

MINUTES
City of Newport Planning Commission
Regular Session
Newport City Hall Council Chambers by Video Conference
March 8, 2021

Planning Commissioners Present by Video Conference: Jim Patrick, Lee Hardy, Bob Berman, Jim Hanselman, Braulio Escobar, and Bill Branigan.

Planning Commissioners Absent: Gary East (*excused*).

City Staff Present by Video Conference: Community Development Director (CDD), Derrick Tokos; and Executive Assistant, Sherri Marineau.

Public Members Present by Video Conference: Michael Robinson, Bret Fox, and Onno Husing.

1. **Call to Order & Roll Call.** Chair Patrick called the meeting to order in the City Hall Council Chambers at 7:00 p.m. On roll call, Commissioners Hardy, Hanselman, Branigan, Berman, Escobar, and Patrick were present.

2. **Approval of Minutes.**

A. **Approval of the Planning Commission Regular Session Meeting Minutes of February 22, 2021.**

MOTION was made by Commissioner Berman, seconded by Commissioner Hardy to approve the Planning Commission Regular Session Meeting Minutes of February 22, 2021 as written. The motion carried unanimously in a voice vote.

3. **Citizen/Public Comment.** None were heard.

4. **Action Items.**

A. **Disposition/Recruitment to fill Vacancy on the Commission's Citizen Advisory Committee.**

Tokos reported that there was one opening for the Planning Commission's Citizen Advisory Committee since Braulio Escobar was appointed as a Commissioner. The Commission established a Citizen Advisory Committee to the Commission in 2004 to assist with the review and revision of the Newport Zoning Ordinance. In 2011 the Commission elected to keep the Committee empaneled to provide additional community feedback on legislative land use policy and regulatory concepts as they were being developed. With Escobar's appointment there was an opening on the Advisory Committee. While the Citizen Advisory Committee was a "committee" by name, it was not originally envisioned as permanent. However, if the group is to remain as a standing, expanded part of the Commission for work sessions, then it might be advisable to codify that by ordinance under NMC 2.05.005. This would also create an opportunity to establish a fixed size of the advisory committee (as opposed to at least three) and to determine whether or not appointments should be made by the Planning Commission or City Council.

Tokos explained that the City Attorney thought it would be a wise move to engage the City Council to see if the advisory members should be a permanent fixture for the Work Session. It was his understanding that the Council viewed this similarly to the Commission, thinking the Advisory Committee was a good thing. There had been some confusion on who should do interviews and who made the appointments. Tokos noted if they were to be a permanent fixture it would be a reasonable thing for the Commission to request the Council consider making the amendment to the Municipal Code to make it a formal part of the Commission

in terms of the work sessions. The group wouldn't perform any different than they were currently but it would make it clear that they were a formal part of the Commission in respect to work sessions.

Berman asked what Tokos proposed for selecting members. Tokos didn't think the Council would have any concerns with the Commission doing the advertisements and selections. Berman wanted it to stay with the Commission because they often had very specific needs the Council might not be aware of.

MOTION was made by Commissioner Escobar, seconded by Commissioner Berman to request the City Council codify the Citizen Advisory Committee as a standing committee to assist the Planning Commission with work session topics. The motion carried unanimously in a voice vote.

5. Public Hearings. At 7:04 p.m. Chair Patrick opened the public hearing portion of the meeting.

Chair Patrick read the statement of rights and relevance. He asked the Commissioners for declarations of conflicts of interest, ex parte contacts, bias, or site visits. Hardy, Branigan and Patrick reported a drive by. Hanselman reported a site visit. Berman reported an ex parte contact and stated that he sent an email to the City Attorney and had received an email from Derrick Tokos. He noted this would be discussed later in the hearing. Patrick called for objections to any member of the Planning Commission or the Commission as a whole hearing this matter; and none were heard.

A. File 1-SV-21.

Tokos acknowledged the testimony that was received that day from William Barton in opposition. He reviewed the criteria for approval and the letters submitted by the applicant. Tokos explained that when the Council initiated a street vacation they were not predisposed to approve it. They had their initial take and based this on the feedback from the Commission and testimony. They would further reflect on the policies in place on whether or not they would proceed. Tokos encouraged the Commission to weigh these factors when taking testimony.

Tokos reviewed the applicant's proposed site plan, the reasoning for the street vacation request, and the coffee drive thru concept. He then reviewed the notification areas that the statute required and pointed out the location of the owners in the area that were opposed to the vacation. There were about 30 percent who objected, which meant the majority of the area did not object. Tokos reported that he didn't show there being any adverse effects on adjoining properties. The thought was that if the right-of-way (ROW) was vacated it would be more intuitive to drivers. Tokos explained that the landscaping would be improved and maintained by developer. He reminded the Commission that they needed to weigh the written testimony that was for and against the proposal. If the Commission believed that the public benefits outweighed the concerns they should make a favorable recommendation to Council. If they believed the drawbacks outweighed the benefits they should convey this to the Council.

Berman was concerned that a Council initiated vacation for the benefit of a private property owner eliminated the possibility for the Commission to take into account the public interest. He worried that the remaining three criteria were qualitative not quantitative. Berman didn't think the Council was aware they had taken this consideration away from the Commission's deliberations. Tokos explained that they hadn't taken this way from their consideration because the public benefit was one of the policy considerations at the time the Council initiated it. This was still a policy consideration before the Commission and would again be a policy consideration before the Council. Berman thought that Tokos agreed with the applicant's attorney that this no longer applied based on the case law. Tokos noted that what he was saying was that the Commission wouldn't want to hang their hat on the statutory provisions of 271.130 that related to prejudicing the public interest. The Commission could convey any concerns they had to Council relative to the public benefit, but at the end of the day the Council wasn't obligated to follow through with this and they could choose not to adopt the ordinance. Tokos reminded that the Council understood this and noted that in some ways there was always a private benefit with a street vacation because someone would gain

land. When the Council initiated this they reserved the judgement until they had benefit of the Commission's recommendation and public testimony through the hearings process. Berman didn't see it like this because he didn't see the mechanism for the Commission to convey concerns short of turning down or not giving a recommendation. He wanted to see the Council take another look at the two processes to do vacations and when it would be appropriate to use each one. Berman didn't see why this couldn't have been a property owner initiated vacation, which would have put an additional burden on the applicant to get a majority positive as opposed to not getting a negative majority. This would have allowed consideration of 271.130, that there could be a broader discussion on if this was the right thing for Newport to do outside of just meeting the criteria. Normally they would look at the criteria for approval and if they were all met the Commission recommend approval. In this case, there wouldn't be much of an argument that they didn't meet the three criteria. Berman wanted it noted that there was some public interest in this intersection. Tokos emphasized that the Commission could frame this under the Council policies and they could convey their concerns relative to needing this ROW for a particular purpose, because it was one of the Council's policies. Patrick thought they could still take public interest as a reason for deliberations. They could also make a recommendation that they approved it but also objected on public interest grounds.

Hanselman spoke of watching this intersection for traffic flow, and noted some close call incidents he witnessed with a bicycle and vehicle. He was concerned there wasn't a traffic study done to base their decision on. Hanselman didn't understand why the developer needed this access with other ingress/egress from their property. He wanted to see what the 2040 Vision and other committees might have in mind for that corner. He didn't see why they couldn't find another solution because this had too many concerns for him.

Proponents: Bret Fox addressed the Commission. He was in support of the street vacation and believed it was in the public and community interest to approve it. There were a number of utilities running under the street which the city would maintain easements. Because of this, they could never construct a building above it and the only use for it was site use, which he felt was for the public benefit. If the street was vacated it would allow him to work with city staff on a development plan which would add more landscaping and make it a better experience for pedestrians. Fox felt they could make the corner function better and safer. He reported that he had developed the Walgreens location across the highway from this location and worked with Goodwill to present their site to redevelopment. He hoped this would help the Commission had confidence that he could improve this corner. Fox noted that vacating half a street meant the street would still be 50 percent wider than all the other streets that joined into the highway, meaning there was still room to make modifications to connect to the highway in that area. He would be maintaining the property after it was improved, at no cost to the city, and there were a number of true benefits to keep it improved over a number of years. Fox was surprised by the objections and thought the parking space that would be lost was for only one car. He thought the connection to the property to the north could be done better so the properties connection to 2nd Street could be done in a safer and be a narrower traffic calming situation. Fox hoped to have the Commission's support and reported that he had reached out to the County Counsel, Wayne Belmont since November and didn't receive any objections. He also reported that he had reached out to Onno Husing to discuss his concerns. Fox explained that he would work to address any concerns anyone had and he would continue to look for input from staff and neighbors.

Michael Robinson, attorney for Bret Fox, addressed the Commission. He agreed with the staff report and requested that the Commission disclose any other concerns they had during the hearing so they could address them. Robinson reviewed how they elected to have the Council initiate the vacation. He noted that at the Council meeting they had a robust discussion and voted unanimously to do a street vacation. Robinson reported there was no opposition in the record by ODOT for the street vacation.

Robinson covered the criteria and what the legislation told jurisdictions that could and couldn't do. He reviewed how the criteria was met for the Council initiation. Robinson noted that the ORS 271.120 criteria on prejudice on public interest standards didn't apply to Council initiated vacations. He thought the time where this was in consideration was at the Council initiation. There were no statutory provisions telling a

City Council what it could and couldn't consider when initiating a street vacation. The city had policies the Council used, and the staff report and the Council found these were met. As a legal matter it was not considered in the City Council initiated vacation. Robinson noted that his November 16th letter addressed the policies the Council had to address. The primary concerns were for parking but he thought the area to be vacated only had one legal parking space. There was more than 100 parking spaces on either side of this on the County property. Robinson felt this showed there wasn't an impact to the public because there was more than enough parking in the surrounding area. Robinson noted that the applicant had offered to do a traffic study and the Council considered this. He noted that Fox would not object to doing a traffic study and coordinating with Public Works and ODOT. Robinson reminded that the structure of ORS 271 and the case law stated that prejudice to public interest was not a standard for City Council initiated street vacations.

Berman asked if they considered doing a property owner initiated vacation request and, if so, why they went with a Council initiation. Robinson explained the problem with an property owner initiated vacation was they didn't often get to the policy questions. The Statute contemplated that the ROW vacated went back to property owners. Robinson's advice to the applicant was to have the Council initiate and go through the public hearings process. He noted that a Council initiated vacation required opponents to submit written opposition and a property owner initiation put the burden on the property owner. If they couldn't get the owners of 66.75 percent to sign a petition they wouldn't get a public hearing. With a Council initiation they would get a hearing.

Escobar asked if one of the considerations to proceed with a Council initiated vacation was to eliminate the public interest in the decision. Robinson explained it wasn't and he didn't think it was a legal standard. This wasn't something they had been thinking about until they got the first opposition letters. Escobar asked if the vacation wasn't allowed, would there be an alternative means to operate at this location. Fox reported it might be possible for the business to still be developed without the vacation. Having the vacation allowed more leeway to have more landscaping and maintenance of the land, and allowed more leeway in providing a safer connection to 2nd Street. The proposed plan wasn't final at that time, but they were trying to design the driveway to be a perpendicular connection to the street that was used and they were trying to improve the property for the community and patrons. Fox noted that as far as the bench, there had been conversations with city staff on suggestions on what should be returned and added when they improved the property so it was better than before. Some people thought the clock and bench should be returned. This was something they contemplated to create a nice experience for pedestrians using the area.

Branigan asked if instead of coming in perpendicular they could come in at a point around the triangle area with a turn lane. Fox thought that rounding off the corner encouraged vehicles to take the corner at a faster speed and meant there would be conflicts for accidents. They would take this into consideration for developing the area, though. Branigan asked how many cars could go through the "S" turn before they got to the coffee kiosk. Fox explained the design was to have customers enter from the north and traffic would extend on the north side of the building. Branigan asked about traffic backup coming from the south. Fox explained if it backed up there people would drive north to seek another exit. Robinson reminded that what they were looking at was what would happen with a street vacation. He explained that the Commission could include a list of things that they wanted to be considered, such as the driveway issue.

Berman asked if they considered how the general pedestrian flow from surrounding businesses would access the kiosk across Highway 101 and if any public improvements would be needed for this. Fox noted most of the attraction for drive thru service was for drive up access. Berman asked if there would be a window for walk ups. Fox reported that it wasn't currently designed this way but it was something to consider. He would relay this to the coffee shop.

Opponents: Onno Husing addressed the Commission. He acknowledged that the applicant and his attorney tried to reach out to him about his concerns but they didn't get to talk before the hearing. Husing noted that the County was formally notified fairly recently. He didn't feel this was the type of notice the County would have needed to be an early participant in the decision. The only notice they had received before was an

email sent to Wayne Belmont that quickly mentioned this development. Husing noted he wasn't in a position to represent the County when Fox and Robinson asked to speak with him, but he did contact his leadership team to get a County response. Husing explained the County Commissioners knew about his letter and supported it, but it wasn't their official position because this didn't meet, according to the definition under Oregon law, an actual formal position taken on behalf of the County Commissioners. He reported that because this was a city initiated petition, they found out about it late. Husing tried to get the County engaged and issue a letter at the last minute that would reflect their deep concerns. His letter wasn't in opposition but to get everybody to talk about this. Husing noted that the County Commission determined this didn't constitute a formal County action in order to provide a quality response to the City. He confirmed that the testimony he was giving reflected himself as an individual. The County wanted more dialog and thought this should take additional time. Husing wanted it on the record that he was representing himself.

Husing further explained that he was coming forward with the perspective of a Planning Director that had this space right outside his business doors. He saw the area's daily traffic, pedestrian and bicycle flow. Husing thought that Newport did a good job of making the city more pedestrian friendly. He thought this should be taken to visioning committees to get their thoughts and input on what the community really wanted to do there. Husing questioned if the Council really knew that if they did an application by the city rather than the applicant it somehow made the public interest not an appropriate category. In the instances where there was a vacation application with multiple parties that couldn't be reached, it was a good opportunity for a local driven vacation when people couldn't be reached for response. Husing felt there were a handful of people who could have been reached out to with this vacation to interact with, including the County. He didn't think the current process was the right approach. Husing noted this space had been used for protests and had become a public square, something important to defend, and was sacred. He believed this needed more time and thought, and thought that parts of the staff report didn't make sense. Husing noted that when doing a vacation you were giving something to a private party. If they were thinking about giving away an area that was being used already and could be used for something else, they should be sure that something else wasn't important there. Husing felt this property could be a real focal point for the community. He hoped there was more time for dialogue and thought the Vision 2040 Committee and others should take a look at this as well.

Rebuttal: Bret Fox reminded that there was an entitlement permitting process with the city to make sure things were done correctly. He had made a gesture with the City for this property because he saw it being neglected, and offered to improve and maintain it. Saying it was just being given away wasn't true because he was making a long term commitment to improve and maintain the property. Fox reported that he had talked to the County Attorney and noted the email he sent to Wayne Belmont had attachments for the improvement. The email explained that Fox wanted to talk to him about two things, one being this improvement. He felt Husing was contorting what he had done.

Robinson reported that they reached out to Husing the day they got his letter on February 22nd. They tried to schedule a meeting to try and flush out his concerns and how they could address them, not to make a deal. Robinson reported the notice was mailed out 24 days before the hearing, there were three publications in the newspaper prior to the hearing, and they posted notification onsite. He reminded that the County and everyone else got notice in advance and the City had exceeded what the statute required for notices. Robinson noted that this location was a street, not a public square. He reminded that this was a proposal to vacate a public street, not a public square. A public square had a different process. As far as Husing's note on introducing traffic in a sacred space, this was an area where parking occurred there currently. If they were talking about taking parking away, there were multiple parking spaces in the area. They were only vacating the north half of the ROW and there was still a significant portion of the ROW available to the public. The reason there was criteria in local code and State law was to guide the discussion. If they didn't have criteria there wouldn't be guidance on how to make decisions. Robinson noted that LUBA looked at the issue and agreed with what he was saying. He recognized that people worried about what happened to properties outside of the criteria. The Council clearly knew what they were doing and if there was a recommendation to the Council they would be looking at it again. Robinson noted that Fox was a willing

applicant to do what was right and would do a traffic study, make public improvements, and work with other interested. Robinson thought that at the end of the day the Commission could recommend approval to the Council because they had met the approval criteria. He didn't think the prejudice of public interest was a legal standard with this body or the Council. Berman asked Robinson if what he was saying was that if they approved the recommendation the Council he would be making the same remarks to them to approve with the criteria. Robinson noted the body that initiated can also be the body that decided not to initiate. When it got back to the Council they could terminate the initiation. Robinson still didn't think they could apply the public interest standards. LUBA agreed that the public interest standard wasn't prejudice and also said that Council initiation street vacations weren't bound for a final decision and the Council could withdraw it.

Chair Patrick closed the hearing at 8:37 p.m.

Escobar asked if it was appropriate it to refer the matter back to the Council for a clear determination as to whether or not the city recognized it would be the proponent's position that this body could not consider the public's interest. If this was approved and went to the Council it wouldn't be an issue. If the Council denied this, and part of the denial was adverse impact on the public interest, he wouldn't want to set the city up for a LUBA appeal. Escobar suggested referring the matter back to the Council to determine that by initiating the street vacation they were intending to preclude the public interest in the criteria. Tokos reminded that this was a quasi-judicial proceeding that was a land use matter. One standard they didn't talk about in the Land Use Code required non-impact to ROW's that provided access to the ocean or the estuary. They were working under a 120 day clock and Commission's role was to provide a recommendation to the Council. Tokos wanted it to be clear that the public benefit was one of the policies the Council used to initiate. If they believe after hearing the Commission's recommendation that the public benefit was not well served, they could step away from this process and not go through with it. Tokos noted the statutory public interest wouldn't come into play but it didn't mean the public interest wasn't a factor in the consideration.

Hardy didn't see any problems with this application and didn't think it would be a detriment to the public. It would produce property taxes and she didn't think there was anything objective she could determine against it.

Branigan thought this had met the criteria and thought the public impact was minimal. He thought they should recommend an approval for the vacation to the Council as proposed.

Berman was concerned by the prejudice of public interest issue. He agreed the three criteria they had to take into consideration had been met. Berman wanted a discussion on what conditions they would be able to attach. He thought they could recommend a traffic analysis be done, that there be close consultation with the County, and that there be a serious look at pedestrian traffic flow near the facility. Berman thought the criteria was met and would vote to approve. Patrick asked for clarification on his thoughts concerning the County. Berman explained he wanted there to be a lot of discussions on how this would work and how it would affect the County facility. He thought there should be a requirement for consultation with the County. Tokos cautioned that they needed to be clear on how the conditions given could be met. If it was the desire to meet with the County before it went to the Council they could do this, but they couldn't preference it in a way that was confusing to the applicant on how they could achieve it. Berman agreed that he wanted something like this.

Hanselman didn't think the Council knew what they were doing. He was upset with how this must revolve with prejudice with the public. He agreed they met three of the criteria and he couldn't pass this with the simple promise that they would make it all right after it was passed. Hanselman would vote nay unless qualifications included a serious traffic and safety study, and a resulting discussion and approval after that. He didn't feel he could represent the citizens with his hands tied like this.

Patrick thought if they went by the first three criteria, it was met and needed to be approved. He didn't buy that they couldn't consider the public interest. They should approve it with the three conditions they were allowed to consider and put in a requirement for traffic and public study and a meeting with the County before the Council hearing. He wanted an addition that the Commission thought the process was broken and the Council needed to understand that if they initiated a vacation, they weren't allowed to consider public interest and might want to consider withdrawing the request.

Berman asked if the Commission could write a cover letter to the Council that they approved the request because the criteria had been met, but believed that Council initiated vacations needed more detailed analysis than appeared to have happened. Tokos thought they should think about doing two separate motions as opposed to a letter. They could suggest the City Attorney take a look to see if the current process was in any way impeding the Council's ability to consider those policies before they acted on the ordinance. Tokos thought the City Attorney might say no, the Council could consider the same policies once it was back in front of them again, and if they weren't satisfied they were met under the testimony they heard through public testimony and the Commission recommendation, they wouldn't follow through with the process. If their thought was to take a look at policies, they would have a Council initiated process one way or another and this was about framing the concern. If the concern was that the public benefit couldn't be reasonably weighed, then this was something to be conveyed by motion to have the City Attorney confirm this. The Council would have full discretion to move forward or not based on the policies they put together. Tokos reiterated that what he had heard was for conditions was there be (1) a reservation of an easement over the area; (2) a performance of a traffic study with parameters set with consultation with the City Engineer; and (3) the applicant would attempt to meet with the County before this was presented for Council action and the results of the meeting to be conveyed to the Council. Patrick reminded that the traffic study needed to include pedestrians. Tokos confirmed this. He noted that the second motion would be to either to hold off and do a prepared letter for the next meeting, or suggest the City Attorney look into the policy question to confirm there were no barriers for the Council. Berman wanted to see the letter but didn't think the timing worked. Patrick thought they should make a motion with conditions of approval and another motion for the Council to take a look at how this was structured.

Hanselman asked if they could make a motion to request the Council withdraw their request and return with a developer driven request. Tokos noted this would mean the Commission would be making a motion that they not move forward with the city initiated request. Hanselman thought the Commission needed to be very clear with the Council about what their troubles were so they didn't miss what the Commission was struggling with to take into account, and so the public's best interest could be considered. Hanselman questioned if the Council knew what they were doing when they initiated this.

MOTION was made by Commissioner Berman, seconded by Commissioner Hardy to make a favorable recommendation the City Council for File 1-SV-21 with the three conditions that required a reservation of an easement over the area; a traffic and pedestrian study to be performed with parameters set with consultation with the City Engineer; and the applicant to attempt to meet with the County before the presentation for Council action and the results of the meeting to be conveyed to the Council. The motion carried in a voice vote. Escobar was a nay.

Patrick thought the Commission should consider asking the Council to look at their actions rather than saying they should withdraw. Tokos noted the basis on the previous motion was on concerns of public impact, which were things he would have to tie to Council policy, not to statutory provisions. If they were conveying this approval based on the criteria and were concerned about public interest, the issue with the second motion would be to encourage the Council to look at their policies with initiated vacations to see if there was anything, once initiated, that would preclude them from revisiting the public benefit or any other policies. He agreed that it was legitimate to recommend the Council to take a hard look at it as well as recommending the City Attorney take a look and give advice. Patrick thought they needed a motion to the effect that there was a problem with the process because, as the Commission understood it, they couldn't take the public interest into consideration. Tokos suggested the motion be to have the City Attorney look at

the interplay between ORS 271.130 and their policies, and see if it precluded the Commission or the Council from considering the public interest. Patrick asked if the City Attorney came back and said they couldn't, the Council would have to think about when they should initiate a vacations. Tokos suggested the motion be to recommend the City Attorney look at the interplay between the ORS 271.130 Council initiated process and the Council's policies for initiating that process to see if there was anything that would preclude the Commission or the Council to revisit those policies once the process had started.

Berman thought what they wanted the City Attorney to look at was the ORS 271.130 provisions and city policies, the implications of city initiated vacations versus a property owner initiation, and what city policies could be put into effect to make sure all appropriate considerations could be made by Council and Commission. Escobar thought the Council might not have been aware of the LUBA case and thought this case should be provided to the City Attorney for his review going forward.

MOTION was made by Commissioner Berman, seconded by Commissioner Hanselman to recommend the City Council instruct the City Attorney to examine the issues surrounding Council initiated vacations versus property owner initiated vacations. The motion carried in a voice vote. Branigan and Hardy abstained.

6. **New Business.** None were heard.
7. **Unfinished Business.** None were heard.
8. **Director Comments.** None were heard.
9. **Adjournment.** Having no further business, the meeting adjourned at 9:07 p.m.

Respectfully submitted,



Sherri Marineau
Executive Assistant