

**MINUTES**  
**City of Newport Planning Commission**  
**Work Session**  
**Newport City Hall Conference Room 'A'**  
**Monday, September 10, 2012**

**Planning Commissioners Present:** Jim Patrick, Jim McIntyre, Mark Fisher, Rod Croteau, and Bill Branigan.

**Planning Commissioners Absent:** Gary East and Glen Small (*excused*).

**Citizens Advisory Committee Members Present:** Lisa Mulcahy.

**Citizens Advisory Committee Members Absent:** Bob Berman (*excused*).

**DLCD Representative Present:** Patrick Wingard.

**City Staff Present:** Community Development Director (CDD) Derrick Tokos and Executive Assistant Wanda Haney.

Chair Patrick called the Planning Commission work session to order at 6:03 p.m. and turned the meeting over to CDD Tokos.

**A. Unfinished Business.**

1. DLCD Training: Oregon Land Use System – Part 2. Tokos said that from the on-line training found at [www.coastalatlas.net/training](http://www.coastalatlas.net/training) we will be picking up where we left off in May and should be able to cover three more chapters at tonight's meeting.

Chapter 4 was about making land use decisions. There are three main types of local land use decisions: legislative, quasi-judicial, and ministerial. Public notice is required in most cases. Staff decisions are subject to appeal to the Planning Commission; and some Planning Commission decisions can be appealed to the City Council. All can be appealed to LUBA. All decisions must be consistent with state statutes, statewide planning goals, case law, and other applicable legal requirements.

Legislative land use decisions establish local land use policies and typically become part of the Comprehensive Plan or Zoning Code. Legislative map changes are applicable to broad geographical areas rather than specific sites. Legislative changes are heard first by the Planning Commission, then by the City Council. Quasi-Judicial decisions are when existing policies or regulations or map changes are applied to specific sites or development proposals. Examples are conditional use permits, variances, partitions, subdivisions, annexations, or street vacations. Ministerial decisions are made by local planning staff and do not require a public notice or hearing. Building permits would be an example.

There are also limited land use decisions and expedited divisions. Limited land use decisions are done by the locally-designated decision-maker. Examples are tentative partitions, tentative subdivisions, and design review. They are subject to notice requirements outlined by state statute. Expedited divisions are made by planning staff after notice and are also subject to requirements outlined in state statute. There is no hearing. The decision must be made within 63 days of the application. Appeals are to a referee hired by the local government and finally to the State Court of Appeals.

Regarding the process for land use decisions, the procedures for legislative and quasi-judicial decisions are outlined in statutes. Legislative decisions are more flexible because they deal with broad public issues. Quasi-judicial decisions are more complex and require "due process". For quasi-judicial decisions, Planning Commission members should avoid communications outside the public hearing process. Members are required to declare such contact. The local government must maintain a record of the proceedings and adopt findings of fact regarding the reasons for their decision. Within UGBs the process must be completed within 120 days. For land use applications, legislative land use decisions are subject to post acknowledgement plan amendment (PAPA) requirements contained in state statutes. For quasi-judicial decisions, the 120-day review process begins after the planning staff received required application forms and supporting information.

For public notices, notice for legislative actions must be provided to the public as outlined in local procedures and must be forwarded to the DLCD Director. For quasi-judicial actions, specific parties (including the applicant, property owners within 100 feet of the property if within the UGB, and any neighborhood or community organization) must be notified 20 days prior to the public hearing. For legislative decisions, the Planning Commission holds the initial hearing before forwarding a recommendation to the City Council. Final action is by the City Council following a hearing. Legislative hearing procedures are relatively flexible and there are no limitations on outside contact between decision makers and the public. For quasi-judicial actions, the Planning Commission holds a hearing before forwarding a recommendation to the City Council. At the

hearing, the chair summarizes the procedures, and the planning director describes the applicable criteria and staff recommendations. The applicant presents their case, and others may testify in support. Opponents can then challenge. All parties have the right to present and rebut evidence. Failure to raise an issue orally or in writing in advance of or during the hearing precludes appeal to LUBA on that issue; which is commonly referred to as the “raise it or waive it” requirement.

Regarding the decision and findings, legislative decisions require a record and findings. The requirements are less rigorous than for quasi-judicial decisions. The record must show that the legislative action is within the legal authority of the jurisdiction and that applicable procedures were followed. Legislative decisions must be consistent with requirements in state statutes and the statewide planning goals. For quasi-judicial decisions, the Planning Commission makes its decision after hearing the staff report and public testimony. There are four courses of action from which to choose: approve the application; approve the application subject to specific conditions; deny the application; or continue the review process to obtain additional information. The final decision must include findings of fact and conclusions that are adequate to explain the basis of the action. The adoption of findings may occur immediately following the hearing, or the final version of the findings may be adopted at a separate meeting. The final decision must be based on what is known as “substantial evidence” that a reasonable person would rely on in reaching the decision.

Local ordinances specify the process for appeals. Only parties that have stated their case before the local government have 21 days to file a “Notice of Intent to Appeal” with LUBA. Following such filing, there is a prescribed time period for the local jurisdiction to provide the complete record of proceedings; briefs are filed; and LUBA hears oral arguments from the parties and issue a written opinion that either affirms, reverses, or remands the decision for additional consideration. LUBA’s decision may be appealed to the Court of Appeals; or finally, to the Oregon Supreme Court. Mediation is an alternative to a formal appeal.

Discussing staff’s role, the presentation explains that the planning staff are the first individuals the applicant meets. Staff is responsible for explaining all requirements, reviewing the application for completeness, and preparing the staff report. Staff presents its report and recommendation to the decision-maker. Staff generally prepares the final decision documents and findings of fact documenting the reasoning to support the decision. Staff prepares a public notice that describes the location of the subject property, the nature of the application, and the proposed use. The notice also explains the applicable criteria; the date, time, and location of the public hearing; the name of a local government contact; and requirements for public testimony and how the hearing is conducted. When a staff report is prepared, it must be made available to all interested parties seven days prior to the public hearing.

Ex parte contact occurs when a decision-maker receives information, discusses the land use application, or visits the subject site outside the formal public hearing. Such contact must be disclosed on record at the hearing, and any new evidence introduced through the contact must be presented. Bias occurs when a decision-maker has prior judgment of the case that prevents them from making an objective decision based on the facts. Such decision-makers should excuse themselves from the proceedings. A conflict of interest occurs if any action by public officials results in financial gain or loss to themselves, a relative, or a business associate. That must be disclosed. There are two types of conflicts of interest: actual and potential. An actual conflict is one that *would* occur as a result of the decision. If that is likely, the decision-maker must disclose it and not participate in the decision. A potential conflict is one that *could* occur as a result of the decision. In that case, disclosure is still required, but the decision-maker may participate in the decision. To determine legal issues with any of the above, decision-makers should consult with their local legal counsel if there are any questions or concerns. Tokos noted that if any of the Commissioners ever encounter a circumstance where they have one of the above and feel it may be problematic for them to hear a case and want feedback from legal counsel, to just sent Tokos an email. Tokos added that this applies to quasi-judicial hearings, which are a whole lot stricter and much more formal.

Patrick asked about the summary of the procedure that is required and noted that he doesn’t give that. Tokos said that there are specific requirements of what needs to go into the public notices, and we do include that in there. Tokos said that if a quasi-judicial action is particularly contentious, he may bring in a stricter script for Patrick to read at the hearing. He thinks that the Planning Commission hearing script may need some updates. Wingard asked if Newport requires Commissioners to describe site visits or just note them for the record. Tokos said site visits just have to be noted for the record, but the Commissioners can always add whatever they feel is important. He added that these are visits specifically to the site to think about the proposal.

Chapter 5 was an overview of the Oregon Coastal Management Program (OCMP), which is comprised of the statewide planning goals and requirements along with local government comprehensive plans and land use regulations. Local plans address Goal 16 (estuaries), Goal 17 (shorelands), and Goal 18 (beaches and dunes). The presentation stated that Goal 19 is the responsibility of the state and federal governments rather than local communities; but Wingard said he was making a note that that statement is not quite accurate, and Tokos agreed that it’s not only the state. The comprehensive plans of coastal cities must meet coastal Goals 16, 17, and 18 to ensure that Oregon’s coastal resources are protected; restored; and where appropriate, developed.

The mission of the OCMP is to “conserve and protect Oregon’s outstanding coastal resources by assisting local governments to develop livable, resilient coastal communities and knit together the programs and activities of local, state, and federal agencies on the Oregon coast.” The OCMP has authority over all areas within the state’s Coastal Zone, which extends from the crest of the Coastal Mountain Range to three nautical miles out to sea. The purpose of this state program, which is housed in DLCD, is to assist the work of the communities and agencies involved in planning on the coast. The OCMP helps ensure that coastal goals are integrated into city and county plans and regulations. The OCMP provides coastal communities with financial, planning, and technology assistance. More information about the OCMP is available at [www.oregon.gov/LCD/OCMP](http://www.oregon.gov/LCD/OCMP).

Many state agencies are involved in coastal management. The State Land Board holds the submerged and submersible lands of the coast in trust for the public and has oversight over tidelands, the seafloor within three nautical miles of shore, the beds and banks of rivers, and wetlands. The Oregon Department of State Lands is the administrative arm of the State Land Board and manages all the coastal assets. The Oregon Parks and Recreation Department owns and manages more than 35,000 acres of land in more than 100 state parks in the coastal zone and also has jurisdiction over public use of the ocean beach. The Oregon DEQ is the state’s lead agency for protecting air, water, and land quality. ODFW manages fish and wildlife resources to protect their habitats. The Oregon Water Resources Department administers state law regulating the use of surface and groundwater and issues water rights. The Oregon Economic Development Department (Business Oregon) assists local governments to plan for and promote economic development. The Oregon Marine Board (OMB) uses revenues from boat license fees to help coastal communities build docks, boat ramps, and associated facilities. The Oregon Forestry Department manages more than 600,000 acres of three state-owned forests in the coastal zone and regulates timber harvest on private lands. The Oregon Health Division monitors the water quality of public water systems. The Oregon Department of Agriculture regulates oyster cultivation as a commercial activity within estuaries and leases state tidelands for commercial shellfish production.

In 1977, NOAA approved the OCMP as meeting federal requirements under the national Coastal Zone Management Act. Two benefits of that are funding assistance and authority to review federal actions for consistency with Oregon’s coastal rules and regulations. More than a third of the coastal zone is owned and managed by the federal government; principally the US Forest Service and the BLM. The Corps of Engineers is responsible for building and maintaining jetties, channels, and other navigation structures and is the lead federal agency for waterway management; including public waters and wetlands. The BLM manages nearly 500,000 acres of primarily timberland in the coastal zone; and the US Forest Service is a major landowner and manager of timberlands in the coastal zone. The US Fish and Wildlife Service is the lead federal agency for protection of fish and wildlife habitat and species through the Endangered Species Act. The National Marine Fisheries Service (a division of NOAA) regulates open fisheries and also implements the federal Endangered Species Act. The EPA is the lead agency for air and water pollution control; designates dredged material disposal sites in the ocean; and, through the Clean Water Act, delegates jurisdiction to the state DEQ. The US Coast Guard is responsible for maintaining safe navigation and vessel operation and is the federal lead agency for oil spill prevention, response, and cleanup. Tokos discussed the requirement that local jurisdictions sign off on land use compatibility statements. These are handled at staff level; but would come to Planning Commission if appealed or if they required local action such as a conditional use permit.

Chapter 6 dealt with Goal 16 (Estuarine Resources). Estuaries are bodies of water partially enclosed by land and connected with the ocean. Each estuary includes channels that are continually submerged, tideflats and tidal salt marshes that are covered by tidal waters twice a day, and associated freshwater wetlands and rivers affected by the tide. Since 1970, coordinated state and local planning has been required to protect estuaries’ long-term health. All coastal local governments with estuarine resources have adopted comprehensive plans and land use regulations that meet Goal 16; and amendments to those plans and regulations must comply with that goal. The objective of Goal 16 is to protect the long-term values, diversity, and benefits of estuaries and associated wetlands and also to provide for appropriate restoration and development. The goal relies on a classification system that specifies the level of development allowed in each estuary. All local governments with authority over an estuary must adopt a management plan and land use regulations according to four classifications: Deep-draft development for estuaries with maintained jetties and channels more than 22 feet deep; Shallow-draft development for estuaries with maintained jetties and channels up to 22 feet deep; Conservation for estuaries without a maintained jetty or channel within or adjacent to an urban area with altered shorelines; Natural for estuaries without a maintained jetty or channel not adjacent to an urban area and with little development. Oregon has 22 major estuaries; 3 are classified as deep-draft development, 8 are shallow-draft development, 6 are conservation, and 5 are natural estuaries. Seventeen other estuaries are considered minor estuaries and are classified as natural or conservation.

Each estuarine area contains management units whose boundaries are determined by the types of resources in the area and the extent of past alterations; these are natural, conservation, and development units. Within each, particular uses and activities are promoted, encouraged, protected, or enhanced; and others are discouraged, restricted, or prohibited. Certain uses are considered permissible for each unit, while others uses may be allowed if they meet the Goal 16 resource capability test. Natural units are managed to protect natural resources, such as areas with significant fish and wildlife habitat; especially those that are the least altered or developed. Permissible uses include low-intensity water-dependent recreation, research, passive

restoration, bridge crossings, and limited use of riprap. Uses that may be allowed under the resource capability test include boat ramps, aquaculture, habitat restoration, pipelines or other utility crossing, and bridge crossing support structures. The conservation unit is applied to areas that have been altered from their natural state. A variety of development is allowed as long as there are no major alterations. Uses that may be allowed under the resource capability test include high-intensity water-dependent recreation, marinas, certain water surface uses that do not require dredging or filling, and aquaculture. Development units are reserved for areas with fewer natural resources that have been the most altered. These are typically applied to deep-water areas close to shore, navigation channels and subtidal areas suitable for disposal of dredged materials. In addition to uses permitted in natural and conservation management units, permissible uses include dredging and filling, water-dependent commercial activities, and dredged navigation channel and water storage areas that support industry, commerce, and recreation. Resource capability uses include non-water-dependent or related uses and mining. Each Oregon estuary is managed according to a local estuary management plan that is part of the comprehensive plan. Permissible uses are generally consistent with Goal 16. Resource capability uses are conditional uses subject to the criteria in Goal 16.

Under Goal 16, unless the local jurisdiction fully addresses a proposed action that may alter the estuarine ecosystem in its comprehensive plan, the applicant must undertake an impact assessment that considers: size, scale, and location of the proposed activity or development; resources present at the site and those that it will affect; effects on other existing uses of the estuary; expected impacts on water quality, physical conditions, or biologic resources; and ways to avoid or reduce such impacts. Before a decision is made, the local government applies the Goal 16 resource capabilities test to determine whether the proposed impacts on the estuary are significant or whether they can be accommodated without harm. In addition, some activities are subject to the dredge, fill, and other alterations test; which requires the local government to assess need, consider upland alternatives, and minimize adverse impacts. In addition to approval through the local process, proposed actions involving removal or filling of material in an estuary are subject to the requirements of other agencies. The Oregon DSL must approve any proposed removal or fill under state law; and the US Army Corps of Engineers has ultimate jurisdiction over any removal or fill under federal law. Other agencies, such as Oregon DEQ and the National Marine Fisheries Service have approval authority over certain aspects of the proposed activity.

The function and habitats of Oregon's estuaries have been significantly affected by the disposal of dredged materials from construction and maintenance of navigation channels and harbors. Goal 16 requires local estuary plans to avoid further loss by planning for the appropriate disposal of dredged materials. Each local management plan must have a dredged material disposal plan with enough capacity to hold material expected to be dredged over the next 20 years. When dredging or filling results in the loss of significant habitat or ecosystem functions in one area of an estuary, equivalent habitat or function must be created, restored, or enhanced in another area. This mitigation is required as a condition of approval by the appropriate state and federal agencies.

Riprap is a layer, facing, or protective mound of stones randomly placed against shorelands or dunes to prevent erosion. It is permitted in natural management units to protect development that existed on or before October 7, 1977, when the goals were approved. It is also allowed for certain other structures or uses, such as a historically-designated building. Riprap is allowed in conservation units and development units when: it protects an existing or permitted use; land management or nonstructural measures are not sufficient protection; and it minimizes adverse effects on water currents, erosion, and accretion. It is also allowed in conservation units when it is consistent with the resource capabilities of the area and the purpose of the conservation management unit.

Goal 16 requires local estuary management plans to be based on an inventory. The DLCD ensures that data from various agencies and other sources are compatible and usable by local governments. Much of the inventory information underlying many local estuary plans is out of date or has been superseded by more accurate and current information, particularly in digital format for use in a GIS. Local governments are encouraged to use the Periodic Review process or the next planning cycle to work with resource agencies to ensure that their estuary plans are based on the most current and accurate data.

In 1972, Congress passed the Coastal Zone Management Act, which empowers states with coastal management programs that meet the requirements of the Act to review certain federal actions, including licenses and permits that are consistent with the enforceable policies identified in the state's federally-approved coastal management program. In 1977, Oregon became the second state whose coastal management program was approved. DLCD applies consistency requirements to federal actions affecting the state's coastal zone. Coastal local governments' land use plans and ordinances are included as enforceable policies of the Oregon Coastal Management Program.

Tokos added that the Commission didn't really work on that as part of the zoning code comprehensive update. He said that we have a thorough estuarine chapter, which we will probably come back to in the future. The state is working on some effort to update estuarine plans for different estuaries along the coast. Feedback is needed to better differentiate what the role of the local government is as opposed to state government. We are asked to do some of the same things that the state is already going to be doing. It would be nice to get that sorted out a little bit so that it is clearer. In addition, there is the Endangered Species Act having to do with wetlands that we will be working through as well.

Branigan asked if NOAA permits were reviewed by the City. Tokos said that the Port was the applicant, and we issued several estuarine permits on that. He said most areas in the Bay are development areas. There are a few conservation areas. We do have jurisdiction on development happening in the water in the Bay. Tokos added that it is hard to get approved for riprap, but we do have the review function if riprap is permissible.

**B. Adjournment.** Having no further time, the work session meeting adjourned at 7:00 p.m.

Respectfully submitted,



Wanda Haney  
Executive Assistant