



CITY OF

PORTLAND, OREGON

**OFFICIAL
MINUTES**

A REGULAR MEETING OF THE COUNCIL OF THE CITY OF PORTLAND, OREGON WAS HELD THIS 13TH DAY OF MARCH, 1996 AT 9:30 A.M.

THOSE PRESENT WERE: Mayor Katz, Presiding; Commissioners Blumenauer, Kafoury and Lindberg, 4.

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

Mayor Katz recognized the role major water consumers played in conserving water during the flood emergency.

Commissioner Lindberg said because of their efforts, as well as those of residential users, City residents avoided having to boil water. The shortage was real and these conservation measures reduced consumption about 37 percent. He recognized 20 major users who participated in these efforts.

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

CONSENT AGENDA - NO DISCUSSION

359 Accept bid of Coffman Excavation, Inc. for Inverness Main Force, Section A, Columbia Boulevard Wastewater Treatment Plant for the Bureau of Environmental Services for \$480,112 (Purchasing Report - Bid 96)

Disposition: Accepted; prepare contract.

360 Reject all bids for Grant Pool bathhouse renovation (Purchasing Report - Bid 97)

Disposition: Accepted.

361 Accept bid of Albina Asphalt Co. for annual supply furnishing emulsified asphalt for \$42,000 annually for two years (Purchasing Report - Bid 98A)

Disposition: Accepted; prepare contract.

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362 Accept bid of Select Contracting, Inc. for Wilshire Park improvements for \$136,578 (Purchasing Report - Bid 103)

Disposition: Accepted; prepare contract.

363 Vacate a three-foot right-of-way lying north of SE Powell Blvd., under certain conditions (Second Reading Agenda 333; C-9887)

Disposition: Ordinance No. 169857. (Y-4)

364 Vacate a certain portion of NE Airport Way east of NE 165th Avenue, under certain conditions (Second Reading Agenda 334; C-9900)

Disposition: Ordinance No. 169858. (Y-4)

Mayor Vera Katz

***365** Pay claim of Dura Construction Company (Ordinance)

Disposition: Ordinance No. 169859. (Y-4)

***366** Pay claim of Kathleen Wolff (Ordinance)

Disposition: Ordinance No. 169860. (Y-4)

***367** Pay claim of Dana Ludwig (Ordinance)

Disposition: Ordinance No. 169861. (Y-4)

***368** Authorize extension to Legal Services Agreement with Hoffman, Hart and Wagner (Ordinance; amend Contract No. 29110)

Disposition: Ordinance No. 169862. (Y-4)

Commissioner Earl Blumenauer

***369** Designate and assign certain City-owned property as public street right-of-way for the extension of SE 99th Avenue (Ordinance)

Disposition: Ordinance No. 169863. (Y-4)

Commissioner Charlie Hales

***370** Contract with John Warner for Laurelhurst Park design services for \$87,412 (Ordinance)

Disposition: Ordinance No. 169864. (Y-4)

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- *371** Accept land acquisition agreement with owners of property located at the east end of Johnson Lake on the Columbia Slough (Ordinance)

Disposition: Ordinance No. 169865. (Y-4)

Commissioner Gretchen Kafoury

- *372** Approve an alternative consultant selection process, create an exemption to the consultant selection process, authorize a contract with the selected consultant and provide for payment (Ordinance)

Disposition: Ordinance No. 169866. (Y-4)

- *373** Approve an alternative contracting process and create an exemption to competitive bidding for application to the Fourth and Yamhill parking garage two floor addition project (Ordinance)

Disposition: Ordinance No. 169867. (Y-4)

- *374** Authorize contract with Carpet Resource Center to furnish and install carpet in the Justice Center for \$250,688 (Ordinance)

Disposition: Ordinance No. 169868. (Y-4)

Commissioner Mike Lindberg

- *375** Authorize a contract and provide for payment for the Northeast Portland sewer extension Project No. 1 (Ordinance)

Disposition: Ordinance No. 169869. (Y-4)

- *376** Authorize a contract and provide for payment for Phase II, Unit 1 of the reconstruction of sewers in Alder Basin (Ordinance)

Disposition: Ordinance No. 169870. (Y-4)

- *377** Contract with the U.S.D.A. Natural Resources Conservation Service for monitoring of snow cover and precipitation in Bull Run watershed without advertising for bids (Ordinance)

Disposition: Ordinance No. 169871. (Y-4)

- *378** Agreement with ACE Consultants, Inc. for \$150,000 for design and technical services for water main improvement and other design services as may be required (Ordinance)

Disposition: Ordinance No. 169872. (Y-4)

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***379** Agreement with Murray, Smith & Associates, Inc. for \$150,000 for design and technical services for water main improvements and other design services as may be required (Ordinance)

Disposition: Ordinance No. 169873. (Y-4)

380 Authorize Agreement with Oregon Department of Environmental Quality relating to hydrogen sulfide management (Second Reading Agenda 350)

Disposition: Ordinance No. 169874. (Y-4)

REGULAR AGENDA

Mayor Vera Katz

381 Adopt 1996-98 City of Portland Affirmative Action Plan (Second Reading Agenda 326)

Disposition: Ordinance No. 169875. (Y-4)

Commissioner Charlie Hales

S-*382 Adjust salary rates for three promoted employees to the top of the salary ranges for their classification (Previous Agenda 344)

Discussion: Cay Kershner, Clerk of the Council, read the new title submitted with the Substitute Ordinance. Commissioner Lindberg moved the Substitute and, hearing no objection, the Mayor so ordered.

Disposition: Substitute Ordinance No. 169876. (Y-4)

City Auditor Barbara Clark

383 Assess benefitted property for the costs of HCD street and storm sewer improvements within the SE Lafayette/88th Avenue LID (Hearing; Ordinance; C-9880)

Discussion: Dan Vizzini, Auditor's Office, said because this is an HCD project, property owners in this district are getting a local street for roughly 24 percent of the cost. He said no written remonstrances or phone calls have been received.

John Hawthorne, Transportation Engineering, said the costs came in under their estimate and they saved about \$22,000 in construction costs over their original estimate.

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Disposition: Passed to Second Reading March 20, 1996 at 9:30 a.m.

***384**

Create the NW Thompson Road Local Improvement District
(Ordinance; C-9912)

Discussion: Mr. Vizzini said this is a single-owner Local Improvement District formed on Thompson Road, between Skyline Boulevard and Miller Road. The petitioner, Forest Heights Estates, may request that this project be terminated before construction. They would like to allow the City to go through the normal process up to the bid stage and then look at the actual construction bids. Neither his office or the Bureau of Transportation Engineering have a problem with that as the project would only be done at the request of the petitioner.

Disposition: Ordinance No. 169877. (Y-4)

At 9:53 a.m, Council recessed.

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A RECESSED MEETING OF THE COUNCIL OF THE CITY OF PORTLAND, OREGON WAS HELD THIS 13TH DAY OF MARCH, 1996 AT 2:00 P.M.

THOSE PRESENT WERE: Mayor Katz, Presiding; Commissioners Blumenauer, Kafoury and Lindberg, 4.

OFFICERS IN ATTENDANCE: Cay Kershner, Clerk of the Council; Michael Holstun, Senior Deputy City Attorney; and Officer Chuck Bolliger, Sergeant at Arms.

385

Deny appeal of Downtown Community Association of Design Commission's decision to approve application of Downtown Development Group for a design review to construct a new full "half-block" (100' by 200') 10 level, 500 stall parking garage with 1 1/2 or 2 levels of retail space at street level, located at 809 SW Park Avenue (Findings; 95-00774 DZ)

Discussion: Michael Holstun, Senior Deputy City Attorney, said he reviewed, with the Planning Bureau, the findings prepared by the attorney for the applicant in support of Council's decision three weeks ago. He said the findings include a number of additional items raised during that proceeding and adopt by reference the staff report and the substitute findings prepared by the Bureau of Planning. These are before Council today to affirm the tentative decision made earlier.

Mayor Katz noted that the findings clarify some of the issues raised during the hearing.

Commissioner Lindberg asked if the substitute findings recommended by staff in support of the Design Commission decision are basically the same as the findings and decision document referred to in the memo dated March 12, 1996 from the City Attorney to the Council Clerk.

Mr. Holstun said no. The document provided to the Clerk is what is called the additional findings. These include a number of findings not included before to respond to issues raised during the hearing. Council is voting on those as well.

Commissioner Lindberg said those are the ones he has some questions about. He said during the last hearing Council was under the impression that it had to hear the design review first and then deal with the parking garage second. However, there is a City Attorney's opinion here that states that they both could have been

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heard together, as a package.

Mr. Holstun said it is his opinion that the Bureau of Planning could have, if it wanted, not accepted the application for design review on the grounds that the use determination was yet to be made. However, in accepting the application the Bureau did not commit legal error. Not accepting it was just an option.

Commissioner Lindberg said a lot of people who testified were given the impression that the design review had to be processed first.

Mr. Holstun said some people may disagree with his view on this.

Mayor Katz said this was an important policy issue that Council members struggled with. Why did this come before the use issue? Perhaps some clarification is needed for future projects.

Commissioner Lindberg said that will not make any difference now as this one has already started along a certain path.

Mayor Katz said she does not want to see the design come before the use in the future although she does not know how other Council members feel about it. This probably needs further discussion, perhaps added on to a Council Informal.

Commissioner Lindberg, referring to Page 11, said the top paragraph refers to the fact that guidelines are not intended to be applied as approval criteria in individual land use reviews. He asked if this is the first time that has been clarified or if this is a long-standing policy. He said that would mean that on an individual project none of the guidelines in the Portland Downtown Plan or Central City Plan, for instance, could be applied. He requested clarification regarding application of the Downtown Design guidelines in the future. He asked if these documents, which took years to develop, can be applied, adding that he thought they had been in the past.

Mr. Holstun said the Central City Plan was, he believes, the first document the City adopted in part by ordinance and in part by resolution. This technique has been used routinely since then, i.e., the Outer Southeast Community Plan. Those portions of such plans adopted by ordinance have the force and effect of law. That includes both the policies and the further statements. Following that, a number of what is commonly referred to as Action Chart items are listed. He cited the Central City Plan, which in Policy 14 had 17 Action Chart items, many of which are fairly specific but not altogether consistent. He said he understands the Planning Bureau's position is that adopting the documents in this manner allows those

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Action Chart items to be adopted without going through and resolving all the conflicts now.

Commissioner Lindberg said he was not asking about the action items as he knows they were not adopted by ordinance and projects could not be approved or denied based on them. They reflect a vision of what the City wants to do. His question, on page 11, has to do with guidelines.

Mr. Holstun said the Downtown Plan was not adopted following this procedure but this is a problem that has been around for a long time. The one case he is aware of that specifically dealt with this issue involved another parking garage, the Broadway Metroplex Building. That appeal was also brought by the Downtown Community Association (DCA). The Court of Appeals in its decision pointed out that the Downtown Parking and Circulation Policy was divided into goals and guidelines. In that case, the Court determined that the guidelines were aspirational and not binding, mandatory approval standards in the land-used context. He said because the issue was raised about the Downtown Plan, he applied that analogy in these findings. Here there is a document broken down into goals and guidelines. Applying that analogy, the findings explain that those guidelines operate in an essentially similar manner to the action items. They are not binding, mandatory approval standards.

Commissioner Lindberg said to say that a guideline is not binding is something that is hard to argue with. To say that it is not intended to be applied to individual land-use reviews means Council should totally disregard it. He said he is not so concerned about this case, as the decision has been made, but once this is adopted in a legal document it sets a precedent for all future cases in the City.

Commissioner Blumenauer said the findings state that it is not intended to be applied as approval criteria.

Mr. Holstun said the word mandatory could be inserted if that would make it clearer.

Mayor Katz said that is the problem.

Commissioner Lindberg said certain approval criteria are numerical but others are like guidelines that can be referred to in making a decision up or down. His interpretation is that if they are not intended to be applied as approval criteria, then they are not relevant to the case.

Mayor Katz said the argument Commissioner Lindberg made (in his

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dissenting vote) was that he was applying the guidelines and because of them he could not support this design review.

Commissioner Blumenauer said the majority of Council, however, stated these are guidelines; they are not mandatory. He said a whole host of things which were part of a vision would never have gotten Council approval because it realized they were not, should not and could not be applied as mandatory approval criteria.

Mayor Katz asked for the supporting court decision on this issue.

Mr. Holstun said it was Downtown Community Association versus the City of Portland and involved the parking garage on Broadway. That case dealt with the Downtown Parking and Circulation Plan which included guidelines. The Court said guidelines are advisory, not mandatory, approval criteria that reflect the long-standing view of the Bureau of Planning about the division of documents with goals being operative, legally-binding provisions while guidelines are aspirational.

Commissioner Lindberg asked if it would not be more accurate to say then that the guidelines are not meant to be mandatory approval criteria but can be considered in individual land-use reviews. It still looks to him as if one cannot refer to them. He said he would not be making such an issue of this if it did not look as if this would set a policy for dozens of future projects. He asked who wrote the paragraph.

Mr. Holstun said it was mostly him.

Commissioner Blumenauer said Council needs to discuss the implications of the interpretation Commissioner Lindberg is talking about. He said he sincerely believes it was never the intention to make those guidelines mandatory.

Commissioner Lindberg said he does not feel they are mandatory either. He just believes they can be considered in an individual land-use review and in reading that sentence (page 11), it does not seem to indicate that can be done.

Mr. Holstun said he does not think Council commits error by considering these guidelines, or action items, as they represent lots of hours by lots of people who prepared them. They are intended to represent possible ways to implement the goals, which are legally binding. Considering them in that light is entirely appropriate.

Commissioner Lindberg said he totally agrees that the action items in

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the Central City Plan are aspirational, although he thinks there are some wonderful things in them. However, setting those aside, he is talking about all the work done in Downtown Design Guidelines. These are not action items, they have to do with how private and public projects are designed. He thinks that is different.

Mr. Holstun said the design guidelines are a different animal altogether.

Commissioner Lindberg said that paragraph refers to Downtown Plan planning guidelines.

Mayor Katz said if Council cannot get a satisfactory response to this, it will delay this if possible because the implications may be important.

Mr. Holstun said there is still another document that he think is causing confusion because of the language he used on Page 11. He said what he refers to there are the goals and guidelines of the Portland Downtown Plan, not the Design Guidelines. He said the Design Guidelines were addressed in the substitute findings drafted by Dennis Lachman and those are applied and found to be satisfied. The paragraph on Page 11 is not referring to those guidelines. It is referring to the goals and guidelines for the Portland Downtown Plan, a separate document.

Commissioner Lindberg said there is a State law dealing with guidelines which states that they should be advisory and not limit State agencies and special districts to a single approach. He said he never thought the guidelines were mandatory but thought they could be considered. He thought the State law about guidelines referred to both goals and guidelines. He asked Mr. Holstun if that did not apply to these design guidelines.

Mr. Holstun said the statutory definition of guidelines refers to Statewide planning goals which do include guidelines. The case he mentioned earlier used that definition and reasoned by analogy that where the City of Portland in the Downtown Parking and Circulation Plan policy used the term guideline, it intended it to be non-binding as well.

Dennis Lachman, Planning staff, said the point Commissioner Lindberg is making on Page 11 is for documents that have a two-tiered system, such as the Downtown Plan which has both goals and guidelines. The Design Guidelines are not a two-tiered document so everything there is an approval criteria.

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Mr. Holstun said after the Court decision he cited, the Court left open the opportunity for the City to make clear, when it adopted guidelines, whether they were intended to have the force and effect of law. That was made clear when Council adopted the Central City Fundamental Design Guidelines as standards which had to be met. That is not in the other document.

Mayor Katz said if Council wants to do what Commissioner Lindberg is recommending, it needs to go back and amend those documents and be very clear that the guidelines will also have the effect of law.

Mr. Holstun said that is correct.

Commissioner Lindberg asked if that would require some other language in these findings. He asked if adding the word "mandatory" would clarify this somewhat.

Mr. Holstun said if Council wants to amend the sentence to say: "however, the guidelines are not intended to be applied as mandatory approval criteria in individual land-use reviews," that would clarify what he intended when he wrote them.

Mayor Katz moved to amend the findings to include that. Commissioner Lindberg agreed. She said the other, bigger issue is whether Council wants to reassess the notion of guidelines applied as law.

Commissioner Lindberg said he now understands that the Downtown Design Guidelines actually are criteria.

Mr. Lachman said that is correct.

Mayor Katz said perhaps further exploration is needed regarding the application of guidelines.

Commissioner Lindberg said he sees no need for an Informal from his standpoint.

Commissioner Kafoury noted that the word "mandatory" is used in the last paragraph of that section.

Commissioner Lindberg said when he voted on this he referred to a lot of goals and guidelines and wants to clarify that. He said his last question regards the reference on Page 4 to the Central City Plan where it states: "the only indication in the Central City Plan concerning the park at this site is the mere conceptual statement to consider purchasing this block for park purposes." Is the mere

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conceptual statement a vision or an action item? He said he would prefer to delete that if it does not make any difference to the end result.

Hearing no objections, the Mayor so ordered.

Commissioner Lindberg asked if Council, when considering the findings, had each side testify.

Mayor Katz said no.

Mr. Holstun said not since he has been with the City.

Mayor Katz said both sides could be given three minutes to comment.

Bob Shoemaker, attorney for the Downtown Community Association, said there seemed to be a bit of confusion about the goals and guidelines of the Downtown Plan. On Page 11, the paragraph Commissioner Lindberg talked about deals with guidelines but the quoted language below that refers to goals, not guidelines. The paragraph below that states: "The above-quoted provisions from the Downtown Plan do not provide mandatory approval criteria applicable to this design review proceeding." Mr. Shoemaker disagreed. He said those are goals and they do apply to this proceeding. Goals are law. There is a distinction between the guidelines cited at the top and the language on pages 5, 14 and 31, which are goal statements.

Mr. Holstun said the paragraph that follows the quoted provision regarding goals states: "Even though the above-quoted language from the Downtown Plan is properly viewed as establishing mandatory requirements, the cited Downtown Plan language is directed towards prospective City land-use planning, rather than individual, private applications for land-use reviews." He said this language talks about enhancing the livability of downtown by providing parks, and places for both children and adults to talk, play, look, think and enjoy. He said that is a directive to the City in its land-use planning efforts to take steps to plan and zone properties to achieve that goal, rather than requiring that individual permit applicants demonstrate that they are going to accomplish those goals.

Mayor Katz said the findings also state (on top), "therefore the Downtown Plan's goals may, in appropriate context, apply as approval criteria."

Mr. Shoemaker said they thought it was illegal, and stated as much, to have design review come before use review. In reviewing the

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statutes, design review is defined as a limited land-use decision. A limited land-use decision is supposed to be a final decision which concerns the approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright. He said this use is not permitted outright until, and if, the applicant gets permission to use this block as a parking garage. At this point it is not a use permitted outright. Therefore, design review is a nullity. It is not a permit, not a limited-land use decision and does not fit into any of the Oregon statutory criteria. He said Council ought to look at this too as the DCA is surely going to appeal that.

Mr. Holstun said the statutory decision of limited land-use decision is approximately what Mr. Shoemaker read. This is not a use allowed outright but is a use allowed through the Central City Parking Review. As a consequence it is not a limited land-use decision but is, instead, a permit decision as defined in the Statute. That allows discretionary review of a land-use approval and even though it involves design review, design review might be a limited land-use decision but only if it is for a use allowed outright.

Mayor Katz said Mr. Shoemaker's point could be part of Council's discussion as well.

Bob Stacey, attorney for the applicant, said applicant may have some points of disagreement with these findings but they are all technical and not important to Council's decision. The discussion about whether the two layers of the old Downtown Plan should be applied in these kinds of cases should be undertaken with some care. As Mr. Shoemaker's comments suggest, design review is often and ordinarily applied to outright permitted uses. And yet the City requires that the Central City Design Guidelines, the Downtown Design Guidelines and the Central City Plan policies be applied to design review. Now, in Council's decision, the Downtown Plan policies are being applied. This is four levels of, in many cases, pretty fuzzy writing, being applied to the review of outright permitted uses. If Council is after 75,000 jobs and 15,000 houses in the downtown and Central City, it should think cautiously before adding a fifth layer of fuzzy language.

Commissioner Lindberg asked what the fifth layer would be.

Mr. Stacey said the guidelines under the Downtown Plan would be added to the goals, which are applicable. The Downtown Design Guidelines, Council has made clear, are applicable as the third layer. Commissioner Kafoury abstained from voting as she was not present at the hearing.

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Commissioner Lindberg noted his comments at the initial hearing, where he voted no, against the project. He said he has not changed his opinion but, since a majority of Council has voted the other way, he will go ahead and vote yes today on these findings in order to move this on.

Disposition: Findings adopted as amended. (Y-3)

At 2:40 p.m., Council adjourned.

BARBARA CLARK
Auditor of the City of Portland

Cay Kershner
By Cay Kershner
Clerk of the Council