for Safeway to have a gas station. This is a “private need” not a “public need” by any definition. If you were to follow the logic provided by Safeway, then any shopping center would be entitled to a gas station under the conditional use criteria and any store that had a deli, health foods and general commodities would be entitled to a service station under the same criteria. This is not the appropriate definition or proper precedent for public need.
- In reviewing the Conditional Use Criteria C and D, demonstrable public need and the public need is best served by allowing the conditional use on this site as opposed to other available properties, the applicant’s attorney states there is no question about Criteria D. There is a question and the answer to that question happens to be “no.” The applicant has not addressed that criterion appropriately.
- Gas stations are a conditional use in the Retail Commercial use. Where is the thorough analysis that is required under this standard of Criteria D. Why is this site better than other available sites.
- The left-in turn lane to the site from Tualatin-Sherwood Road was originally not supposed to be there and then it was justified for one purpose and then another purpose. The evidence shows there is already traffic backing up at this location. A service station, especially a discount service station, is going to make traffic a lot worse.
- If the conditional use as proposed under the test that is espoused by the applicant, the City will have no end to conditional uses that you will be obligated to support and not just service stations. It will entirely defeat the purpose that we have in Oregon and the City of Sherwood for doing a conditional use analysis.

Chair Emery asked if there was any further opponent testimony. There being none, Chair Emery recessed the meeting at 9:10 PM for a 5-minute break and reconvened the public hearing at 9:15 PM.

Chair Emery asked if the applicant wished to provide rebuttal testimony.

Mike Robinson, representing the applicant, addressed the Commission. He responded to Mr. Kleinman’s comments and noted:

- Mr. Kleinman said Sherwood is a commuter community and people do not expect to buy gasoline in Sherwood. If you want to buy things outside the community, this is the right answer. The fact is, that Sherwood residents want the convenience of having services closer to home.
- If the Commission accepts the argument that there is not enough demand for the existing gas stations, let alone two new stations, the same thing could be said for the grocery stores. The

Safeway grocery is fulfilling something they believe was lacking in the community in the way of retail. Should the Safeway grocery store not be here because there were no long lines at Albertson's, absolutely not. There was a need for the Safeway grocery store and most people would say they are glad to have this store.

- In response to Mr. Harris's comments, the Commission needs to remember that he represents Chevron and Texaco. The Commission has seen reports from the applicant and opponents, so you have "dueling economists". The Economic Insight report notes in their resume that they describe their clients as important players in a global market place. They certainly are not representing the little guys; their clients are Arco, Texaco, BP, Chevron, Mobile and OPEC. It is an interesting position for them to be telling the Commission in their report that the City should not be letting any more competition come into Sherwood.
- If the Commission does not like the decisions that have been made in the past, they should recommend to the City Council that the Code be changed. This would take care of Mr. Harris's fear and Mr. Kleinman's concern of opening Pandora's Box. The Code can be changed.
- The Commission has approved three gas stations in the last 14 years and have relied on each applicant's market demand study.
- The one thing the Commission did not hear from the opponents was, what is public need if it is not market demand. The opponents said it could not be market demand, but they did not define public need.
- The Safeway gas station will benefit the public by adding competition and additional services.
- With regard to the amount of testimony from opponents, usually only people who have concerns come to the public hearings.
- There are two service station applicants (Safeway and Space Age Fuels) who are willing to put up their money because they feel there is a need in Sherwood. It is interesting to note that the three existing gas stations are the "majors" or "branded majors" as defined by Mr. Blumsack.
- It is Safeway's position that Sherwood residents want the convenience of having a full service shopping center on the west side of Highway 99W. If they are wrong, there will be something else there.
- He has been involved with this project from the time the property was owned by Patrick Lucas. They did not make representations that the kind of uses being applied for now would not occur.
- Mr. Kleinman's testimony consisted largely of deriding past interpretations the Commission has made with respect to what public need is. The applicant is not asking the Commission to do anything different than what has been done in the past.
- His February 6, 2001 letter to the Commission cited a number of decisions by LUBA for Beaverton, Woodburn and Harney County where the public need standard is in the code and those communities found the public need standard was met by increasing residential uses where there was little land available to meet the identified need and there was a strong market demand for the identified need.
- With regard to market demand, the evidence is clear. The City's population has increased and with it the need for grocery stores, drug stores and gas stations have increased.
- With regard to the question of where is evidence showing this is the best site, the evidence is in two places. It is on pages 5 and 6 of the Hobson-Ferrarini report and pages 14 and 15 of

the Staff report. Both reports concluded that this is the best of the very few remaining sites for a service station.

- The Commission has consistently used market demand and relied upon the applicant's evidence of that to define the public use standard has been met. The applicant would ask the Commission to follow this interpretation.
- If Washington County did not believe the left-in turn from Scholls-Sherwood Road would work, they would not have approved it.

Craig Ramey, Regency Realty, 4000 Kruse Way Place, Building One, Suite 130, Lake Oswego, Oregon 97035, addressed the Commission. He noted:

- He is not an attorney. He is in the real estate development business.
- The Commission had heard many comments from attorneys and competitors.
- He talked about Regency's involvement in this project. Regency has responded to the neighborhood testimony by moving the Safeway gas station farther away from the residential neighborhood. They listened to the neighbor's comments and switched the location of the bank and service station.
- The reason the neighbors are not in attendance tonight is because Regency has responded to their concerns. There were some comments from people who just did not want another fuel station in Sherwood, period.
- Neighborhood opposition is not a reason to find that there is not a public need.
- They expected to have opposition from the competing gas stations. This opposition is not a reason to find that there is no public need.
- If the Commission follows Mr. Harris's logic, they must place a moratorium on future fuel stations in Sherwood. This is not what the criteria suggests should be done and is not what has been done in the past.
- They would ask the Commission to approve the proposed Safeway service station.

In response to Ms. Lafayette's question, Mr. Ramey said a "destination-type tenant" is one that is not counting on the anchor tenant for their business.

Mr. Robinson clarified that the previous day care center is the location of proposed bank site plan.

Mr. Wechner said Regency Realty had designed a sign for the northeast corner of the site. Apparently, this sign was over their budget and the City has not seen another plan.

There being no further testimony, Chair Emery closed the public hearing on SP 00-16/CUP 00-07 Sherwood Crossroads Service Station Site Plan for discussion and deliberation by the Commission.

Mr. Wechner said the condition of approval regarding the sign was for art work. Staff felt a welcome to Sherwood sign would be appropriate and a better alternative. One of the issues that was not addressed was when the art work should be provided. Staff would recommend that prior to occupancy of the last building on the site (Sherwood Crossroads) the sign shall be in place. It may be more appropriate to address this during the bank site plan public hearing.

Terry Keyes discussed the condition regarding street lights on Borchers Drive. Street lights are required as frontage improvements for any development in the City relative to commercial and industrial sites. When the Safeway site was being developed, he was not sure if the street light issue was missed or just did not get done. Part of the problem was there were two developers on this project, originally Patrick Lucas who did the subdivision and then Regency Realty, who was actually developing Lot 1 of the subdivision. In an effort to help Regency, the City determined the street lights could be placed on Borchers Drive when the bank and service station sites were developed. This is why the condition has been placed on the service station application.

Mr. Fletcher asked for clarification regarding removing Condition A5. Mr. Wechner said this condition was proposed in response to the original location of the service station.

The Commission discussed the hours of operation for the proposed service station. They concurred that a condition should be added regarding hours of operation.

Mr. Allen said there are two issues; neighborhood impacts and need. He said the neighborhood impacts have been addressed by switching the location of the gas station and bank. He said there is the question of public need. If market need was all that needed to be identified, then any private investment would be market need. He was looking for something that talks specifically about physical capacity or lack thereof. He did not believe the Hobson-Ferrarini report answered this question. The Economic Insight report dealt with the physical capacity, in particular Exhibits B, C and D. Based on the physical capacity analysis, he did not believe that the public need being distinguished from the market need has been found.

Ms. Lafayette said market need seems to be a business needs to do something and public need fills a purpose. She questioned why you would have to have a Safeway card to receive a discounted price on their gasoline. She thought there were too many parking spaces being proposed for the gas station.

Mr. Fletcher thought that Sherwood is under capacity for service stations and that people will drive to King City to buy gas as a cheaper price. He totally disagreed with the representative from Economic Insight regarding discounted gasoline prices. The City is only at 50% capacity because people will buy gas for less at locations other than Sherwood. He said the applicant has lessened the impact on the surrounding neighborhood. He supported the application.

Mr. Schroeder said the developer went to the expense of redrawing the plans and moved the location of the gas station. Mr. Johns, a resident of Wildflower Village, testified that he would not oppose the gas station if its location were changed. There is going to be a public need for this gas station, especially when Roy Rogers Road is connected through to Beef Bend Road. This will be the only gas station between Sherwood and the Murray Hill area in Beaverton on this link. He said the public need is there. He supported the application.

Mr. Shannon said the public need factor is hard to define. You can talk about fuel capacity and the population, but Safeway is not building this station because of the population of Sherwood. You have to remember that Highway 99W is a major arterial. The public need for him is that

this is competition and America was founded on competition. The proposed location is probably better for traffic flow than the location of the BP station. Mr. Jay Johns said if the bank building and gas station were reversed, none of the residents would be speaking in opposition. He said if the Safeway gas station is approved, they should look at how the Alto service station is designed and landscaped because it is very attractive and well kept. He did not feel the Code should be changed. The need factor for the Safeway store and the gas station is there through competition. If the Commission says no to this applicant, they are saying “no fueling stations in Sherwood” and there may as well be a moratorium on service stations. He supported the application.

Mr. Weislogel said he too struggled with the fact that the Zupans went out of business after the Albertson’s was opened. Some changes are hard. He concurred with what has been said about Roy Rogers Road and what will happen when it is linked. He thought the applicant has taken care of most of the major concerns, in particular by relocating the gas station site. He was concerned about some corporate decision that may be made with regard to Chevron buying out the Union 76 station, but this is not really in the City’s purview. He agreed with the modifications to the conditions.

Mr. Allen was concerned with how the Commission could say today that there is a need and in the future tell someone there is not a need. If the Commission can distinguish between the need for fuel and the need for convenience items, could they do something to identify that the Commission is finding the need for a fueling station and not some other particular use.

Mr. Wechner said Criteria C and Criteria D, 4.302.03 Conditional Use Criteria are essentially linked. There are two parts; one says is there a demonstrable public need for the proposed use and other says that public need is best served by allowing the conditional use on the property in question as compared to other available property. The decision and motion by the Commission should be supported by their findings.

Ms. Lafayette asked if the findings of fact should be modified in that the Commission findings are that a gas station at this site is another department within a one stop shopping versus an isolated service station. Mr. Wechner said this should be a part of the motion.

Chair Emery said Criteria C, D and E still seem to have issues. He did not feel the applicant had met the burden of proof for these criterion. He was also concerned about the amount of opponent testimony and number of signatures on the petition.

The Commission concurred that the approval is for a fueling station and not a mini-market/service station.

The Commission discussed the number of parking spaces. Mr. Jones said the Code the application is vested under requires a certain number of spaces. The Staff Report states the number of parking spaces is adequate. The current Code does not require any parking spaces for a gas station.

The Commission recommended the following changes and additions to the conditions:

- Add a condition under “F”, The hours of operation shall be limited to 5:00 AM to 12 Midnight, seven days a week.
- Revise Condition A2 that the submitted plans are dated February 6, 2001.
- Revise Condition A5 regarding the illumination of the sign on the “southwest” side.
- Remove the condition that requires the disabled parking space be moved.
- Remove the condition regarding the rockery wall.

There being no further discussion,

Chair Emery moved the Planning Commission approve SP 00-16/CUP 00-07 Sherwood Crossroads Service Station Site Plan and Conditional Use based on the findings of fact, public testimony, Staff recommendations, agency comments, applicant comments and conditions as revised. Seconded by Jeff Fletcher.

Vote for Passage of Motion: 5-Yes, 2-No (Allen, Emery), 0-Abstain

5B. SP 00-17 Sherwood Crossroads Bank Site Plan

Chair Emery opened the public hearing and called for the Staff Report. Keith Jones referred the Commission to the Staff Report dated February 13, 2001, a complete copy of which is contained in the City Planning files. He said there are no major concerns with this application. Staff recommends approval of this application with the following changes to the conditions:

- Condition A2, the date should be changed to February 6, 2001.
- Add a condition regarding the Sherwood Crossroad shopping center decorative feature at the corner of Highway 99W and Roy Rogers Road shall be installed and completed prior to occupancy of the bank building (reference SP 99-17 conditions of approval).

Ms. Lafayette thought that the landscaping berm on Borchers Drive was necessary because the lanes for the bank drive-thru will be on the Borchers Drive side.

Chair Emery asked if the applicant wished to provide testimony.

Michael Robinson, representing Regency Realty, 900 SW 5th Avenue, Suite 2600, Portland, Oregon 97204, addressed the Commission. He noted:

- He did not think the rockery wall or berm is justified for the bank. The drive-thru facility is not opened late at night. Typically these are closed by 7:00 PM. There is a six-foot wooden fence along the residential area across the street on Borchers Drive. The headlights from cars will be directed towards the fence and not over the fence.
- The bank site will not have the same level of impact as the service station on the adjacent property.
- The site plan review criteria is not the same as the conditional use criteria.
- He did not know if the bank would have a drive-thru ATM.
- The applicant does not know what the ultimate outcome will be with the service station. It may be appealed to the Council. They would ask the Commission that if the service station were ultimately disapproved, for a condition that states, “If the service station is not

constructed in its proposed location, the bank can be constructed on the service station site.” This condition will not require the applicant to come back to change the bank location back to its original site plan.

- The best location for the bank is where the service station is being located. They switched the location to accommodate the surrounding neighbors concerns.

Chair Emery asked if there was anyone who wished to testify as a proponent or opponent to this application. There was no testimony and Chair Emery dispensed with the rebuttal portion of the public hearing. He closed the public hearing on SP 00-17 Sherwood Crossroads Bank Site Plan for discussion and deliberations by the Commission.

Ms. Lafayette asked for clarification regarding the dumpster site. Mr. Josh Spooner, Benner Stange Architects said the refuse container will be enclosed in a fenced area and not be visible to the public.

Ms. Lafayette said she was still concerned about the number of parking spaces. Staff advised the Commission that the current Code does have provisions for maximum and minimum parking spaces. However, the Code in effect at the time this application was submitted did not call for a maximum number of parking spaces.

Chair Emery asked if the evergreen trees had been removed and if standard street trees are still included in the landscaping plan. He asked if the evergreen trees could be put back on the plans.

Mr. Shannon said he did not support the request that the bank could be located in either site if the service station was eventually disapproved through the appeal process.

Mr. Allen said he did not have a problem with the applicant’s request regarding the location of the bank.

Mr. Robinson said he agreed with Mr. Shannon and the point was well taken. The applicant would not change the location of the bank if the decision on the service station were overturned. The current language regarding substantial alteration of the site plan is very limited in its discretion.

It was the consensus of the Commission that the bank location would remain static.

The Commission made the following changes and additions to the conditions:

- Revise Condition A2 to read, “This land use approval shall be limited to the submitted plans dated February 6, 2001, except as indicated in the following conditions. Additional development or change of use may require a new development application and approval.”
- Add a condition under Section E, “A decorative corner feature compatible with the Sherwood Market Center artwork shall be completed and installed at the corner of Highway 99W and Roy Rogers Road. This requirement is a part of the overall Sherwood Retail development site plan (SP 99-17).

- Add a condition under Section E, “A continuous evergreen landscape buffer shall be installed between the bank building and Borchers Drive for the purpose of screening headlights from the drive-thru. The planting shall not be located within the vision triangle.

There being no further discussion,

Chair Emery moved the Planning Commission approve SP 00-17 Sherwood Crossroads Bank Site Plan based on the findings of fact, public testimony, Staff recommendations, agency comments, applicant comments and conditions as revised. Seconded by Patrick Allen.

Vote for Passage of Motion: 6-Yes, 1-No (Lafayette), 0-Abstain

5A. SUB 99-8 Nottingham Phase 1 Preliminary Plat, Condition E7

Chair Emery said the Commission is being asked to define and clarify Condition E7 of the conditions of approval for SUB 99-8. The Commission would not be hearing testimony not specifically relating to this condition. He opened the public hearing and asked if Staff wished to provide comments.

Dave Wechner referred the Commission to memorandum dated February 6, 2001. Condition E7 reads, “The construction plans for public improvements shall identify the location of the drip lines for trees on the eastern boundary of Lots 4-10. A conservation easement shall prohibit grading and construction, except fence construction. The conservation easement boundary may encroach into the drip line to ensure adequate building envelopes on Lots 4-10. The conservation easement shall be shown on the final plat.”

- When the applicant submitted the final plat to the City for approval, he also submitted engineering plans. The plans identified a drip line that appeared to follow the outline of the trees. On the preliminary plat, a 20-foot wide conservation easement was shown that was 20 feet from the eastern boundary of the plat.
- Because he was not a part of the original decision on this application when Condition E7 was approved, he recommended it come before the Commission for clarification on how they would like the Staff to proceed with this application. Condition E7 is not being proposed to be changed.
- The question to consider is can the drip-line easement be encroached upon, and if so, how much and who should be making that decision.

In response to Mr. Shannon’s question, Mr. Wechner said the trees are boundary line trees or very close to the boundary. Mr. Shannon said the purpose of the condition was to protect the trees that are very old.

Mr. Wechner said the applicant has requested a reduction of the conservation easement. The applicant’s representative is in attendance and the adjacent property owners, the Salisburys, are also in attendance. During the past week, some trimming of the trees occurred on the developers side since the original drip-line was established. Mr. Shannon is correct that the drip-line was changed by trimming these trees, but this could be subject to interpretation.

Mr. Wechner said the submitted plans did not show building envelopes.

Chair Emery asked if the applicant wished to provide testimony.

Craig Brown, Matrix Development, 12755 SW 69th Avenue, Suite 100, Tigard, Oregon 97223, addressed the Commission.

- He said they had a certified arborist and forester come out and establish the drip-line. They are not asking that the conservation easement be different than the one that was already established.
- They are not asking to encroach into the conservation easement.
- They are in agreement to have the conservation easement be at the drip-line that was established by the forester/arborist.

Mr. Wechner distributed additional information to the Commission that included the drip-line location that Mr. Brown was referring to.

Mr. Brown said the first drip-line was shown by their engineer and it is not the same as the one defined by the arborist.

- They were conditioned to place a fence along the property line. During the last month, six branches from these trees have broken. These are very large branches. The arborist estimated some of them to weigh 1600 pounds. This is definitely an unsafe condition. If they had built the fence, each one of these branches could have taken out the fence. There is also concern for public safety.
- They have not been within 50 feet of the trees in terms of grading.
- They do not want to damage the trees.
- They are not encroaching into the drip-line at all. Let the conservation boundary line be the drip-line as determined by a professional, licensed arborist.

The Commission asked if it should be their decision to determine what the drip-line is. Chair Emery said the Commission is being asked to determine how the condition should be handled.

Mr. Brown said the applicant did not request this hearing and they had the same questions as the Commission.

Chair Emery asked if there was anyone else wished to provide testimony.

Susan Claus, 22211 SW Pacific Highway, Sherwood, Oregon 97140, addressed the Commission.

- The drip-line is an issue, but is not the only reason for this hearing. This is a conservation easement and the point of the condition was for protection of the trees.
- Damage will be done to the feeder roots of the trees if the building envelopes encroach into the conservation easement.

- How will the potential homeowners be notified of this conservation easement? Can they build a deck in this area? There are other issues that need to be dealt with.
- Mr. Brown was not a part of the original hearing. Joe Broadhurst brought this application before the Commission for approval.
- It is not a simple process to draw a 20-foot setback on the final plat and say the protection of the trees has been accomplished.
- There has been a lack of communication between the developer and the adjoining property owner.
- There is less than full use by the property owner on the identified lots because of this easement.
- The limbs that the developer said were dead is not a fact. She distributed pictures of the tree limbs that were trimmed. It is clear that all of these limbs were not dead.
- The developer started to do the trimming on February 13, 2001. The Salisbury's attorney wrote a letter asking them to wait until after the public hearing before the Commission. If the damage is done, you cannot go back and correct it.
- There is no language to deal with the preservation or conservation of the trees.
- Since the original hearing, it has been determined that some of the trees are on the boundary line. If you have boundary line trees, it is joint tenancy and both property owners are supposed to work together.
- If the prime directive is to preserve the trees, let's not have an artificial statement that the condition has been complied with.
- There are many complicated issues and she was not sure what the process should be. There may also be legal issues. Does it rest with the Commission to provide direction to the Staff on how to clarify this condition.

Mr. Allen asked what exactly the Commission is hearing? Ms. Claus said there is a lack of clarity to a condition that the Commission imposed.

Ms. Lafayette said there seemed to be two concerns; the actual line of the conservation easement and how to notify future property owners about this conservation easement.

Ms. Claus said these are two of the issues and there is also the possibility of having boundary line trees which means joint tenancy. The arborist hired by the developer came out after the trees were trimmed. They have three other arborists with different opinions.

Chair Emery said the Commission is addressing who is to make the decision on how the building envelopes will be applied in relation to the conservation easement and whether or not they encroach. This is the whole issue. The other issues need to be brought to another forum.

In response to Mr. Fletcher's questions, Ms. Claus said they do not agree with the drip-line that is shown. They have two documents identifying another drip-line. They have documentation from one arborist, Mr. Radford, who looked at the trees prior to their being trimmed. They have two other arborist reports that are included in the information the Commission received tonight.

Mr. Fletcher said it was not the Commission's intent, when this condition was written, to resolve disagreements between different arborists.

Ms. Claus said the Commission has the authority to make an interpretation on the particular condition.

Loren Radford, 15635 NW Parson Road, Forest Grove, Oregon 97116, addressed the Commission. He referred the Commission to his February 1, 2001 letter.

- He has been a certified arborist for nine years. This is his part-time occupation. He is a teacher in the landscape department at Polk Community College.
- He visited the site in question on January 30, 2001, at the request of Bob Salisbury.
- There are two formulas by which arborists determine where the critical roots are. Feeder roots go out 3 or 4 times past the drip-line. They were looking for the area where filling, compaction or cutting would cause damage to the tree. One method is by the drip-line of the tree. This system is not always the most accurate.
- The other formula operates on the diameter of the tree trunk. Some trees are more tolerant than other trees of construction damage.
- The drip-line of the tree is not something that is a matter of judgment. The drip-line is the outside edge of the canopy.
- Different arborists can make different assessments where the critical roots are located.
- He measured the diameters of 16 Douglas Fir trees. He provided a sketch map (not to scale) of these trees and provided these to Mr. Salisbury. This was attached to his letter.
- He was called out again last Saturday to look at the site because pruning that had taken place. It may seem like a moot point, but the drip-line has been artificially reduced on these trees.
- Some dead branches and some live branches were removed right at the stub. Typically, this is not considered good pruning by professional standards.
- He did notice that some of the trees in question may fall within the boundary line of the property.
- In response to Chair Emery's question, he said the age of the trees is difficult to tell without doing an increment boring. He would say that most of them are between 110 and 120 years old.
- He has not seen the arborist report from Mr. Broadhurst.

Robert Salisbury, 1765 NW Meinecke Road, Sherwood, Oregon 97140, addressed the Commission.

- He talked to the arborist, Walter Knapp, when he visited the site on February 15, 2001.
- Mr. Knapp said it was about the poorest trimming job he had ever seen.
- He asked Mr. Knapp where the drip-line was and Mr. Knapp said it was out in the flat where the straw had been put down. He said if the developer ever puts fill in there or builds a house in there, it will damage the trees.
- Mr. Knapp did not measure the trees.
- He thought the conservation easement was to keep the trees alive. If you work over the feeder roots, in 5-6 years the trees are going to start to fail if there are houses or roads that disturb the feeder roots.

- He referenced a letter to him from Barney Olberg, a graduate forester. Mr. Olberg inspected the Douglas Firs on February 8, 2001. Wind resistance through root protection is absolutely necessary. If the feeder roots are killed on the south side of the property line, the trees will go down. This letter was contained in the packet.
- He referenced a letter dated February 13, 2001 from Morris Van Meter an associate forester, who also inspected the trees. This letter was contained in the packets.
- If the Douglas Fir trees are going to be saved, they have to go past the drip-line.
- In response to Chair Emery's question, he said the feeder roots go out past the drip-line.

John D. Parsons, attorney representing Robert Salisbury, 888 SW 5th Avenue, Suite 1000, Portland, Oregon 97204, addressed the Commission.

- He understands that the Commission is hearing one issue, but the reality is that the decision made tonight will affect the trees.
- The Douglas Fir trees are fantastic and should be preserved.
- The drip-line that was originally constructed was by some arborists measure not quite conservative enough. Because of this ambiguity, a couple of discoveries have been made.
- There is a question as to the exact location of the property line.
- The 10-foot setback shown on the plat will kill the trees, if you read through the arborist's reports. This will occur over a term of 2-5 years. The houses will be built and the trees will fall, most likely onto one of these houses. If the trees fall towards the Salisbury property, they will take out the Salisbury's house.
- What causes the lives of these trees to be at stake is the trampling, excavation and mowing.
- Whatever the Commission decides, to the extent they can rectify the ambiguity that has been created, it may be prudent for the City to consider not being an arbitrator, but sending this to an arborist panel.
- Given the artificial relocation of the drip-line due to the pruning of limbs, the Commission would be guessing where the true drip-line is supposed to be and where the feeder root are located. The developer had live limbs cut off.
- The pictures distributed by Ms. Claus show piles of green limbs. This is not pruning, it is pushing the drip-line back. The developer was trying to maximize their lot value because the conservation easement would certainly impair their ability to build a house on the lot.
- The applicant has an economic motivation to maximize the return on their investment and Mr. and Mrs. Salisbury do not.
- Maybe the City should send out their own arborist to determine how best to preserve these trees. The City may wish to have a survey of exactly where the property line is located and perhaps this should be done independently. This will most likely trigger a legal issue as to whether the trees are Salisbury's, or the developer's, boundary line trees.
- What are the parameters of the conservation easement. There may be as much as a fifty-foot radius on some of these trees.
- The Commission may also want to consider setting a precedent for letting the developer try to relocate the drip-line.

Chair Emery asked if there was any further testimony. There being none, he asked the applicant if he wished to provide rebuttal testimony.

Craig Brown addressed the Commission. He noted:

- The property owner (Salisbury) would not let them cross the property line to prune the trees. They had to use a lift truck to prune the dead branches. They agree that the branches needed to be cut back, but they were told they could not cross the property line to do this. The police were called out because of this.
- He believes if you have trees that are a hazard and extend over your property, you have the right to trim them back. You have the right to remove hazardous conditions. This is all they have done.
- He has a full arborist report. He understood this hearing was an interpretation of conservation easement versus drip-line.
- There are still a lot of dead branches that should be removed.
- Because the drip-line became such a technical issues, rather than have the engineer determine its location, they had an arborist determine the drip-line so that the conservation easement would not encroach into the drip-line.
- Their arborist agreed that there were unsafe conditions and that the limbs needed to be taken down. The Salisburys were notified that there are unsafe conditions.

Chair Emery said the Commission is hearing this to decide who will make the decision on how to resolve the issues. The issues will not be decided tonight, but the Commission will decide who will be making the decision.

Chair Emery closed the public hearing for discussion and deliberation by the Commission.

Mr. Wechner said the Condition E7 allows for some flexibility. Staff found that as the decision-makers on the plat, it was appropriate for the Commission to hear the applicant's reasons why the condition should be changed. A lot of issues came up tonight that are outside the scope of what Condition E7 states on its face. The condition was not well written and needed to be more specific. In this case, no specific building envelopes were identified by the applicant, except to the extent that the rear yard setback was 20 feet. Staff would ask the Commission to give some direction on how to resolve the conservation easement issue. The final plat has not been recorded and the conservation easement was not in place at the time the trees were trimmed. Staff was trying to avoid the appearance of unfairness without hearing from both parties. Mr. Brown has tried to meet them half-way. He has made some concession that the drip-line now proposed is greater than the one proposed with the final plat. The issue is that a condition was approved and now the natural condition on which it was based has changed.

Mr. Schroeder said in looking at the sketch by Mr. Radford, it looked like on the Salisbury's property there is a road and a shed that are located within the drip-line of the Douglas Fir trees. The Commission discussed the different opinions from the arborists. Chair Emery said the arborists from each side should meet with Staff and try to come to some type of consensus as to the location of the drip-line. If a consensus is not reached, Staff should have an independent arborist review the issues. The Commission agreed.

Mr. Weislogel said these Douglas Fir trees are an asset to the City and they should be protected.

The Commission concurred that the issue of the drip-line and conservation easement should be resolved by Staff. The intent of Condition E7 is to save the Douglas Fir trees.

6. New Business

There were no comments.

7. Adjourn

There being no further business to discuss, the work session was adjourned at 11:50 PM.

Respectfully submitted,

Dave Wechner, Planning Director