




CITY OF  
**PORTLAND, OREGON**  
DEPARTMENT OF PUBLIC SAFETY

Charlie Hales, Commissioner  
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Portland, Oregon 97204  
(503) 823 4682  
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**MEMORANDUM**

November 2, 1995

To Mayor Katz  
Commissioner Blumenauer  
Commissioner Kafoury  
Commissioner Lindberg

From Charlie Hales 

Subject HB 3065 and 120 Day Rule

Background

As you may be aware, HB 3065 was one of the efforts to change our land use procedures that prevailed in the last legislative session. Prior to HB 3065, delays to allow additional evidence were excluded from the 120-day deadline for a local decision in a land use case. Now, under current Type III procedures, HB 3065 potentially adds 42 days to the process (21 days per evidentiary hearing). The city cannot be sure it will be able to issue a decision within 120 days if it provides a *de novo* appeal to the City Council, as is the current practice. Note that the 120-day rule does not apply to comprehensive plan amendments.

Recommended Change to Type III Procedure

The proposed response to HB 3065 is to make appeals to Council on the record only, unless the applicant waives the 120 day deadline at the time the application is submitted. Making the decision to waive or retain the 120 day period up front will make the process and ground rules clear for all interested parties in the first notice of the initial hearing. In cases such as Costco, where the applicant's strategy is political or where a new policy direction is requested, the applicant would likely waive the 120 day limit. Appeals to the Council on the record will still give citizens the opportunity to speak directly to the Council, and they will likely continue to speak to a range of issues. However, we will all need to be familiar with the issues raised in the record. Council hearings will be prefaced with a statement that the decision is to be made based on the record and any new information will be disregarded. Our findings will also need to be meticulously supported by the record.

The attached materials describe the proposed changes to the Type III process in detail. Every effort has been made to preserve as much time as possible to prepare for the evidentiary hearing before the Hearings Officer. Preserving this phase of the land use process facilitates better decisions and fewer appeals to Council.

Mayor, Council  
November 2, 1995  
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Next Steps

Sr Deputy City Attorney Mike Holstun prepared a resolution directing the Bureau of Planning to institute this procedure immediately to meet the requirements of HB 3065 and to develop and proposed zoning code amendment to implement the procedure. This will come to Council on November 8, 1995. The code amendment process will not begin in earnest until we have had a few months to see how the proposed Type III changes are working. Any changes to the code will follow the usual path through Planning Commission and the Council.

Planning staff will brief Commissioners' assistants on this resolution at their regular weekly meeting on Monday, November 6.

- c David Knowles, Bureau of Planning  
Mike Holstun, Sr Deputy City Attorney

35461



CITY OF  
**PORTLAND, OREGON**  
BUREAU OF PLANNING

Charlie Hales, Commissioner  
David C Knowles, Director  
1120 S W 5th, Room 1002  
Portland, Oregon 97204-1966  
Telephone (503) 823-7700  
FAX (503) 823-7800

October 30, 1995

RECEIVED  
NOV 01 1995

TO Interested Persons  
FROM David Knowles, Director *David*  
SUBJECT Changing the Process for Appeals to Council

Portland has a strong commitment to citizen involvement, we are also committed to making land use decisions in a timely manner. Balancing these two goals is difficult. Allowing time for neighbors to analyze and respond to development proposals takes time, slowing review increases the costs of development, making Portland a less attractive place to develop, and a less affordable place to live and do business. Speedy reviews can curtail the opportunity for meaningful citizen review of proposals, which can result in greater negative impacts on an area and inappropriate developments.

Our Zoning Code strikes this balance fairly and well. However, recent changes in state law compel us to change some of our procedures and timelines. On November 8, City Council will consider a Resolution that directs the Planning Bureau to do two things. First, we will immediately modify the way in which Type III procedures are handled. This modification is allowed under our Zoning Code, but is not explicitly described. The attached pages explain the modifications. We are trying to both comply with State law while maintaining the best possible balance between public review and speedy decisions.

Second, we will begin the process to amend the Zoning Code. Cary Pinard of the Planning Support Group will be working on the amendments to the Zoning Code. Please call her at 823-7846 with any questions.



CITY OF  
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 BUREAU OF PLANNING

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**PROPOSED CHANGES TO THE TYPE III PROCEDURE**  
 October 30, 1995

Recent changes to state law require the Planning Bureau to change how we review some land use applications. The 120-day rule requires governments to make a final decision on a land use application within 120 days. Before the new law—HB 3065—was passed, we had time for two evidentiary hearings within the 120 days. That is no longer the case. New ways of calculating time limits mean we have to alter the review process to meet the 120-day rule.

Prior to HB 3065, state law required that, at the end of a hearing, we had to hold the record open for seven days if anyone requested it. The 120-day clock stopped for this period. The law did not require additional time for others to respond to the additional information submitted during the seven days, but we have routinely granted these delays, again with the clock stopped.

HB 3065 changed the rules in several ways. First, it requires that we allow up to three seven-day periods at the end of a hearing. The first may be requested by any person, the second seven-day delay is allowed for rebuttal, and the third seven-day period is allowed only for the applicant to have a summary response. Second, HB 3065 does not allow us to stop the clock for any of these delays, unless we receive permission from the applicant. These delays are allowed after each evidentiary hearing.

Our Type III procedure provides for a hearing before a land use Hearings Officer or a commission. It also provides for a hearing before the City Council if there is an appeal. Although the Zoning Code does not require it, we have allowed both hearings to be evidentiary hearings. An evidentiary hearing is one where new facts and evidence may be submitted. Under the old law, we barely had time within the 120 days for two evidentiary hearings. Under the new law, we no longer do, the attached diagram illustrates this problem.

Our Zoning Code allows City Council to choose how it will hear appeals. They may hold a full evidentiary hearing, or they may hear the appeal on the record. On the record appeals—also called review on the record—means simply that the City Council relies only on the testimony and other evidence that was submitted to the Hearings Officer. In an appeal based on the Hearings Officer's decision and record, the appellant presents arguments to the Council about what is wrong with the Hearings Officer's decision, and the other side defends the decision. Neither side presents new evidence, and no new issues may be raised. Hearing appeals on the record saves considerable time, and makes it possible to meet the 120-day rule. Review on the record is used by all the other major jurisdictions in Oregon.

We must comply with State law. The City Attorney has advised us that every case that violates the 120-day rule is a risk. When we don't meet the 120-day rule, the Circuit Court can require us to show why the application should not be granted, or the Court may approve the application.

The November 8 City Council Resolution will direct us to immediately modify the way in which Type III procedures are handled. The modification will be in two areas:

- 1 We will change the timeline between when an application is received and the end of the appeal period
  - We now have 14 days to determine whether an application is complete, that will be increased to 30 days so other bureaus can help in that determination
  - We will reduce the time from when an application is complete to the date of the hearing from 51 days to 41 days. As part of that, notice will be posted on the site 20 days before the hearing instead of 30, and staff reports will be available 7 days before the hearing instead of 10
  - We are calculating only two 7-day delays after the hearing. There will only be three 7-day delays if the applicant requests both the first and third, we think this is unlikely
- 2 We will break the Type III procedure into two "paths." When an application is received, we will ask the applicant to choose one of the paths.

Waive the 120-day rule. If the applicant chooses to waive the 120-day limit, the procedure will be as shown in the attached diagram titled "Type III Procedure with Two Evidentiary Hearings—Proposed Procedure." The notice sent to neighbors and posted on the site will let neighbors know that the applicant has chosen this option. Two evidentiary hearings will be allowed: One before the Hearings Officer or a commission, and a second if there is an appeal to City Council. Some timelines will be changed.

- The time for preparation of an appeal report will be reduced from 21 to 13 days
- We are calculating only two 7-day delays after the City Council hearing

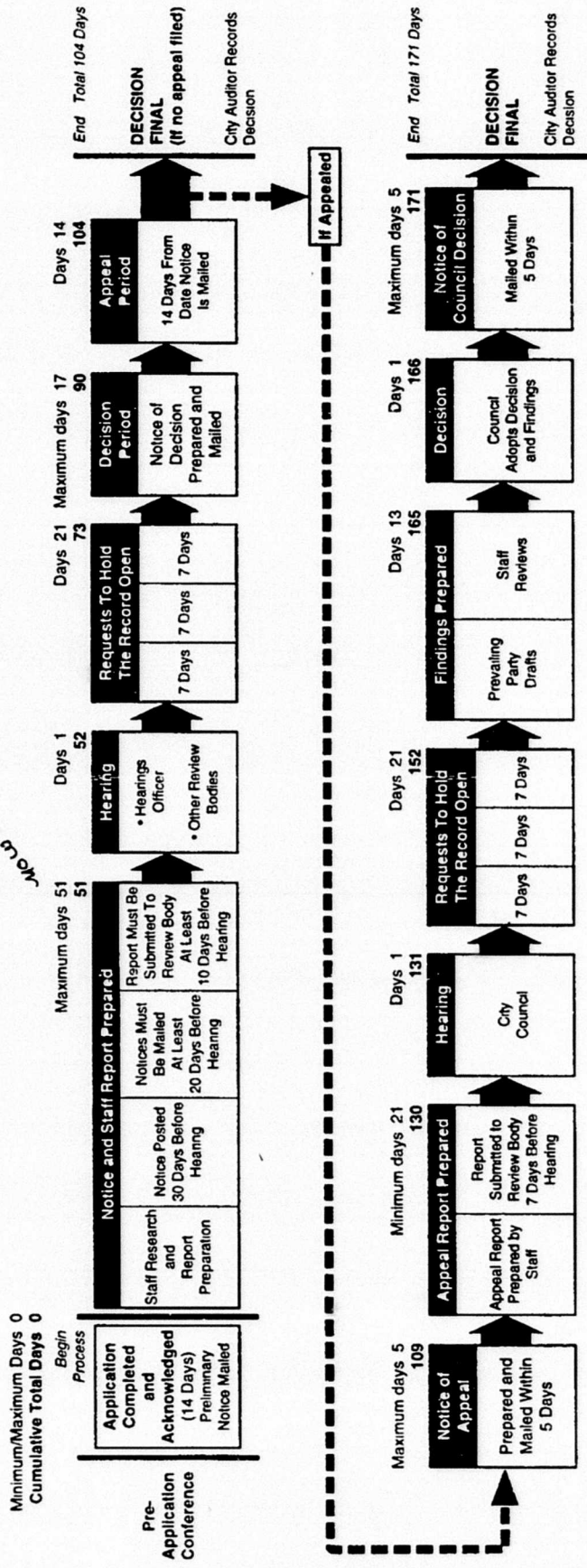
Comply with the 120-day rule. If the applicant does not want to waive the 120-day rule, any appeal to City Council will be on the record, there will be only one evidentiary hearing. The procedure will be as shown in the diagram titled "Type III Procedure with One Evidentiary Hearing—Proposed Procedure." The notice sent to neighbors and posted on the site will let neighbors know that the applicant has chosen this option, and that everyone will need to submit evidence to "make their case" at the first hearing. In addition to the changes listed above, the following will be changed. These changes only affect cases where there is an appeal to City Council.

- After the City Council hearing—on the record—no 7-day delays are required by state law
- The time to prepare and review findings will be reduced from 13 to 6 days

Cary Pinard of the Planning Support Group will be working on the amendments to the Zoning Code. Please call her at 823-7846 with any questions.

# TYPE III PROCEDURE WITH TWO EVIDENTIARY HEARINGS - Current Procedure

*now done this way*

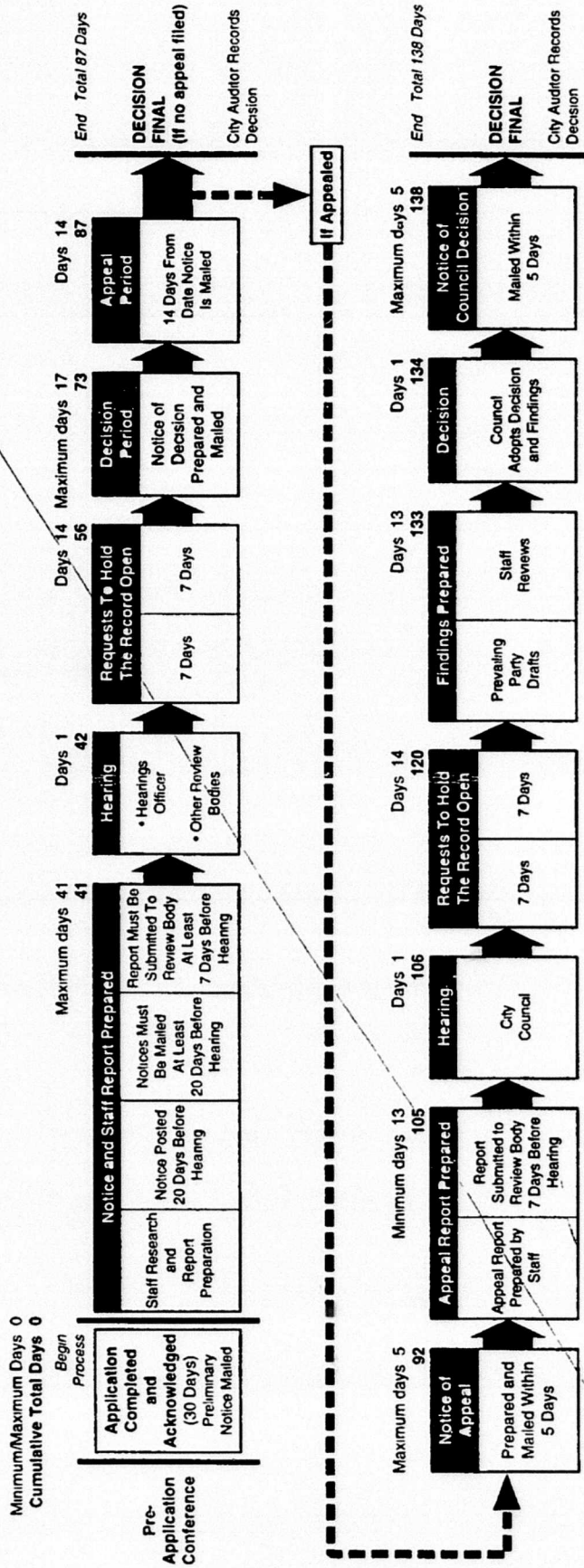




**TYPE III PROCEDURE WITH TWO EVIDENTIARY HEARINGS - Proposed Procedure**

**When 120-Day Rule Is Waived**

*THIS PROCESS MAY BE PUT IN PLACE BY CODE MAT*





**RESOLUTION NO. 35461**

**Direct Bureau of Planning Staff to institute necessary changes in processing Type III land use reviews in order to comply with the 120 day deadline established by ORS 227.178(1). (Resolution)**

WHEREAS, ORS 227 178(1) requires that "the governing body of a city \* \* \* shall take final action on an application for a permit \* \* \* including resolution of all appeals \* \* \* within 120 days after the application is deemed complete "

WHEREAS, the 1995 Legislature amended ORS 197 763 which establishes certain quasi-judicial land use decision making requirements

WHEREAS, the 1995 amendments to ORS 197 763 require that the City allow persons wishing to add additional evidence to the record at the conclusion of an evidentiary hearing on a quasi-judicial land use application seven days in which to do so

WHEREAS, the 1995 amendments to ORS 197 763 also require that the City allow persons wishing to respond to such additional evidence seven day in which to do so

WHEREAS, the 1995 amendments to ORS 197 763 also require that the city allow the applicant seven days in which to submit final written legal argument

WHEREAS, the 1995 amendments to ORS 197 763 effectively require that the city allow as many as 21 additional days for submission of additional evidence and argument after an evidentiary hearing is concluded

WHEREAS, the 1995 amendments to ORS 197 763 require that this potential additional 21 days for submission of additional evidence and argument after an evidentiary hearing be provided at the initial evidentiary hearing before the initial review body and the initial evidentiary hearing before City Council, if it conducts an evidentiary hearing

WHEREAS, the 1995 amendments to ORS 197 763 change prior law to provide that this additional time for submission of additional new evidence, response to that evidence and final legal arguments such that this delay must be allowed within the 120 day deadline established by ORS 227 178(1), unless the applicant is the one who requests the right to submit new evidence

WHEREAS, the city is not given discretion under ORS 197 763 as amended to deny a request to submit new evidence at the conclusion of the initial evidentiary hearing, if such a request is made, and that request may be made by persons other than the applicant

WHEREAS, the statutory changes present the possibility that an appeal may be delayed for as much as 42 days if an evidentiary hearing is held before both the initial Review Body and City Council as is currently done as a matter of practice in most Type III proceedings

WHEREAS, the time required for soliciting comments, providing notice of hearing, and drafting findings and a decision make it impossible to render a final decision in a Type III review within 120 days if the delays now required by ORS 197 763 are requested and the City Council conducts an evidentiary hearing

WHEREAS, the city can render a final decision in Type III reviews within 120 days if any appeal to City Council is limited to the record and the appeal to City Council is appropriately expedited

WHEREAS, PCC 33 730 030 H 5 provides that appeals of Type III decisions to "City Council may be heard 'on the record' and must also conform to any rules of procedure adopted for their use "

WHEREAS, the City Council wishes to comply with the statutory requirement that final decisions in Type III reviews be rendered within 120 days in a manner that is fair for all parties

WHEREAS, the City Council believes the fairest way to comply with the statutory 120 day deadline is to ensure that all parties are advised prior to the time set for the initial evidentiary hearing before the initial Review Body whether any appeal to the City Council will be an appeal with an evidentiary hearing or an expedited "on the record" review. If this is done, all parties will know that they will only have a single evidentiary hearing before the initial Review Body and can present their cases accordingly

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PORTLAND, that

- a Type III reviews which include a request for a comprehensive plan amendment are not subject to the 120 day deadline established by ORS 227 178(1), and the City Council may continue to allow an evidentiary hearing in considering such appeals
- b From the date of this resolution forward, Planning Bureau Staff shall, as part of the application process for all other Type III reviews, request that the applicant waive the 120 day deadline established by ORS 227 178(1) If such a waiver is given, any appeals of Type III decisions by the initial Review Body may be considered by the City Council with an evidentiary hearing in accordance with PCC 33 730 030 and Council rules If the 120 deadline is waived, current Zoning Code Type III review procedures and deadlines may continue to apply and the additional notice described in paragraph c below need not be given
- c From the date of this resolution forward, in cases where an applicant for a Type III review does not include a waiver of the 120 day deadline established by ORS 227 178(1) as part of the application for a Type III review, Planning Bureau Staff shall include in the notice required by PCC 33 730 070 D a statement that any appeal of the initial review body's decision to City Council will be an "on the record" review and may be expedited as necessary to comply with the 120 day deadline established by ORS 227 178(1)
- d In cases where a Type III review is in progress on the effective date of this resolution and the notice required by PCC 33 730 070 D has already been given, planning bureau staff shall request a waiver of the 120 day deadline from the applicant and, if the waiver is refused, provide all parties notice that any appeal to the city council shall be an "on the record" review so that the 120 day deadline can be met
- e From the date of this resolution forward, in cases where an applicant for a Type III review does not waive the 120 day deadline established by ORS 227 178(1), Planning Bureau Staff shall take all reasonable steps necessary to ensure that a decision is rendered by the initial review body such that the City Council has not less than 26 days from the date notice of the on the record appeal hearing is given in accordance with PCC 33 730 030 H 2 and 33 730 070 H , in

which to render its final decision

- f If it is not possible to give the 21 days prior notice of hearing before City Council required by PCC 33 730 030 H(3) and allow the Council at least two days following the City Council hearing in which to reduce its decision to writing, adopt findings and provide notice of its decision, the prior notice of City Council hearing may be shortened as necessary to provide the Council such time for action and the Bureau of Planning shall take reasonable steps to provide all parties actual notice of the time and date for the City Council hearing
- g The Bureau of Planning is directed to monitor and assess the procedures required by this resolution to ensure that decisions in Type III reviews can be made in accordance with the 120 day deadline established by ORS 227 178(1) Within 6 months after the date of this resolution, Bureau of Planning Staff shall initiate Zoning Code amendments it concludes are necessary or desirable to comply with the statutory 120-day deadline and other statutory requirements

**ADOPTED** by the Council,  
Commissioner Hales  
November 3, 1995  
MHoistun

NOV 0 8 1995

**BARBARA CLARK**  
Auditor of the City of Portland  
By *Britta Olson* Deputy

1798

Agenda No

# RESOLUTION NO. 35461

Title

Direct Bureau of Planning Staff to institute necessary changes in processing Type III land use reviews in order to comply with the 120 day deadline established by ORS 227.178(1). (Resolution)

<b>INTRODUCED BY</b>	<b>DATE FILED</b> <b>NOV 3 1995</b>
Commissioner Hales	<b>Barbara Clark</b> Auditor of the City of Portland
<b>NOTED BY COMMISSIONER</b>	
Affairs	By <u>Cay Korahmer</u> Deputy
Finance and Administration	
Safety <i>Daniel Holstun</i>	For Meeting of _____
Utilities	
Works	<b>ACTION TAKEN</b>
<b>BUREAU APPROVAL</b>	
Bureau	
Prepared by     Date	
MHolstun     November 3, 1995	
Budget Impact Review	
___ Completed <u>X</u> Not Required	
Bureau Head.	
<i>Daniel Korahmer</i>	

AGENDA		FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS		
			YEAS	NAYS	
Consent	Regular	Blumenauer	Blumenauer	✓	
NOTED BY		Hales	Hales	✓	
City Attorney		Kafoury	Kafoury	✓	
City Auditor		Lundberg	Lundberg	✓	
City Engineer		Katz	Katz	✓	