



CITY OF

PORTLAND, OREGON

OFFICIAL
MINUTES

A REGULAR MEETING OF THE COUNCIL OF THE CITY OF PORTLAND, OREGON WAS HELD THIS 6TH DAY OF FEBRUARY, 1991 AT 9:30 A.M.

THOSE PRESENT WERE: Mayor Clark, Presiding; Commissioners Blumenauer, Bogle, Kafoury and Lindberg, 5.

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

Mayor Clark welcomed Ibrahim Gambari, Nigerian Ambassador to the U.N., Anna Azuri, Consul from Israel and a member on the staff of the Mayor of Prague.

Agenda Nos 206 and 207 were pulled from Consent. On a Y-5 roll call, the balance of the Consent Agenda was adopted as follows:

CONSENT AGENDA - NO DISCUSSION

- 178 Accept bid of Servicemaster S.W. for janitorial services at community and cultural centers for \$227,808 (Purchasing Report - Bid 61-A)

Disposition: Adopted; prepare contract. (Y-5)

- 179 Accept bid of Wilbur Ellis Company for furnishing herbicides for \$40,640 (Purchasing Report - Bid 74-A)

Disposition: Adopted; prepare contract. (Y-5)

- 180 Accept bid of Modern Building Systems for Heron Lakes Golf Clubhouse addition for \$81,640 (Purchasing Report - Bid 87)

Disposition: Adopted; prepare contract. (Y-5)

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- 181** Accept bid of Dunbar-Nunn Corp. for furnishing 82 siren/public address units for \$36,841 (Purchasing Report - Bid 89)

Disposition: Adopted; prepare contract. (Y-5)

- 182** Accept bid of Bones Construction Company for construction of Englewood sanitary sewer system Unit 4 for \$479,255 (Purchasing Report - Bid C9700-4)

Disposition: Adopted; prepare contract. (Y-5)

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

Disposition: Ordinance No. 163832. (Y-5)

- 184** Vacate NE Hoyt Street between NE 49th Avenue and NE 52nd Avenue, under certain conditions (Ordinance by Order of Council; C-9730)

Disposition: Passed to second reading, February 13, 1991, 9:30 a.m.

Mayor J. E. Bud Clark

- *185** Authorize a Purchase Agreement and Notes in an amount of not more than \$9,500,000 (Ordinance)

Disposition: Ordinance No. 163834. (Y-5)

- *186** Pay claim of Alvin Keith Prather (Ordinance)

Disposition: Ordinance No. 163835. (Y-5)

- *187** Adopt policies and guidelines for charges to City bureaus for use of the 1st and Jefferson (Autoport) garage (Ordinance)

Disposition: Ordinance No. 163836. (Y-5)

- *188** Amend the City Code to include the Facilities Services Operating Fund and update and standardize code language for other funds within the Bureau of General Services (Ordinance; amend Code Chapters 3.40 and 5.40)

Disposition: Ordinance No. 163837. (Y-5)

- 189** Authorize assignment from Portland Development Commission of PDC'S responsibilities for Pioneer Place parking garage property (Second Reading Agenda 152)

Disposition: Ordinance No. 163838. (Y-5)

- 190** Authorize acceptance of Bargain and Sale Deed for Pioneer Place parking garage property (Second Reading Agenda 153)

Disposition: Ordinance No. 163839. (Y-5)

Commissioner Earl Blumenauer

- 191** Approve change Order No. 1, accept completion of sumps 1990 and make final payment (Report; Contract No. 26251)

Disposition: Adopted. (Y-5)

- 192** Accept completion of the Fanno Creek pressure sewer replacement and make final payment (Report; Contract No. 26294))

Disposition: Adopted. (Y-5)

- *193** Grant revocable permit to Ching-Fu Yu and John C. Yu for an existing building encroaching into the right-of-way at 1730 SW Jefferson Street (Ordinance)

Disposition: Ordinance No. 163840. (Y-5)

- *194** Accept a sewer easement for the SW Vermont Street east of SW 25th Avenue sewer project, granted by Shadow Hills West - 60, Ltd., at no cost to the City (Ordinance)

Disposition: Ordinance No. 163841. (Y-5)

- *195** Accept a sewer easement for the Linn Park (#39) sanitary sewer system project, granted by Esther Naomi Fish, authorizing total payment of \$400 (Ordinance)

Disposition: Ordinance No. 163842. (Y-5)

- *196** Accept two temporary construction easements for the Linn Park (#39) sanitary sewer project, granted by William J. Herrington and Renee S. Herrington, and Karen R. Buchheit, and pay \$200 (Ordinance)

Disposition: Ordinance No. 163843. (Y-5)

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- *197** Accept a public walkway easement for the NE 16th Avenue and NE Multnomah Boulevard Street improvement project, granted by Lloyd Center Hotel Associates, at no cost to the City (Ordinance)

Disposition: Ordinance No. 163844. (Y-5)

- *198** Accept a bridge easement for the NE Airport Way Street improvement project, granted by the Division of State Lands (Ordinance)

Disposition: Ordinance No. 163845. (Y-5)

- *199** Amend contract with Zimmer-Gunsul-Frasca Partnership, Inc., to provide additional work in connection with the OCC/Lloyd District transportation projects (Ordinance; amend Contract 25034)

Disposition: Ordinance No. 163846. (Y-5)

- *200** Increase contract with Brown and Caldwell, Inc., for Columbia Boulevard Wastewater Treatment Plant secondary processes and composter facilities (Ordinance; amend Contract No. 25377)

Disposition: Ordinance No. 163847. (Y-5)

- *201** Increase contract with CH2M Hill Northwest, Inc., for engineering services at Columbia Boulevard Wastewater Treatment Plant solids processes and Tryon Creek Wastewater Treatment Plant facilities, and provide for payment (Ordinance; Amendment No. 2, Contract No. 25425)

Disposition: Ordinance No. 163848. (Y-5)

- *202** Contract with Northwest Triangle Business Association (NTBA) to represent and coordinate with property owners during the design and construction of street improvements on NW 13th Avenue from NW Davis Street and NW Johnson Street (Ordinance; waives 5.68)

Disposition: Ordinance No. 163849. (Y-5)

- *203** Call for bids for the Columbia Boulevard Wastewater Treatment Plant air compressor installation and provide for a contract and payment (Ordinance)

Disposition: Ordinance No. 163850. (Y-5)

- 204** 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 (Second Reading Agenda 142)

Disposition: Ordinance No. 163851. (Y-5)

Commissioner Mike Lindberg

- *205** Grant application for \$250,000 for Matt Dishman Community Center Rehabilitation under the Urban Park and Recreation Recovery Act of 1978 (Ordinance)

Disposition: Ordinance No. 163852. (Y-5)

REGULAR AGENDA

- *206** Lease agreement with Charles E. Faries and James D. Fulwiler for approximately 15,000 square feet of property along Macadam Avenue (Ordinance)

Discussion: Mayor Clark said he feared leasing property without an escape clause for so long a time, 50 years, at such a low price.

Fontaine Hagedorn, Parks Bureau, said there was no escape clause because the Bureau did not foresee needing this property for 50 years under any circumstances,

Mayor Clark noted the annual increase was not tied to the rate of inflation.

Mr. Hagedorn said the City would realize over \$180,000 over the life of the lease. He added that leasing this property would put it in the hands of the adjacent property owner and prevent it from being used as a dumping site.

Mayor Clark asked that the matter be continued for a week to study the possibility of changing the annual increase to reflect the inflation rate.

Disposition: Continued to February 13, 1991, 9:30 a.m.

- *207** Agreement with the Mitchell Nelson Group for \$180,000 for a master plan for PIR (Ordinance)

Commissioner Lindberg said Council had directed preparation of a master plan for the PIR. He said the master plan will include another noise study to reflect new measurement technologies that have been developed since the last study was done.

Disposition: Ordinance No. 163853. (Y-5)

- 177 TIME CERTAIN: 9:30 AM** - Accept the report and recommendations of the Bureau of Traffic Management for the NE 7th Avenue Neighborhood Traffic Management Project (Resolution introduced by Commissioner Blumenauer)

Discussion: Jamie Throckmorton, Bureau of Traffic Management, said this project originated in the Eliot Neighborhood Association study and noted that NE 7th Avenue received the highest ranking potential of any Neighborhood Traffic Management Project in the City, receiving 95 out of 100 possible points. He said a neighborhood traffic committee was formed to select and review alternatives and that it was approved by over 69% of those in the impacted area. An initial test has indicated the project will be successful in stabilizing traffic without impacting adjacent streets.

Mr. Throckmorton explained that, because the traffic devices will reduce Fire Bureau response times on 7th Avenue, a signal preemption system will be installed on NE Broadway which will make the Broadway/Martin Luther King, Jr. Boulevard route much quicker to use. He said three City bureaus have agreed to the plan as well as the Eliot and Irvington Neighborhood Associations and the NE Coalition. Only the Sabin Neighborhood Association has expressed concern, but tests indicate that the impacts should be very localized to NE 7th Avenue and that there should be no negative impact on streets in that neighborhood.

Opponents of the plan included:

Elsie Gyorog, 1800 NE 17th Ave.
Betty Walker, 3124 NE 17th

Opponents objected to the loss of parking spaces close to the church at NE 7th and Stanton and said they feared diversion of traffic to other streets.

Proponents of the plan's adoption included:

Lee Perlman, 512 NE Brazee
Mike Warwick, 535 NE Thompson
Cindy DeCeceo, 622 NE Ivy
Tess Healey, 2520 NE 7th
Bob Russell, 2529 NE 7th
Grant Watkinson, 1836 NE 7th
Susan Hartnutt, owner of property at 2411 NE 7th
Steve Rogers, 533 NE Brazee
David Sumners, 2404 NE 20th
Michael Matteucci, 214 NE Thompson

Proponents said this is a plan they have sought for 10 years, one that is needed to enhance the liveability and safety of the neighborhood by reducing traffic speed and accidents.

Mayor Clark noted that no traffic circle was slated for the church site at 7th and Stanton and asked if an unloading zone could be established for church goers.

Mr. Throckmorton said the curb extension slated for that location has already been redesigned and shortened in response to the concerns. He said he would check into the possibility of identifying a drop-off spot.

Commissioner Blumenauer asked how many spaces by the church would be impacted.

Mr. Throckmorton said three or four spaces would be eliminated.

Commissioner Blumenauer said they will investigate establishing a church drop off site. However, he added, he believes the plan will have a positive impact on motorists' behavior and in the long run the church will be a safer and quieter place. He said there was a need to move now before the problem gets out of hand.

Commissioner Kafoury, who lives in the area, said she would be watching the effect of the plan on traffic in the 15th and Stanton area.

Disposition: Resolution No. 34810. (Y-5)

Mayor J.E. Bud Clark

Disposition: Ordinance No. 163853. (Y-5)

- 208** Request from the Portland Association of Building Owners and Managers to address Council (Communication)

Discussion: Robin White, Vice President of Portland Association of Building Owners and Managers, said their organization hopes to dedicate the mall in recognition of the late Bill Roberts' efforts in making it possible. She said their plan includes paying for and installing four plaques at various locations on the mall. The Association for Portland Progress and the Downtown Community Association have joined these efforts.

Bill Naito, 5 NW Front, spoke of Bill Roberts' dedication to assuring that Portland's transit mall was of the highest quality.

Lee Lacey, President, Downtown Community Association, also spoke in support.

Disposition: Referred to Public Works Commissioner.

Commissioner Earl Blumenauer

- *209** Intergovernmental agreement with the Port of Portland for the transfer ownership of existing Port-owned sewage facilities at the International Airport (Ordinance)

Disposition: Ordinance No. 163854. (Y-5)

- *210** Contract with Shiels and Oblatz for professional services to manage the Central City Transportation Policy and Plan Study, not to exceed \$40,000, and to establish an Agreement for funding assistance with PDOT, PDC, APP, Tri-Met and Metro (Ordinance)

Disposition: Ordinance No. 163855. (Y-5)

- *211** Continue negotiations to purchase three permanent sewer easements and two temporary construction easements for construction of the Linn Park (#39) sanitary sewer system project; commence condemnation proceedings, if necessary, and obtain early possession (Ordinance)

Disposition: Ordinance No. 163856. (Y-5)

- *212** Authorize the execution of a settlement agreement with EPA in connection with violations of the City's NPDES permit under the Clean Water Act (Ordinance)

Discussion: Commissioner Blumenauer said staff were present to answer any questions.

Disposition: Ordinance No. 163857. (Y-5)

Commissioner Gretchen Kafoury

- 213** Support the adoption of region-wide goals and objectives and the Metropolitan Service District undertaking of region-wide planning for the Portland metropolitan area (Resolution)

Discussion: Commissioner Kafoury said this was part of a process of defining regional goals that began over a year ago. She announced that Commissioner Blumenauer will continue to serve as a member of the Metro Policy Advisory Committee. She said the resolution incorporates changes recommended at a joint meeting of the Council, Portland Development Commission and the Planning Commission held in December and calls for Portland to take the lead in supporting a more aggressive role for METRO in regional planning.

Disposition: Resolution No. 34811. (Y-5)

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Commissioner Mike Lindberg

- *214** Amend contract with The Wolf Organization for consulting services to the cultural plan process and provide for payment (Ordinance; Contract No. 26636)

Discussion: Commissioner Lindberg said this amendment will incorporate a study of cultural diversity into the plan. He said money to pay for this addition had been received from the Metropolitan Exposition and Recreation Commission and from Metro.

Disposition: Ordinance No. 163858. (Y-5) into the plan.

- *215** Accept funds from the Metropolitan Service District and Metropolitan Exposition and Recreation Commission in the amount of \$20,000 and increase the Metropolitan Art Commission General Fund appropriation and estimated revenue (Ordinance)

Disposition: Ordinance No. 163859. (Y-5)

City Auditor Barbara Clark

- 216** Approve December 1, 1989 through May, 1990 sidewalk maintenance bills for assessment (Hearing; Report)

Disposition: Adopted. (Y-5)

- 217** Assess SE Long, Liebe/58th HCD District Street improvement project and LID extension of sanitary sewer in SE Liebe Street (Second Reading Agenda 172)

Disposition: Ordinance No. 163860. (Y-5)

At 10:57 a.m., Council recessed.

A RECESSED MEETING OF THE COUNCIL OF THE CITY OF PORTLAND, OREGON WAS HELD THIS 6TH DAY OF FEBRUARY, 1991 AT 2:00 P.M.

THOSE PRESENT WERE: Mayor Clark, Presiding; Commissioners Blumenauer, Bogle, Kafoury and Lindberg, 5.

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

COMMISSIONER DICK BOGLE

- 222** Liquor license application for Prestige Stations, Inc., dba ARCO #5285, 7509 NE Martin Luther King Jr. Blvd., package store liquor license, new outlet; unfavorable recommendation (Report)

Discussion: Henry Emrich, License Bureau, said this is a proposal to locate an ARCO AM/PM market with alcohol sales at a site presently operated as a service station only. He said the Piedmont Neighborhood Association adamantly opposes this license and the License Bureau shares their concerns about criminal and liquor-related problems at this location. They believe it would be counterproductive to issue a new license before bringing already existing problems under control. He said the License Bureau believes the store would best serve the neighborhood if the sale of alcoholic beverages was not allowed. The Police Bureau has also documented a history of problems and recommend forwarding an unfavorable recommendation to the OLCC.

Mr. Emrich said this site previously operated with a liquor license but has been without one for a year or two.

Betsy Radigan, representing the Piedmont Neighborhood Association and the Piedmont Food Patrol, asked for a denial of this application, based on the problems at the site and on the non-negotiable attitude of ARCO officials. She said the neighborhood was plagued by drug-dealing, prostitution, street crimes, and gang activity, problems that gravitate to parking lots on Martin Luther King, Jr. Blvd. and to package stores.

Ms. Radigan objected to the attitude of ARCO management and their insistence on continuing to do business as usual even when located in a location that is not "usual." At a Piedmont Neighborhood Association meeting last August, she said ARCO officials stated they were unwilling to consider on-site security guards, earlier closing times for beer and wine sales, or litter pickup for a larger area around their store. She said they later canceled a meeting to discuss development of a good neighbor plan.

Commissioner Bogle said he remembered a similar situation several years ago in this area when Council voted to deny a license to ARCO and the OLCC then overruled it. He said he would certainly support the License and Police Bureaus recommendations and vote to deny this outlet.

Commissioner Blumenauer said he was concerned about ARCO's failure to cooperate with the neighborhood. He suggested that the City write to ARCO and note the serious questions raised before Council on license of this type.

Commissioner Lindberg said the neighborhoods have been working hard to control their own destiny and that the Council should do everything they can to support these efforts.

Mayor Clark suggested that the License Bureau and the neighborhood association write ARCO and tell them of Council's concerns.

Gary McGrew, License Bureau, said he would do so.

Disposition: Unfavorably recommended. (Y-5)

- 218 TIME CERTAIN: 2:00 PM** - Appeal of Barry A. Edwards against decision of the Planning Commission to uphold the Planning Director's interpretation of the zoning code on height, setbacks and stories on a single family dwelling at 264 NW Macleay Blvd. (Hearing; Int 3-90)

Discussion: Doug Warren, Planning staff, reviewed the history of this appeal. He said the main subject of the interpretation is the calculation of height under Title 33. Following issuance of the building permit in the summer of 1989, Mr. Edwards questioned the Planning Bureau as to whether construction met zoning code requirements. In January 1990, Mr. Edwards applied for an interpretation of three issues: building height; number of stories, and the legality of one of the sideyard setbacks. The Planning Director found that the height met Code requirements and that the setback was appropriate, but agreed that there were four stories in the building. That interpretation was appealed to the Planning Commission which overturned the method of height calculation, found the lower level of the house did not constitute a story and upheld the Planning Director with regard to the sideyard setback. The Commission's decision was then appealed by Mr. Edwards. The Planning Bureau, believing that the Planning Commission decision directed that the new method of calculating height be applied to this residence, requested that the Bureau of Buildings issue a stop work order on the house until the changes could be made. The City Attorney then reviewed the Planning Commission's decision and found that the Commission never made a decision to apply their height decision to this particular building. The City Attorney then rescinded the stop work order and asked the Planning Commission to reopen the case. At a hearing on November 13, the Commission decided their interpretation

constituted a totally new practice and also found, regarding the resident's vested rights, that a substantial investment had been made in good faith by the applicants prior to the interpretation request.

Mr. Warren said four issues have been raised by Mr. Edwards today: 1) lot coverage; 2) story and setback issues; 3) height; and 4) whether the new interpretation should be applied to the residence at hand. He said lot coverage had never been raised before and is not an issue. The City Attorney has also determined that the story and setback issues are not to be considered. With regard to height, Council should review whether the new interpretation should be applied to the residence at hand. He reviewed criteria to be applied in determining whether a vested right exists, including ratio of expenditures made before the zoning regulations changed and the good faith of owner.

Barry Edwards, the appellant, said he does not necessarily disagree with the concept of vested rights if there is a zoning regulation change. He said his position has been that if the City had made a proper determination of height at the proper time, they would have found it to be too high. Therefore, the concept of vested right does not apply because it is an issue of what the zoning regulation said.

Commissioner Blumenauer asked for City Attorney comment on the extent to which an interpretation by the Planning Director constitutes a zoning change.

Kathryn Imperati, Senior Deputy City Attorney, said she had been unable to find a case that addresses exactly the same situation as found here. She said, in her opinion, the situation is analogous to a situation where a zoning regulation changes. She said she stood by her memo of November 8, 1990.

David Dennecke, attorney for Judson and Barbara Longaker, owners of the dwelling at 264 NW Macleay Boulevard, corrected Mr. Warren by noting that the building permit had been issued in October, 1988. He said in granting the permit the Bureau of Buildings had followed a written rule which it had applied as a standard of applicability for all building permits for at least 20 years until the Planning Commission changed it. He asserted that his clients had vested rights because of their reliance on issuance of the permit to go ahead and build their home, which to date has cost them in excess of \$300,000. He said the challenge to the permit did not come until a year after it had been issued and long after construction had started. He contended that the house is not a monstrosity and that there are many houses in the area with similar exposure because of the steep slopes. He said the architect, Dennis Batke, measured all aspects of the house and after conferring with the Planning Bureau, lowered the roof height one foot so that it met the standards.

Mr. Dennecke cited ORS 227.178, which requires that the rules and standards that are applied must be those in effect at the time and cannot be changed later and applied retroactively. He questioned the timing and good faith of the appellant, Barry Edwards. He said Mr. Edwards had inspected a model in Mr. Batke's office and had no objections except to the lot coverage, for which a variance was sought and granted. He said Mr. Edwards knew at the time he bought his house that the view to the north of him would be cut off.

Dennis Batke, architect, 1800 SW First, said this was a very complicated house on an awkward site, adding that the Planning Bureau had reviewed the plans three times to ensure it was in compliance. He said he measured the site several times and also paid for an independent surveyor to remeasure it. He said they were over the height limit, when measured under the new interpretation, but were under when measured under the old regulation. He objected to application of the new standard retroactively.

Tim Ramis, Attorney at 1727 NW Hoyt, said he had reviewed the appeal for the Longakers to see how LUBA might have rendered a decision on it. He said he concluded: 1) that vested rights had been established; 2) the Planning Commission was correct in not applying the interpretation retroactively; and 3) that the ORS statute cited by Mr. Dennecke does apply in cases such as this involving discretionary issues, in this case the building height. Finally, because Planning Director interpretations have no time limits, the City should not set a precedent allowing them to be used as a legal remedy to attack building permits that have already been issued.

Residents speaking in support of the Longakers included:

George O'Leary, 2611 NW Westover
David Butts, 2925 NW Shenandoah
David Kafoury, 807 NE Culpepper
Don Stastny, 2837 NW Westover
John Hunt, 2886 NW Shenandoah

Supporters cited the quality of the house and the Longakers' good faith efforts. They said there is a need for the City to have a clear and precise policy so that home builders will not be subjected to such harassment over such a long period of time.

Muriel Tamura, 254 NW Macleay Boulevard, spoke in support of Mr. Edwards' appeal. She said the building was never measured and cited the go-around between the Planning Bureau and the Bureau of Buildings. She presented a tape measure to Commissioner Kafoury to help ensure better measurements in the future.

Mr. Edwards said he agrees that the process has been abominable. He said his original concern had been with the lot coverage, not the height, and that it was only after the building permit was issued and the lot staked, that he realized the house had changed considerably from the model he had viewed in Mr. Batke's office. He then concluded the height had been changed and began to do everything he could, as soon as he could, to bring his concerns to the City. He said if the City had cooperated, instead of delaying, the issues could have been taken care of very quickly. On the issue of fault, he said it is probably not appropriate to do anything now. However, he alleged that there has been property damage to him and to other neighbors in the area and that some consideration, perhaps through property tax abatement, might be proper. He said he maintains, as did the Planning Director, that the house has four stories.

Mr. Dennecke, in rebuttal, said the architect modified the height after the Planning Bureau conveyed their concerns. He said nothing is to be served by making any changes in the house now and noted that even lowering the height by 10 feet would not preserve Mr. Edwards' view.

Commissioner Blumenauer moved to tentatively deny the appeal and uphold the Planning Director's interpretation. He said this is a very strong case for vested rights and Council really has no alternative when property owners demonstrate they followed the rules in good faith.

Commissioner Kafoury seconded the motion.

Disposition: Appeal denied tentatively; applicant's attorney prepare findings for February 13, 1991, 2:00 p.m. (Y-5)

- 219 Tentatively approve appeal of David R. Bighouse against Variance Committee's decision and grant application for a 7'8" chain link barbed wire fence within front yard setbacks along Killingsworth/30th at 3009 NE Killingsworth (Findings; Previous Agenda 95)

Disposition: Findings adopted. (Y-3; N-2, Commissioners Blumenauer and Kafoury)

- 220 Tentatively grant appeal of Renda Horn, Trustee for Margaret and Clyde Brummell, applicant against Hearings Officer's denial of a conditional use for fill within 25 feet of a water feature at 2210 SE Lambert (Findings; Previous Agenda 135)

Discussion: Laurie Wall, Planning Bureau, said two sets of findings have been filed with Council because the applicant and the Planning Bureau were unable to reach agreement about applicant's responsibility for removal of the dirt fill. She said the applicant is now stating that the only

fill that he is responsible for is the concrete rubble while the City maintains there is a dirt fill in addition to the concrete rubble within 25 feet of the center line of the creek. Staff does not agree with the changes appellant proposes. One difference between the two sets is that language is included throughout that talks about the fill as an enhancement of the fishery aspect. Staff believes this clouds the issue and is not a reason for fill, except for the concrete rubble which is a minor portion of the fill. Another difference is in the conditions of approval. The applicant leaves out any requirement for a grading and landscaping plan to show how modifications of the property would look. Modifications include grading the slope from 1:1 to 2:1 and also require as much fill as possible be removed from the center line and 25 feet back. Applicants' findings do not propose to remove any of that fill and omit conditions B through E as shown in the staff report. Applicants' findings state that they will only replant the existing 1:1 bank.

Catherine Sohm, Sellwood/Moreland Neighborhood Association, which sponsors the fish hatchery on Mr. Brummell's property, said they find it most regrettable that the Bureau of Environmental Services experts choose to disregard the findings of the Oregon Fish and Wildlife Department. She said Mr. Brummell's only motives are enhancement of the fish hatchery, adding that he only followed a pattern set by other residents along the creek, who are not being cited .

Paul Norr, attorney for the appellant, said this was the first time he has seen a decision directed by Council fall apart. He said there is no opposition from anyone except City staff. He said they have never disputed Conditions B, C, D and E, only Condition A, which deals with what fill material, if any, should be removed from the site. He said they are here to today because of their realization that there were two entirely different interpretations of what Council intended to approve.

Mr. Norr said it was their understanding that Council did not wish any of the materials taken out of the creek but only wanted staff to work out what would happen on the bank. The staff is asking for a 2:1 slope. Applicant wants it to be more stair-stepped so that he can plant materials approved by Fish and Wildlife. Now they have learned that staff wants materials 25 feet from the center line removed, as well as materials they suspect were brought in during the time of Mr. Brummell's construction project. Mr. Brummell, the building inspector at that time, and SMILE members have all testified that these suspicions are untrue. Mr. Norr said if Council wants these materials removed, the staff findings should be adopted. If they want to leave the materials along the creek and bank, then they should adopt appellant's findings.

Ms. Wall said staff is not concerned about the concrete rubble but with the dirt fill.

Mayor Clark asked why they are concerned.

Ms. Wall said Mr. Kenworthy could best answer that.

The Mayor said he remembers Council's decision as represented by Mr. Norr to be correct and that Mr. Brummell is off the hook.

Commissioner Blumenauer said he was concerned about charges that staff behaved in a arbitrary, capricious manner and asked them to comment on their concerns.

Steve Kenworthy, Environmental Services, said because the site is within the Johnson Creek flood plain and possibly the Crystal Springs flood plain, they had been trying to reach a compromise with Mr. Brummell to ask him to remove fill that might be questioned if flood plain criteria were applied. He said they have no intention of asking that the concrete rubble be removed. He said the steep bank with its 1.1 ratio, which is more than usually allowed, could impact flood levels and make the bank more erodible.

Commissioner Blumenauer asked how this relates to other properties along the creek and whether others had to meet the 2:1 slope requirement.

Mr. Kenworthy said, while many properties are in violation of what they are attempting to apply to this property, he was reacting to a particular Bureau of Buildings citation. He said it is his job to try to determine how the fill can be removed without harm to the fish hatchery program and to seek ways to avoid aggravating conditions that are not good to begin with. He said the non-concrete fill can be removed without affecting the SMILE project at all. He said others along the creek have been told they cannot encroach along these same areas and could not put fill within the 25 foot setback without going through a conditional use process. He said there is no justification for the dirt fill as it does nothing to enhance the fishery and quite likely causes problems for flood and erosion control programs.

Commissioner Lindberg asked about testimony stating that the fill had been put in there 10 to 20 years ago.

Mr. Kenworthy said the information he has clearly tells him that material from construction of a four-plex attributable to Mr. Brummell was placed in the creek.

Mr. Norr asked how is this clear, since the building inspector at the time, as well as Mr. Brummell and members of SMILE, said the elevations had not changed since the day Mr. Brummell began construction.

Commissioner Blumenauer noted that the more concrete funnels there are, the more potential there is for flooding and increased erosion. He said the Bureau of Environmental Services is trying to be consistent and introduce more environmentally sound measures. He said he would support the staff findings.

Commissioner Lindberg asked what would happen if Mr. Norr's findings were adopted.

Mr. Norr said the work approved by the Fish and Wildlife Division would be completed and the stair-step setbacks would be used.

Mayor Clark said he believes the fill was done by someone prior to Mr. Brummell's taking over the property and he would vote for Mr. Norr's findings as a matter of equity. Commissioner Bogle said he agreed with the Mayor.

Kathryn Imperati, Senior Deputy City Attorney, said Council needed to indicate which Condition A it approved, staff's or Mr. Norr's.

Commissioner Kafoury said she would not vote as she was not present at the initial hearing.

Commissioner Lindberg said he would vote yes on the basis of equity.

Disposition: Findings prepared by appellant's attorney adopted. (Y-3; N-1, Commissioner Blumenauer; 1 Abstained, Commissioner Kafoury)

- 221 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 West Burnside (Findings; Previous Agenda 175)

Discussion: Cathey Briggs, Planning Bureau, noted that a memo from Senior Deputy City Attorney Ruth Spetter concerning the fee issue called for the appellant to pay the fee. She said a check had been received from David Morrison, the appellant, that afternoon.

Ms. Imperati cited a letter from Steve Abel, attorney for Pacific Western Development Corp., indicating that the fee must be paid prior to adoption of the findings and also asserting that payment of the fee is a jurisdictional issue and that payment should have been made when the appeal notice was filed. Ms. Imperati noted that his first concern was moot as the fee has now been paid.


FEBRUARY 6, 1991

Mayor Clark said Ms. Spetter's opinion clarifies neighborhood association requirements regarding appeals.

Disposition: Findings adopted; filing fee paid. (Y-5)

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

BARBARA CLARK
Auditor of the City of Portland


By Cay Kershner
Clerk of the Council

FEBRUARY 7, 1991

THURSDAY, 1:30 PM, FEBRUARY 7, 1991

The City Council held 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.