



CITY OF

# PORTLAND, OREGON

## OFFICIAL MINUTES

A REGULAR MEETING OF THE COUNCIL OF THE CITY OF PORTLAND, OREGON WAS HELD THIS 30TH DAY OF JANUARY, 1991 AT 9:30 A.M.

THOSE PRESENT WERE: Mayor Clark, Presiding; Commissioners Blumenauer, Bogle and Kafoury, 4.

OFFICERS IN ATTENDANCE: Cay Kershner, Clerk of the Council; Kathryn Imperati, Senior Deputy City Attorney; and Officer Sheridan Grippen, Sergeant at Arms.

On a Y-4 roll call, the Consent Agenda was adopted as follows:

### CONSENT AGENDA - NO DISCUSSION

- 143 Cash and investment balances for December 20, 1990 through January 16, 1991 (Report; Treasurer)

**Disposition:** Adopted.

- 144 Accept bid of H & A Construction for Rivergate vehicle storage for \$479,703 (Purchasing Report - Bid 41)

**Disposition:** Adopted; prepare contract.

- 145 Accept bid of Harris Uniforms for furnishing police uniforms for \$103,195 (Purchasing Report - Bid 73-A)

**Disposition:** Adopted; prepare contract.

- 146 Reject all bids for janitorial services at Kelly Butte (Purchasing Report - Bid 77-A)

**Disposition:** Adopted.

- 147 Accept bid of Oregon Electric Construction, Inc., for Sullivan pump station revisions and modifications for \$1,520,903 (Purchasing Report - Bid 81)

**Disposition:** Adopted; prepare contract.

- 148 Vacate SW Gaines Street from SW 14th Avenue to SW 13th Avenue, under certain conditions (Ordinance by Order of Council; C-9737)

**Disposition:** Passed to second reading.

**JANUARY 30, 1991**

- \*149** Authorize the Director of the Bureau of Planning to sign the Regional Permit for the Columbia South Shore Area (Ordinance introduced by Mayor Clark and Commissioner Kafoury)

**Disposition:** Ordinance No. 163819. (Y-4)

**Mayor J. E. Bud Clark**

- 150** Set hearing date, 9:30 am, Wednesday, March 6, 1991, to vacate a certain portion of NW 27, 1/2 street south of NW Nicolai Street (Report; Petition; C-9586)

**Disposition:** Adopted.

- 151** Support the Regional Strategy Tourism Program as proposed by the Oregon Tourism Alliance (Resolution)

**Disposition:** Resolution No. 34806. (Y-4)

- 152** Authorize assignment from Portland Development Commission of PDC's responsibilities for Pioneer Place parking garage property (Ordinance)

**Disposition:** Passed to second reading.

- 153** Authorize acceptance of Bargain and Sale Deed for Pioneer Place parking garage property (Ordinance)

**Disposition:** Passed to second reading.

**Commissioner Earl Blumenauer**

- \*154** Call for bids for the SW Kingston Avenue, SW Parkside Drive to SW Fairview Blvd., sewer reconstruction project (Ordinance)

**Disposition:** Ordinance No. 163820. (Y-4)

- \*155** Accept a deed for the N Columbia Boulevard frontage road project, granted by State of Oregon by and through its Department of Transportation, Highway Division (Ordinance)

**Disposition:** Ordinance No. 163821. (Y-4)

- \*156** Accept a sewer easement for the Fanno Creek pressure sewer project, granted by Daniel J. Durkin and Marilyn A. Durkin (Ordinance)

**Disposition:** Ordinance No. 163822. (Y-4)

- \*157** Authorize City Engineer to delegate responsibility for establishment of sewer discharge and pretreatment standards to Director of Environmental Services (Ordinance)

**Disposition:** Ordinance No. 163823. (Y-4)

Commissioner Mike Lindberg

- 158 Accept renovation of Overlook House Community Center as complete and pay 2KG Contractors \$5,283 (Report)

**Disposition:** Adopted.

- \*159 Authorize an agreement between the Bureau of Parks and Recreation and Richard Fowler Architects, AIA, for \$18,800 to provide design and consulting services for renovations and improvements to four community centers (Ordinance)

**Disposition:** Ordinance No. 163824. (Y-4)

- \*160 Transfer by agreement assets from Hazelwood Water District to the City of Portland (Ordinance)

**Disposition:** Ordinance No. 163825. (Y-4)

- \*161 Call for bids to construct a pedestrian bridge at Crystal Springs Rhododendron Garden, authorize a contract and provide for payment (Ordinance)

**Disposition:** Ordinance No. 163826. (Y-4)

- \*162 Authorize agreement with Luey Architects for \$17,500 to provide design and consulting services for reconstruction of Sckavone Stadium (Ordinance)

**Disposition:** Ordinance No. 163827. (Y-4)

- 139 **TIME CERTAIN: 9:30 AM** - Amend the Downtown Parking and Circulation Policy to allow the addition of up to 1,370 spaces of new parking over the specified maximum inventory in association with air quality offsets as approved by the Department of Environmental Quality (Ordinance introduced by Commissioner Blumenauer)

**Discussion:** Commissioner Blumenauer said the City is caught not having enough parking where people want it, yet being faced with too many cars and increasing concerns about clean air. Throughout the region, Portland is losing its battle with the automobile. Traffic from 1982 to 1988 increased 44 percent while our population increased only 5 percent. This amendment to the Downtown Parking Plan will add 1,370 parking spaces to downtown, which appears to be the minimum needed to make the Central City plan function over the next ten years. He said they propose to do it in a way that will meet Council's twin objectives of clean air and avoidance of gridlock.

Commissioner Blumenauer said the offset plan, if implemented, will enable Council to approve the additional parking spaces without having any deterioration of air quality. Although the plan does not satisfy everyone, it has the support of the Department of Environmental Quality, Tri-Met, METRO, and the downtown business community.

Elsa Coleman, Parking Manager, said this and the following three items are part of a package of transportation items being brought to Council. The second item establishes a contingency plan as required by the Environmental Protection Agency to assure close monitoring of the offset programs. The final two items launch the City's own offset programs by adding carpool spaces to City garages and adjusting rates.

Ms. Coleman requested passage of three amendments. The first two would amend the report on carpools and rates (Item #141) to correct the number of monthlies from 445 to 275 and to change the carpool rate at the AutoPort from \$67.50 to \$69. The third amendment, recommended by the League of Women Voters, would add wording to the Contingency Plan (item #139) stating that the addition of parking spaces will occur only after offsets are already implemented.

Commissioner Blumenauer moved the adoption of the three amendments. Commissioner Kafoury seconded and the motion carried. (Y-4)

Phil Bogue, Tri-Met Board member, supported the offsets and explained Tri-Met marketing efforts in support of carpools and flex time for downtown workers.

Rick Williams, Vice President, Association for Portland Progress, spoke in support of the plan. He said the private sector plan should be implemented by March 1 and called the addition of downtown parking spaces of vital importance to the continued economic vitality of the Central City.

Lee Lacey, President, Downtown Community Association, supported the plan but requested that the carpool program contain enforcement provisions to prevent abuse. He also asked for a study and report to Council on downtown residential parking needs.

Commissioner Blumenauer said there are certain neighborhoods, such as Northwest and downtown, where there will never be sufficient on-street parking. He said he is not optimistic about establishment of a downtown residential parking permit program in the short term as this could bring business to a halt in the downtown areas. He suggested that Mr. Lacey's group sit down and talk to the Retail Council about their concerns.

Howard Harris, Department of Environmental Quality, read a letter from Director Fred Harris in support of the proposed measures.

Bill Naito, Downtown Business Clean Air Alliance member, suggested that high inversion days be designated as "alert" days when the public would be urged not to use their automobiles. He also urged the City to take a look at its policies concerning monthly parking at the Old Town Garage which is currently operating with a vacancy rate of about 75 percent. He recommended allowing more monthly parking until short term parking picks up in that area. Finally, he called on the City to set an example of flex time by having its downtown employees come to work at 7:30 a.m.

Jeanne Roy, League of Women Voters, asked that changes not be made to the Plan which are not part of a regular update. When the 1985 update was adopted, Council specified there would be another update in 1990 with a citizens advisory committee. The League believes this is the only way to have adequate citizen involvement and that changing the lid without this process has set a dangerous precedent. Second, the League feels strongly that a short-term parking plan is needed, rather than merely responding on an ad hoc basis to developers. Third, the League believes spaces above the inventory should not be allowed for measures such as carpool programs and flex time working hours that are already a part of the state implementation plan. Offsets should be allowed only for new programs, such as the transit subsidy and alternative fuels. Fourth, they want to be sure offsets are implemented before requests are submitted to the DEQ, as their recommended amendment calls for. Finally, the League opposes sections B and C of the contingency plan because this will result in removal of city-controlled spaces primarily for short-term parking at reasonable rate and give commuters priority over shoppers and visitors.

**Disposition:** Passed to second reading as amended.

- 140 Establish a monitoring and contingency plan for air quality offsets for downtown parking (Resolution)

**Disposition:** Resolution No. 34807. (Y-4)

- 141 Transmit report on modifications to the downtown carpool program and monthly rates at First and Jefferson and Front and Davis garages (Report)

**Disposition:** Adopted; prepare contract.

- 142 Amend Chapter 16.20.740, Carpool Permits, of the City Vehicles and Traffic Code to remove a specified carpool permit fee, adjust the limitation to the number of carpool permits which can be sold in any one month and change reference to 6-hour meters to longer-than-4-hour meters (Ordinance; amend Code Chapter 16.20.740)

**Disposition:** Passed to second reading.

#### REGULAR AGENDA

- 163 Reject all bids for construction of Operating Engineers' building (Purchasing Report - Bid 62)

**Disposition:** Adopted.

- 164 Accept bid of the Halton Co. for furnishing one grapple clam backhoe for \$60,490 (Purchasing Report - Bid 68)

**Disposition:** Adopted; prepare contract.

**Mayor J. E. Bud Clark**

- 165** Recommend proposal A-19-89 in the Loma Acres area be forwarded to the Portland Metropolitan Area Local Government Boundary Commission (Report)

**Disposition:** Adopted.

- 166** Authorize filing annexation case A-19-89 in the Loma Acres area with the Portland Metropolitan Area Local Government Boundary Commission (Resolution)

**Disposition:** Resolution No. 34808. (Y-4)

**Commissioner Earl Blumenauer**

- 167** Accept petition and adopt Resolution to improve NE 55th Avenue from NE Halsey Street to NE Wasco Street (Report)

**Disposition:** Adopted.

- 168** Institute proceedings for the improvement of NE 55th Avenue from NE Halsey Street to NE Wasco Street (Resolution)

**Disposition:** Resolution No. 34809. (Y-4)

- \*169** Agreement with Multnomah County and the cities of Gresham, Fairview, Troutdale and Wood Village for cooperative assistance during emergency conditions (Ordinance)

**Discussion:** Commissioner Blumenauer said this is the first time a formal agreement has been reached between governmental entities dealing with emergencies affecting public works emergencies. He said similar agreements will be sought with the Oregon Department of Transportation and with Washington, Clackamas and Clark counties.

Lou Bruneau, Maintenance Bureau, said this allows the City to provide help to its neighbors for up to 12 hours at no cost to the neighboring entity. He said its intent is to avoid bureaucratic paper shuffling and is the first of its kind in the state and one of only a few in existence in the Country. He said the City is also talking about making similar agreements with the Associated General Contractors and other groups in the private sector.

**Disposition:** Ordinance No. 163828. (Y-4)

**Commissioner Mike Lindberg**

- \*170** Agreement with James M. Montgomery Consulting Engineers, Inc., for \$395,000 for engineering services for the Surface Water Treatment Rule compliance improvements and provide for payment (Ordinance)

**Disposition:** Ordinance No. 163829. (Y-4)

- \*171** Authorize an agreement with Economic and Engineering Services, Inc. (EES) not to exceed \$98,500 for professional services to develop a long-term water conservation plan and provide for payment (Ordinance)

**Disposition:** Ordinance No. 163830. (Y-4)

**City Auditor Barbara Clark**

- 172** Assess SE Long, Liebe/58th HCD District street improvement project and LID extension of sanitary sewer in SE Liebe Street (Ordinance; Hearing; C-9688)

**Disposition:** Passed to second reading.

- 173** Assess property for sewer system development charges for the period ending October 31, 1990 (Ordinance; Second Reading Agenda 133)

**Disposition:** Ordinance No. 163831. (Y-4)

At 10:25 a.m., Council recessed.

A RECESSED MEETING OF THE COUNCIL OF THE CITY OF PORTLAND, OREGON WAS HELD THIS 30TH DAY OF JANUARY, 1991 AT 2:00 P.M.

THOSE PRESENT WERE: Mayor Clark, Presiding; Commissioners Blumenauer, Bogle and Kafoury, 4.

OFFICERS IN ATTENDANCE: Cay Kershner, Clerk of the Council; Pete Kasting, Chief Deputy City Attorney; and Officer Sheridan Grippen, Sergeant at Arms.

Mayor Clark welcomed a group of ESL students from Madison High School.

- 175 Tentatively deny appeal of Sylvan/Highlands Neighborhood Association and approve, with condition, application of Pacific Western Development Corp. for a 16-unit PUD in an R10 zone located at SW Arboretum Circle, off W Burnside (Findings; Previous Agenda 57)

**Discussion:** Cay Kershner, Clerk of the Council, said Planning Bureau staff had requested a one-week continuation.

The Mayor so ordered.

**Disposition:** Continued to February 6, 1991 at 2 p.m.

**Commissioner Dick Bogle**

- 176 Liquor license application for Cydne, Inc., dba Fabulous Flowers, 1811 SW Riverdrive, Suite 200, package store liquor license, new outlet; Favorable recommendation (Report)

**Disposition:** Favorably recommended. (Y-4).

- 174 **TIME CERTAIN: 2:00 PM** - Appeal of Franklin G. Drake & Preston Hiefield, Trustees, against decision of the Planning Commission to overrule the Planning Director's interpretation of the zoning code which would limit the number of dwelling units at 2447 NW Westover (Hearing; INT 8-90)

**Discussion:** Doug Warren, Planning staff, said the basic issue is whether this property, a 2.04 acre parcel, can be used to develop 150 units or, based on its size, whether it is limited to the 80 to 120 units that are allowed in the base zone. He reviewed the history of this case, which grows out of a condominium project approved in 1977 for three lots, all owned by Mr. Drake. At that time, variances for the height of the proposed building were granted for a project of approximately 240 units. Seventy units were then built on one of the parcels and that property sold to the condominium owners. Subsequently, the Drakes deeded Tax Lot 60 to the condominium homeowners association but retained an easement agreement on it, reserving the lot as open space, for Tax Lot 59. Now they seek to develop Tax Lot 59 to the original density (150 units) based on the easement agreement for open space on Tax Lot 60, which would give them four acres of density instead of two.



The Planning Director then issued an interpretation stating that the easement functioned in a way tantamount to ownership. The Planning Commission upheld this interpretation but asked the City Attorney to review the validity of the easement documents. Senior Deputy City Attorney Kathryn Imperati issued her opinion that the validity of the easement was secondary because the interpretation of ownership as defined in the Code was invalid. The Planning Commission then reversed itself and adopted the rationale presented to them by the City Attorney. The applicant/appellant, after the Planning Commission reversal, appealed the issue on two points: 1) that procedural inadequacies resulted from the City Attorney advising the Planning Commission in an executive session; and 2) that the Planning Commission misconstrued the definitions of ownership.

Stephen Janik, Attorney for appellant, said the actions taken by the Council and the Variance Committee in 1977 when the property owner received approval to build 220 units are still valid. He noted that the Northwest District Association and his client had reached an agreement at that time over such issues as building height and the configuration of the density and the units. In addition, approvals were given for special setback and spacing requirements and the designation of hillside land as open space. The entire variance was conditioned on the project being in conformance with these plans, which were brought to Council for final approval.

In 1986, Mr. Janik said, to fulfill the commitment for open space, the Drakes deeded Tax Lot 60 to the condominium homeowners association with a restrictive covenant stating that the land could never be developed and retaining the Drakes' right to possess that open space. In 1987, when a question arose about the validity of the variance, the City Attorney issued an opinion, after the land had been deeded away, that the variance was valid as long as construction took place in conformance with the plans on which it had been based. Mr. Janik said both the Planning Director and the City Attorney concurred with the belief that the two acres in Drake ownership plus the rights to the other two acres was the same as ownership. It was not until the Planning Commission's second hearing that the City Attorney changed its mind about this.

Mr. Janik noted other rationales for justifying completion of his project. First, he contended that the 1977 variance amounted to conceptual approval of the whole project by the Council. He argued that once approvals for such a phased project, or a Master Plan, are given, they give the developer "vested rights" to continue to build it according to the original approvals. He compared this project to a Planned Unit Development where open space is designated and then given to the homeowners association. However, he noted, in calculating density, the City does not reduce it by the amount of land dedicated to open space and asked why the density should be reduced by 70 units on the Drake project, simply because the open space was deeded to the condominium association in the middle of the project rather than at its end. Mr. Janik asked Council to allow this project to proceed, stating that it was a wonderful site for housing close to downtown.

David Bennett, Attorney representing the Homeowners Association, said the procedural problems raised earlier by Mr. Janik in his written appeal had been resolved by this proceeding before Council. He said Mr. Janik glossed over the Code definitions of lot and ownership, and disputed his contentions that

restrictive covenants were tantamount to ownership. He said he had never seen a case where someone had retained some rights and then declared that this amounted to ownership.

Mr. Bennett said his clients believe the conveyance of Parcel 2 in 1986 was an invalid covenant because density rights cannot be transferred by deed restriction. He contended that the association could, by a 75 percent vote, declare this property not to be open space and vote to do something else with it, i.e. transfer the density rights to another property. Mr. Bennett said density is a very important property right and the City should not be in the business of deciding that density rights can be transferred from one property to another. He said Mr. Drake had no obligation to convey the property but, once he did, he cannot retain the right to use it. He also disputed Mr. Janik's assertions that this project resembled a PUD where lots are individually platted and there is an obligation to convey the common area.

Mr. Bennett said he did not believe the variances granted 14 years ago still pertain, noting that since that time a restrictive time clause has been added. He said it was bad law to allow this transfer of density rights and if Council wanted to change the Code definition of property ownership they should do so legislatively by ordinance, not make changes on an ad hoc basis in order to achieve their inner-city housing goals. He said his clients believe the City Attorney was correct with respect to the ownership issue and that this project should not proceed as originally planned.

Randy Weisberg, Vice-President, Hillside Neighborhood Association, said the interpretation of ownership proposed by the developer expands the definition of ownership to include someone who asserts rights on an adjacent parcel. For example, under appellants' definition of ownership, one property owner, "Al", could propose to build twice the units on his property normally allowed because he claims to have a covenant from the adjacent property owner, "Betty", giving him the right to prevent development on her lot. He asked Council not to grant this appeal prior to a judicial finding as to the validity of the covenant and the right of Mr. Drake to claim density rights.

Mr. Weisberg said this transfer of density rights was not within the meaning of the current Code definition of ownership and that Council would be opening up a whole Pandora's box of shennanagins if it approved this. He said the involuntary transfer of density rights should not be corrected by broadening the meaning of ownership. He said the Planning Commission rightfully decided the original Planning Director's interpretation set a bad precedent and recommended that Council amend the Code if a change in meaning was desired.

Marjorie Newhouse, Land Use Committee Chair for the Northwest District Association, said their concern with this project is transportation. She said a lot of things have changed since approval was granted in 1977 and both traffic levels and pedestrian access need to be addressed.

Commissioner Blumenauer asked Ms. Newhouse about NWDA's approval of the project in 1977.

Ms. Newhouse said NWDA's concern is not with the variances but with mitigation for traffic impacts.

Gail Parker, President, Hillside Neighborhood Association, asked Commissioner Kafoury to commit to the integrity of neighborhoods, especially with regard to transportation. She said the new development has no pedestrian access and the neighborhood is already under serious assault from commuter traffic. She said the heart of the matter is that the Office of Transportation did not review a project that will seriously add to traffic snarl.

Donna Rieke, 320 NW Maywood, said traffic congestion in the area is already impossible and that this project, and the proposed reconfiguration of NW Westover, guaranty gridlock.

Harry Jordan, 727 NW Westover Terrace and Stan McCleary, 231 NW Seblar Drive, also spoke in opposition to Mr. Drake's appeal. They supported the Planning Commission's decision regarding the definition of ownership.

Commissioner Kafoury asked if transportation issues were relevant to this appeal.

Pete Kasting, Chief Deputy City Attorney, said they are not an issue before Council now and that the only issue before Council is interpreting the meaning of the 1977 variance and determining what rights were granted as part of that variance.

Commissioner Kafoury asked what option people had regarding traffic issues.

Mr. Kasting said he did not believe this project involved a transportation improvement in itself.

Mr. Warren said transportation improvements could be required at the time a building permit was issued. He said no more public reviews are required unless some land use review is requested. The only issue today is the Code interpretation.

Mr. Janik, in rebuttal, said he is not waiving the procedural issues, merely addressing some of the bigger issues today. He contended that Mr. Weisberg distorted his arguments by implying that if Council decided in favor of his client a whole system would be set up where unrelated parties can start transferring density rights. He said this is a disturbing argument as applied to this case because Tax Lot 60 is a common area and has no development rights. That land is shown in the 1977 variance as open space and nobody can develop it. Finally, he asked Council not to focus on the City Attorney's opinion regarding ownership but to consider the validity of the 1977 variance and the analogy with a PUD.

Mayor Clark asked if the property across the street was a part of the project.

Mr. Janik said no, it was separated out from the very beginning.

Mr. Bennett, in his rebuttal, said when the original variance was granted the owner owned all the property but this is not the case now. The owner was not bound to convey Tax Lot 69 but chose to do so. Once having done so, however, the burdens and benefits no longer belong to him and he has no right to retain the density rights. He said the developer had to convey the property free and clear of all encumbrances but, because they tried to reserve some things they had no right to reserve, they are now arguing that they have the density rights. Even assuming the covenant is valid and the lot cannot be built on, his clients control of the property, not Mr. Drake, and have the right to use the property for their own purposes. He asserted that Council does not have the power under the current Code to transfer the density rights. Whether or not the variance is valid, ownership is the issue. Mr. Bennett said he considers transfer of the density rights from the condominium owners tantamount to inverse condemnation.

Commissioner Blumenauer asked Mr. Janik what he thought was conveyed by the covenant to the homeowners association if they do not control it.

Mr. Janik said the property was shown as open space from the outset. Under the agreements, the developer had seven years to add the land to the common areas owned and controlled by the homeowners association. The property was not deeded at the beginning of the project because of the existence of a building on the lot that at one point was to be converted into a recreational facility. This was later torn down because the condominium owners thought it was a nuisance. Once the building was gone, it became clear that they were morally and legally obligated to designate this as open space. That is why, when they deeded the property for free, they retained rights to ensure that it never would be developed.

Commissioner Blumenauer said he appreciated the review but still wanted to know what bundle of rights had been conveyed.

Mr. Janik said it could not be developed so it had no density. The homeowners were given legal title and the right to jointly possess it with Mr. Drake and to use it for the limited purposes of hiking, walking and landscaping. Under no circumstances could it be developed.

Commissioner Blumenauer then asked Mr. Bennett what he thought was conveyed.

Mr. Bennett said everything that is not reserved would be conveyed and density was not among the things that were reserved. He said he believes the conveyance was invalid.

Commissioner Kafoury and Commissioner Blumenauer asked Mr. Kasting and Ms. Imperati to comment on this case.

Mr. Kasting said the deed conveys the property subject to two exceptions: 1) a restrictive covenant on use of the land; and 2) a tree cutting easement. He said there is a conflict between what is in the deed and what the developer may have been obligated to convey in some separate agreement. However, this is a separate issue, involving questions as to whether there are remedies between the

private parties. As far as the deed records are concerned, the property was transferred subject to restrictions.

Commissioner Blumenauer asked what happened to the development rights.

Mr. Kasting said when Mr. Janik approached the City in 1990 for clarification of the 1977 variances, he put forth three arguments to support the conclusion that the owner of Parcel 1 has the right to develop 150 housing units. Those three theories were: 1) the 1977 variances amounted to Master Plan approval; 2) the 220 unit project was approved as a phased project; 3) by virtue of the restricted covenant, Mr. Drake was, for density purposes, still the owner of Parcels 1 and 2 so that both parcels could be counted together in determining the allowable density. He said Ms. Imperati reviewed these three arguments and found the third approach, interpreting the Code so that the term ownership would encompass both Parcels 1 and 2, was the "most attractive" and potentially the most workable of the three theories. Based on that advice, the Planning Director then based his interpretation in accordance with Mr. Janik's third theory. When this was appealed to the Planning Commission, it asked the City Attorney for another review. At that time Ms. Imperati concluded that LUBA would probably not uphold an interpretation of the Code that construed the term ownership to include both parcels as being under the same ownership. She then advised the Planning Commission that she felt their original decision would not be upheld on appeal.

Today, Mr. Kasting said, the bulk of Mr. Janik's testimony has not been on this issue. The argument he is stressing today is that the 1977 variance specifically authorized construction of two buildings, with a total of 150 units on Parcel 1, if all features of the site plan were complied with. One of the features of the original site plan is that Parcel 2 remain undeveloped. He said, under a strict interpretation, the 1977 variance speaks only to the height of two buildings, allowing one 11-story and one 14-story building. Under a broad interpretation, approval of the two buildings would include the right to put 150 units within them. Mr. Janik's argument is that the two towers implicitly convey the right to construct 150 units as long as all features of the site plan are adhered to. The issue is whether Council wants to accept that contention.

Commissioner Blumenauer said since 1977 when Council blessed the plan, there has been a reallocation of ownership rights. It is not unreasonable to aggregate the development on the parcel. However, he said he is troubled by the unclear ownership of density rights and the argument that somebody other than the property owner now has rights to the density. He noted that when the property was conveyed to the homeowners, the density rights were not referenced.

Mr. Kasting said it was a problem of whether the City has adequate assurance that those two towers will be built in accordance with the original 1977 site plan. If so, that would assure the developer that, if the rest of the site plan was carried out, Parcel 2 could be included in calculating the density.

Commissioner Blumenauer asked for clarification of the assertion by the homeowners association that the property is theirs and that they have as much right to the density as Mr. Drake.

Mr. Kasting said the property rights are arguably split between different owners and the question is which people own which property rights.

Commissioner Blumenauer asked if the homeowners association could sell it back to Mr. Drake or pursue some development of their own.

Mr. Warren said originally, when the Planning Director made his interpretation, he assumed that no further development was possible on the site. Mr. Bennett has now called this assumption into question. Whether or not density was conveyed with the property is a legal issue.

Commissioner Blumenauer said it seemed to him that conveyance of the property gave the new owners the density rights.

Mr. Warren said that was a legal issue adding, however, that the Planning Bureau has done no analysis that would rule out development by the condominium association.

Commissioner Blumenauer said there is a property right that somebody has that is not addressed here.

Mr. Kasting said the underlying assumption as to who has what property rights is being challenged.

Mayor Clark said he thought it was common practice with a Master Plan to start a project and then sell off a piece of the property. He contended that such a sale does not then give you the right to reverse all the decisions that have been made for the Master Plan or PUD.

Mr. Kasting said the difficulty with that argument is that they did not get a Master Plan or PUD approval. If they had, they would have been within an authorized structure clearly defined in the Zoning Code. What they did get was a variance and the question now is, what came with that variance. Commissioner Kafoury asked if it made a difference that they did not sell the property.

Mr. Warren said what normally happens with a PUD is that the original developer divests itself of the project over time and the end result is one common ownership in which all participants in the PUD have a partial interest in addition to owning their own lots. In this case, there are three owners -- Mr. Drake, the condominium association, and the unit owners.

Commissioner Kafoury said it seemed to her that we are punishing the developer for deeding the open space.

Commissioner Bogle asked what error the Planning Director had made in his interpretation. He said he thought the strength of the appellant lay in the Variance Committee approval supported by the subsequent Council vote but now is unsure.

Mr. Kasting said the City Attorney advised that the Planning Director probably

made a losing decision when he interpreted the word owner, as used in the Code, in a way that would make Mr. Drake the owner of Parcels 1 and 2. The question is whether the restrictive covenant that ran to Mr. Drake's benefit was enough of a property right to make him an owner of Parcel 2 within the meaning either of the zoning code or Oregon law. Ms. Imperati concluded that this was not the case.

Commissioner Blumenauer said he was troubled by the closed session with the Planning Commission. He said, while the original deal signed off on by the neighborhood association 14 years ago was not unreasonable, he does not want to make a decision about the ownership issue that sets a precedent that could come back to haunt the City in unintended ways. He said the Planning Bureau and City Attorney may need to do some Code work to clarify these agreements so there is an incentive for people to enter into them in the first place. Based on what he has heard, Commissioner Blumenauer said he will support the decision of the City Attorney.

Mr. Kasting clarified that the City Attorney still believes it would be a losing argument to interpret the word ownership the way Mr. Janik proposes. However, Mr. Janik is also arguing a different theory, that approval for 150 units came with the height clearance.

Commissioner Kafoury said she could not get beyond the notion that by giving up the open space the developer lost the density rights.

Commissioner Bogle moved to tentatively grant the appeal. The motion was seconded.

Commissioner Blumenauer voted no for the reasons stated earlier.

Mayor Clark said he was voting aye because, even though the project might not have officially been a Master Plan, it was presented as one at the time of its approval.

Commissioner Kafoury asked for clarification of the issues.

Mr. Kasting said one of the issues to be addressed is whether there is adequate assurance that the open space will remain open space and how this would affect the City's actions. For instance, does the City need to get the dispute resolved before a building permit is issued.

**Disposition:** Appeal granted tentatively. (Y-3; N-1; Commissioner Blumenauer); Bureau of Planning prepare findings for February 20, 1991 at 2:00 p.m.

At 3:45 p.m., Council adjourned.

BARBARA CLARK  
Auditor of the City of Portland

*Cay Kershner*  
By Cay Kershner  
Clerk of the Council

**JANUARY 31, 1991**

**THURSDAY, 1:30 PM, January 31, 1991**

The City Council will hold a special session to discuss the budget on Thursday, January 31, 1991, from 1:30 to 4:30 pm in Council Chambers, 1220 SW 5th Avenue, Portland, Oregon 97204. The meeting is planned as a work session and no public testimony will be accepted unless otherwise directed by Council.

Beginning Monday, February 4 through Friday, February 22, Council will hold hearings on the FY 1991-92 on Mondays, Tuesdays, Thursdays and Fridays. Regular Council business will be conducted on Wednesdays.

A schedule of budget hearings is available from the Office of Finance and Administration, 1120 SW 5th Avenue, Room 1250; 796-5288.