



City of Oregon City

625 Center Street
Oregon City, OR 97045
503-657-0891

Meeting Minutes - Final

City Commission

Dan Holladay, Mayor
Renate Mengelberg, Commission President
Brian Shaw, Nancy Ide, Frank O'Donnell

Wednesday, February 7, 2018

7:00 PM

Commission Chambers

REVISED

1. Convene Regular Meeting and Roll Call

Mayor Holladay called the meeting to order at 7:00 PM.

Present: 5 - Commissioner Brian Shaw, Mayor Dan Holladay, Commissioner Nancy Ide, Commissioner Renate Mengelberg and Commissioner Frank O'Donnell

Staffers: 12 - City Manager Tony Konkol, Assistant City Attorney Carrie Richter, City Recorder Kattie Riggs, James Band, Community Services Director Phil Lewis, Community Development Director Laura Terway, Economic Development Manager Eric Underwood, Library Director Maureen Cole, Finance Director Wyatt Parno, Public Works Director John Lewis, Human Resources Director Jim Loeffler and Community Communications Coordinator Kristin Brown

2. Flag Salute

3. Ceremonies, Proclamations

3a. Planning Commission Annual Update

Denyse McGriff, Chair, and Paul Espe, Vice Chair, gave the annual Planning Commission update. They discussed the Planning Commission's goals and work plan for the coming year.

4. Citizen Comments

William Gifford, resident of Oregon City, spoke about the upcoming Metro Council election and invited everyone to Carol Pauli's campaign kick-off party tomorrow night.

Patrick Rectenwald, resident of Oregon City, was representing citizens who were concerned about a halfway house for recently released inmates that was proposed in his neighborhood. He referred to the City's code and Oregon Revised Statutes which discussed the requirements for establishment of halfway houses in residential facilities. He requested a full risk analysis be performed on the area surrounding the home on Roosevelt Street and for the City to red tag the project immediately.

Laura Terway, Community Development Director, and Jim Band, Police Chief, explained the work that had been done to address the issue.

Jennifer Ostrick, resident of Oregon City, also expressed concerns regarding the halfway house.

Kent Ziegler, resident of Oregon City, discussed January's Oregon City Business Alliance Forum where Tony Konkol, City Manager, was the speaker. On behalf of Rediscover the Falls, he encouraged the adoption of the master plan for the Riverwalk. He referred to the recent edition of the Oregon City News where there was an article against a proposed annexation written by a Planning Commissioner. He thought Carol Pauli would be an excellent Metro Councilor.

Carrie Richter, City Attorney, advised Mr. Ziegler to bring the article up at the next Planning Commission meeting as the City Commission would be reviewing the application and she preferred not to talk about now.

5. Adoption of the Agenda

The agenda was adopted as presented.

6. Public Hearings

6a. AP-17-0006: Appeal of the Planning Commission Approval of Planning Files CP-17-0002, DP-17-0003, and NR-17-0004 Including a Request to Waive or Otherwise not Impose the Appeal Fee

Mayor Holladay opened the public hearing.

Ms. Terway explained the process for City Commission review of the fee waiver request hearing and for the appeal hearing. The fee waiver request was to waive the appeal fee and City Attorney costs for the Abernethy Place application. The appeal fee was \$3,488 and the attorney costs were estimated to be \$6,000. She entered into the record additional comments received from the appellant, Resolution 04-01, and Resolution 16-23.

Carrie Richter, City Attorney, read the hearing statement. She asked if any Commissioner had ex parte contacts, conflicts of interest, bias, or any other statements to declare. There were none.

Ms. Terway presented the staff report. The Commission could decide to waive the fee for any or all of the following reasons: the City Commission wished to call up the decision for review, fairness to the applicant and to all parties dictated a full or partial waiver of the appeal fee, a fee waiver should be granted because the City lacked statutory authority to impose the fee, and a fee waiver should be granted because imposing the fee was unconstitutional.

Jim Nicita, appellant, had researched how the City applied appeal fees. He discussed an ordinance from May 1980 where an appeal fee from the HRB to the City Commission was set at \$50 and it remained today at \$50. The appeal fee was different from the Planning Commission to the City Commission. He found an appeal in 1985 indicating a \$100 charge for an appeal. ORS 227.181c stated the fee must be prescribed by ordinance or by regulation. One of the questions that was subject to interpretation was whether the resolution met the criteria of that statute. Two City ordinances set the appeal fees, Ordinance 88-1012, setting the fee at \$200, and Ordinance 90-1044, setting the fee at \$250. Ordinance 92-1016 changed the code to

allow the Commission to set appeal fees by resolution rather than by ordinance. Since that time the City had set its fees by resolution. In 1992, Resolution 92-29 was adopted setting the fee at \$500 and in 1996, Resolution 96-45 set the fee at \$750. A very significant jump occurred in 2001 when Resolution 01-02 was adopted which set the fee at \$2,400. In 2004, the fee was set at a base fee of \$2,530 and added the City Attorney fees through Resolution 04-01. Resolution 06-18 amended Resolution 04-01 and set the appeal fee at \$2,659 but removed the City Attorney fees. Resolution 07-26 set the fee at \$3,009 with no City Attorney fees and the increase was based on accommodating the additional overhead associated with Community Development's move to an alternate facility. He questioned if that reason met the intent of ORS 227.181c. Resolution 10-19 was on the City Commission's consent agenda and restored the inclusion of the City Attorney fees. There were progressive increases in the fee in 2013 to the present, which was \$3,488 and attorney fees. He discussed the fairness standard in OCMC 17.50.290c, and how it was unfair to pay more for an appeal of a Planning Commission decision than for an appeal of a Historic Review Board decision. There had only been one time the City Attorney fees had been charged since 2004, which set up a fairness issue of applying the fee to some parties and waiving it for others. It was not fair for appellants to pay the fees when they had not been justified with facts. The fees were set by resolution instead of by ordinance, providing inadequate notice to the public and City Commission as to the fees being set, justification, and their implication. An open-ended City Attorney fee provision subjected citizens to the hypothetical possibility of retribution for pursuing their right to free speech or their right to address grievances against the City in Circuit Court or LUBA. He then discussed the arguments under ORS 227.181c. He thought the City's Code conflicted with the State Statute, and therefore was invalid as the City approved increases through resolution instead of ordinance.

Michael Robinson, attorney representing the applicant, gave arguments in opposition to the fee waiver. The City Commission had to decide if it was fair to grant a fee waiver for this application. This application went through five Planning Commission meetings and the record included thousands of pages. Staff had expended an enormous amount of time as well as the applicant and its supporters. The fees did not capture all of the costs, but did require the appellant to repay the base fee plus the actual City Attorney's fees. He thought waiving the fee would be unfair when there was this much process and demand on staff time. There was no reason to call this decision up for review. The City had the statutory authority to do what it had done. Fees like this were charged by every jurisdiction and there were no LUBA, state, or federal cases where these fees were found to be statutorily impermissible. It was not unconstitutional to impose fees. He discussed a court case, *Bell v. City of Hood River*, and how it was not on point with the appellant's argument. The history of the fee was irrelevant as he saw it as a collateral attack on what past City Commissions had done and it did not have any bearing on the specific facts that the Commission was being asked to decide on tonight. He did not think the Commission was doing anything unlawful. The legislature had said the City could charge actual or average fees. He did not think the argument of approving fees by resolution as opposed to ordinance would have merit in a LUBA or court case. He discussed how the City of Bandon case raised by the appellant was not on point. He asked the Commission to reject the appeal fee waiver request.

Mayor Holladay asked how much the delay had cost the applicant.

Dan Fowler, applicant, said if the delay caused the hotel not to be built it could cost millions. He and his partners had put in close to a million dollars in this project so far.

There was discussion regarding the difference between a resolution and a regulation

and how the appeal did not meet the reasons for a waiver as outlined by staff.

William Gifford, resident of Oregon City, asked that the Commission consider the lack of support for this unclear idea.

Paul Edgar, resident of Oregon City, thought the issue was about public participation and making fees so unreasonable that they shut off public involvement.

Mr. Nicita gave rebuttal. He discussed the constitutional issues Mr. Robinson raised. There were three appeals from 2004 to 2007 where the base fee was charged, but the City Attorney fees were not charged. He thought charging the fees to some parties and not to others without any explanation for the differential treatment was getting into some federal constitutional issues, such as the fairness standard, due process, and equal protection clause, and the privileges and immunities clause of the Oregon constitution.

Mayor Holladay closed the public hearing.

Ms. Richter said in regard to the three appeals where no City Attorney fees were charged, at that time the Attorney fees were not part of the fee resolution.

Mayor Holladay asked if there had been a time when appellants were charged the base fee and City Attorney fees. Ms. Terway said yes, the last appeal that had been submitted this year paid both those fees.

Commissioner Shaw thought it was fair to charge the fees, especially with how much time and resources had gone into the process.

Commissioner Mengelberg said the fee schedules and conditions had been in place for a long time, and everyone knew the rules. Citizens could come to meetings and voice their opinions for free. The cost for evaluation of the information and legal review needed to be paid for, and she thought they did not need to waive the fee.

Commissioner O'Donnell did not think the requirement of a fee denied a person justice as was described in Bell v. City of Hood River. He thought the fee should be applied.

Commissioner Ide said the City had the authority to charge the fees and as a home rule city had the right to establish the fees by resolution. She thought they should deny the waiver of the fees.

Mayor Holladay said there had been a lot of public process on this application. He asked if the appellant had gone to the McLoughlin Neighborhood Association for support of the appeal fee waiver.

Mayor Holladay reopened the public hearing to get an answer to his question.

Mr. Robinson said there were three neighborhood associations that had standing before the Planning Commission. One supported the application, and the other two did not. One neighborhood association never took up the issue of a fee waiver. The McLoughlin Neighborhood Association without a general membership vote granted a fee waiver, and then in a general membership meeting voted to rescind the fee waiver. None of the neighborhood associations appealed the decision and none of them had the ability to ask for a fee waiver.

Mr. Fowler said when there was a specific request for support of a fee waiver, the McLoughlin Neighborhood Association voted it down 32-3.

Mr. Nicita clarified the sequence was as follows: the McLoughlin Neighborhood Association steering committee first voted to appeal the application and request a fee waiver. The City's ordinance allowed a steering committee and a general membership to vote to appeal and request a fee waiver. The steering committee decided to take the decision to the general membership meeting. During that meeting there was a motion to rescind the steering committee's vote. The first vote on it was a tie, and a second vote was taken which also resulted in a tie. On a third vote, the motion to rescind the steering committee's decision failed. Thereafter Mr. Fowler and other members of the McLoughlin Neighborhood Association requested the chair hold a special meeting. At that special meeting, the general membership voted to rescind the decision of the steering committee.

Mr. Fowler stated he never requested a special meeting. That was done by members of the steering committee who thought the process was not fair to the applicant because they did not have notice of that meeting. The motions never included a fee waiver request; it was about the appeal only. The only time the fee waiver request was brought up was at the last meeting where it was voted down.

Mayor Holladay closed the public hearing.

Mayor Holladay reviewed the list of reasons to waive the fee that was provided by staff. There was consensus that the City Commission did not wish to call up the decision for review, did not wish to give a full or partial waiver of the appeal fees, did not believe the City lacked statutory authority to impose the fee, and did not think imposing the fee was unconstitutional.

A motion was made by Commissioner Shaw, seconded by Commissioner Mengelberg, to tentatively deny the fee waiver request for AP 17-0006 and to continue the item to March 7, 2018 for the adoption of findings. The motion carried by the following vote:

Aye: 5 - Commissioner Brian Shaw, Mayor Dan Holladay, Commissioner Nancy Ide, Commissioner Renate Mengelberg and Commissioner Frank O'Donnell

Mayor Holladay opened the public hearing.

Ms. Terway explained the process for the appeal of the Conditional Use, Detailed Development Plan, and Natural Resource Overlay District for a development near 17th and Washington Streets.

Ms. Richter read the hearing statement. No new evidence could be submitted and the evidence for the fee waiver could not be considered for this appeal. The only ones who could participate in the hearing were those who participated before the Planning Commission. She asked if any Commissioner had ex parte contacts, conflicts of interest, bias, or any other statements to declare.

Commissioner Ide participated in a Clackamas Heritage Partners meeting where a letter of support for the hotel was discussed. She did not participate in that decision and left the meeting early.

Commissioner Shaw attended the McLoughlin Neighborhood Association meetings as a spectator and was not involved when this application was brought before the Association.

Mayor Holladay, Commissioners Shaw, Ide, and O'Donnell had visited the site.

Ms. Richter said the Planning Commission record and all other materials had been placed before the City Commission and were part of the record. Given the results of the fee waiver denial, she asked the appellant if he wished to proceed with the appeal.

Jim Nicita, appellant, said he would not be withdrawing the appeal.

Ms. Terway provided the staff report. She gave a general overview of the project, which was development of a five-story hotel with approximately 99 rooms and associated frontage improvements. She reviewed the site plan, elevations of the proposed building, and appeal issues. The appeal issues were as follows: failure to comply with the neighborhood association meeting requirement, failure to utilize materials and a design that matched the Hackett House, failure to require a variance rather than an adjustment, failure to comply with the End of the Oregon Trail design guidelines, failure to obtain a variance rather than a modification, failure to comply with stormwater management and applicable state water quality standards, failure to give notice to the applicable tribal representatives, failure to utilize a watershed scale assessment and there was no Goal 5 analysis of storm water impacts to Clackamette Cove, and failure of the Planning Commission to consider the request for reconsideration. She then discussed the appeal process.

Mr. Nicita discussed the 1990 End of the Oregon Trail Master Plan, which he thought was a legally binding planning document. The City Commission of that time adopted a Tourist Commercial Code, Comprehensive Plan policies, and Urban Renewal Plan to implement this Master Plan. However they only accepted the Master Plan, rather than adopted the Master Plan. The City also expended large sums of money to purchase land for the Master Plan. He thought they had effectively adopted the Master Plan. They did not adopt the End of the Oregon Trail Design Guidelines that were published in 1991. Later on the Downtown Community Plan adopted the Design Guidelines by reference. He discussed a case, Gonzalez v. Lane County, that was an example of a law of incorporation by reference. He thought both the Downtown Community Plan and End of the Oregon Trail Design Guidelines applied. The Comprehensive Plan controlled the code and he thought the Design Guidelines would control any of the ordinances in the Development Code. The Design Guidelines had a height limitation of 2.5 stories and new development was to be complimentary with a wood exterior that would evoke the era of the Oregon Trail. He did not think this application met those Design Guidelines. OCMC 17.62.050A3a required the hotel to utilize similar materials and design that incorporated the architecture of the adjacent Hackett House as well as the surrounding district. The Hackett House had a wood exterior. He did not think the hotel could exceed the height limitation with an adjustment or variance because the Design Guidelines controlled anything in the code. When the applicant's representative went to the Two Rivers Neighborhood Association meeting, he met with one person. The code said they had to meet with an association, and one person did not meet that standard. They were required to give a pre-certified mailed letter to the chair of the CIC and that was not done. Another issue was bicycle connectivity. Under OCMC 12.04.195, block spacing standards, there was supposed to be a bicycle access lane at 550 feet or more. The applicant did not measure the block to comply with the code, and no bicycle access lane had been provided. Regarding the letter from the tribes, the submission from staff had email addresses that could not identify who the emails were being sent to. It did not constitute evidence that the appropriate cultural officials were contacted.

Mayor Holladay said the time was now 10:00 PM and asked if the Commission wanted to proceed with the meeting.

A motion was made by Commissioner Mengelberg, seconded by Commissioner Ide, to proceed with the hearing. The motion carried by the following vote:

Aye: 5 - Commissioner Brian Shaw, Mayor Dan Holladay, Commissioner Nancy Ide, Commissioner Renate Mengelberg and Commissioner Frank O'Donnell

Dan Fowler, applicant, said he had been working on this project for almost two years. During that time, he attended numerous staff meetings, two Historic Review Board meetings, three McLoughlin Neighborhood Association meetings, Two Rivers Neighborhood Association meeting, and five Planning Commission meetings. The application had received unanimous approval.

Michael Robinson, attorney representing the applicant, was in agreement with the staff report and Planning Commission decision that the applicant met the burden of proof by substantial evidence that the relevant approval criteria were satisfied. This site was not within a historic district and was properly zoned for this use. The Historic Review Board and Clackamas Heritage Partners were in support of the application. This was the right use in the right location at the right time. The End of the Oregon Trail Master Plan was not a planning document. Mr. Nicita cited OCMC 17.62.050A3a, stating the architectural style of the hotel had to match the Hackett House. He thought this standard did not apply as the site was not within a historic district. Also the code provision only said it had to match the architecture, not architectural style. He did not think the Planning Commission erred by not granting Mr. Nicita's reconsideration. That issue was not in the record, and the request was made after the decision and record was closed. Regarding the allegation that the City did not follow notice to the tribes, the Code required that notice be given to five designated tribes and they had 45 days to respond. The City gave email notice to each of the five tribes as five individual emails and only one responded. Regarding the letter to the CIC, the Code did not impose a jurisdictional defect on the letter as it did not have to be sent via certified mail. Three neighborhood associations participated in the process. The Code also did not mandate how many people had to attend a neighborhood meeting to make it a meeting. The End of the Oregon Trail Design Guidelines were a draft, and did not function properly if they followed its intent. The Guidelines and the Master Plan had never been adopted; they were drafts. He explained two cases raised by Mr. Nicita, *Baker v. City of Milwaukie* and *Gonzalez v. Lane County*, that had been incorrectly used as examples. He thought the Planning Commission did its job and the application met the criteria. He requested the Commission reject the appeal and approve the application.

Jerry Herrmann, resident of Gladstone, passed out a memo and gave reasons why he thought the proposed hotel should go forward, especially as it could become a hub for the redevelopment of the north end district.

Ms. Richter said the first three bullet points and the two images of Mr. Herrmann's memo were in the record, but the last two bullet points were not and could not be considered.

Paul Edgar, resident of Oregon City, testified about the lack of historic design of the hotel and how it detracted from the area.

Mr. Nicita gave rebuttal. He did not think Mr. Robinson presented accurately the information regarding the notification to the tribes. Only one email was sent to five different email addresses and it was unclear in those email addresses who the emails

were sent to and if they were the correct representatives. Regarding the height and the rationale to preserve a view corridor, this was a two phase project and when the second phase that was a mixed use condo retail development came in, it would block that view corridor. He disagreed with Mr. Robinson's interpretation of OCMC 17.62.050A3a. He thought Mr. Robinson had suggested the site had to be in the McLoughlin District, Canemah District, and Downtown District simultaneously and that was not possible.

Mayor Holladay said a past Commission could not bind a future Commission and without adopted plans, something that had happened over 20 years ago was not relevant to the Commission today. Master plans were about visions for an area, but they were not cast in stone.

Mr. Robinson gave final rebuttal. If the Commission closed the hearing and record tonight, the applicant would waive his right to final written argument. Mr. Nicita was right that individual emails were not sent out. It was one email sent to five different email addresses. One of the tribes responded and he thought it went to the right people. There was a memo from staff stating this was how staff sent notice to the tribes and he did not think there was an issue. Regarding the height adjustment to preserve the view corridor, Phase 2 was not going to interfere with the view. Regarding the architectural style, the Code did not include the word style and he thought OCMC 17.62.050A3a required that the site had to be in one of the three districts and it had to be adjacent to a historic structure. This site was not in any of the three districts. If the End of the Oregon Trail Design Guidelines had been adopted, there would have been evidence to show that, but it was not in the record. Incorporating them by reference did not make them mandatory approval criteria. He asked that the appeal be rejected.

Mayor Holladay closed the public hearing.

Commissioner O'Donnell summarized the issues. The Design Guidelines and Master Plan were never adopted. Alternative communications with the neighborhood groups were allowed. He thought the Planning Commission had not erred in their decision. He thought the decision was justifiable and without prejudice.

Commissioner Shaw agreed. The hotel had to hit a certain price point for the rooms, and in order to get a hotel that was financially stable and would be successful, the applicant had done the best design that he could.

Commissioner Mengelberg said the development was not in a historic district and the Code provision did not apply. Communities and architectural styles evolved over time. She thought it was a beautiful design and supported the application.

Commissioner Ide thought it was the Commission's job to ensure the Planning Commission complied with all of the City codes and other applicable regulations and she thought the Planning Commission had complied. She supported the denial of the appeal.

Mayor Holladay stated he thought this was a mission to kill a project.

Mr. Nicita challenged the Mayor for personal bias on that statement.

Mayor Holladay said the Planning Commission and Historic Review Board both reviewed the project and approved it. He strongly supported the Planning Commission's decision and did not find the appellant's arguments persuasive.

Ms. Richter asked in regard to the bias challenge, was Mayor Holladay going to vote based on the applicable approval criteria and the appeal issues as they related to the applicable approval criteria. Mayor Holladay said yes, he was.

A motion was made by Commissioner Shaw, seconded by Commissioner Ide, to tentatively deny AP 17-0006 and approve Planning Files CP 17-0002, DP 17-0003, and NR 17-0004 to be brought back on March 7 for the adoption of the findings with the record closed. The motion carried by the following vote:

Aye: 5 - Commissioner Brian Shaw, Mayor Dan Holladay, Commissioner Nancy Ide, Commissioner Renate Mengelberg and Commissioner Frank O'Donnell

7. General Business

7a. Resolution No. 18-04, Willamette Falls Riverwalk Master Plan Adoption

Phil Lewis, Community Services Director, and Alex Gilbertson, Metro Planner, presented the Riverwalk Master Plan.

Ms. Gilbertson reviewed the project background, details about the site, concept planning, community engagement, themes from the public input, recommended Riverwalk concept design, and draft Riverwalk Master Plan.

Mr. Lewis discussed and showed images of the Woolen Mill Overlook, Public Yard and Woolen Mill Alcove, Clarifier landscape and PGE Dam Promenade, and the Willamette Falls Overlook.

Ms. Gilbertson explained the cultural and historic interpretation of the site, phasing of the Riverwalk, Rediscover the Falls organization, funding of \$19 million and counting, and next steps. Staff recommended adoption of the resolution.

Those who spoke in favor of the Master Plan were as follows: Alice Norris, president of Rediscover the Falls; Martha Schrader, Clackamas County Commissioner; MG Devereux, Deputy Director for Oregon Parks and Recreation; and Jonathan Stone, Executive Director of the Downtown Oregon City Association.

There was Commission discussion on the years this project had been in process and how it would restore a national treasure.

A motion was made by Commissioner Shaw, seconded by Commissioner Mengelberg, to approve Resolution No. 18-04, Willamette Falls Riverwalk Master Plan adoption. The motion passed by the following vote:

Aye: 5 - Commissioner Brian Shaw, Mayor Dan Holladay, Commissioner Nancy Ide, Commissioner Renate Mengelberg and Commissioner Frank O'Donnell

8. Consent Agenda

A motion was made by Commissioner Mengelberg, seconded by Commissioner Ide, to approve the consent agenda. The motion carried by the following vote:

Aye: 5 - Commissioner Brian Shaw, Mayor Dan Holladay, Commissioner Nancy Ide, Commissioner Renate Mengelberg and Commissioner Frank O'Donnell

8a. Resolution No. 18-03, Public Waterline Easement Vacation at 358

Warner Milne Road

- 8b. Contract for Technical Advisor Consulting Services for the Police and Municipal Court Facility
- 8c. Personal Services Agreement with Wallis Engineering for 2018 Waterline System Improvements Project
- 8d. OLCC: Liquor License Application- On-Premises Sales, Applying as a Limited Liability Company, Ruby's Pub & Grill, 515 Main Street
- 8e. Minutes of the December 20, 2017 Regular Meeting
- 8f. Minutes of the January 3, 2018 Regular Meeting

9. Communications

a. City Manager

Mr. Konkol announced ODOT would be starting the rock fall improvement project on 99E and traffic delays would be expected.

b. Commission

There were no Commission communications.

c. Mayor

There were no Mayor communications.

10. Adjournment

Mayor Holladay adjourned the meeting at 10:49 PM.

Respectfully submitted,

Kattie Riggs

Kattie Riggs, City Recorder