

Rivergrove City Council Meeting Minutes
January 8, 2017

CALL TO ORDER AND ROLL CALL

The meeting was called to order at the River Grove Elementary School library at 7:01 p.m.

Present: Mayor Heather Kibbey, Council President Arne Nyberg, and Councilors Carolyn Bahrman, Brenda Ruble, and Bill Tuttle were present. City Attorney Bill Kabeiseman was also present. City Recorder Leanne Moll declared a quorum.

Note: Mayor Kibbey changed the order of the agenda, placing the appeal hearing first.

NEW BUSINESS

1. Hearing on Appeal of Denial of Tree Removal Permit at 4620 Dogwood Drive

Councilor Bahrman and Councilor Ruble recused themselves and left the Councilors' table.

City Attorney Bill Kabeiseman read the public disclosure.

Before asking for *ex parte* conflicts and bias, Mr. Kabeiseman shared a letter regarding the previous efforts to get a home approved on the property from attorney Cody Westin dated January 3, 2018. The letter made allegations about Mayor Kibbey speaking to the real estate broker and making comments that caused the previous buyers to withdraw their application. Mr. Kabeiseman read the following from the letter:

"The Mayor's unlawful actions in pressuring the Fishers led them to terminate their contract with Greenwing based on improper threats and untrue allegations, and thus were a deprivation of and an interference with Greenwing's constitutional due process property rights. Greenwing is prepared to file suit pursuant to 42 U.S.C. § 1983 to seek all available remedies for these constitutional violations, including seeking compensatory damages, punitive damages, and attorney fees.

However, if the City approves Maywood Homes' Development Application and Tree Removal Permit with acceptable conditions of approval to the Applicant and Greenwing, Greenwing's damages as a result of the Mayor's unlawful interference in the Fisher sale would be mitigated. In such a circumstance, Greenwing would be willing to consider releasing its claims in connection with the Fisher sale."

Mr. Kabeiseman explained that the letter was not directed towards anyone on Council, but the nature of the allegations prompted him to investigate further with the Mayor. Mr. Kabeiseman disclosed that the contents of the letter were communicated to Mayor Kibbey. The full letter was entered into the public record.

Mayor Kibbey stated that she received a copy of the January 3rd letter from Cody Weston. Mayor Kibbey strongly denied the allegations that she did anything to obstruct a sale of Mr. Edelman's property. She explained that Council must first address and resolve the appeal, and she was ready to move forward. Mayor Kibbey stated that she was able to hear the appeal based solely on the evidence in the record and the criteria set forth in the City ordinances and she is able to do so in an unbiased way.

Mayor Kibbey disclosed that she had one *ex parte* contact with her husband as she was measuring the plans to see if the home could be moved north. Her husband, an architect, entered into a conversation with her about the plans for the home and helped her with the measurements.

There were no other *ex parte* contacts, conflicts of interest, or bias disclosed.

Mr. Kabeiseman explained that the applicant had requested a *de novo* hearing. Section 8.190 of the Rivergrove Land Development Ordinances (RLDO) stipulates: “*Unless otherwise required by this ordinance, review of a decision on appeal shall be confined to the record of the proceeding...*”

RLDO 8.200 defines a *de novo* review thusly: “*...a hearing by the review body as if the action had not been previously heard and as if no decision had been rendered, except that all testimony, evidence and other material from the prior hearing shall be included in the record of the review.*”

Mr. Kabeiseman explained that the default position is to have everything on the record stand. The appellants claim that there are some items that were presented to the Planning Commission that they did not know were on the record and that they are entitled to have a *de novo* review. In a *de novo* hearing, the previous testimony remains on the record, but additional evidence may be added for Council's consideration. Mr. Kabeiseman advised that in this situation, holding a *de novo* hearing is recommended.

Motion: Councilor Nyberg **moved** to hold a *de novo* hearing. Councilor Tuttle **seconded**. Motion **passed 3-0**.

City Recorder Leanne Moll passed out all the new testimony presented to the City:

- A letter dated December 22, 2017 from Mr. Robinson to Mr. Kabeiseman with two exhibits;
- A letter dated January 3, 2018 from Mr. Robinson to Mayor Kibbey and City Council with five exhibits;
- A letter dated January 3, 2018 from Cody Westin to Mr. Kabeiseman;
- A letter dated January 8, 2018 from David Pierce to City Council;
- A letter dated January 8, 2018 from Councilor Bahrman to City Council;
- An undated letter from Mr. Todd to Mr. Edelman (received by the City on January 8, 2018).

Mr. Kabeiseman outlined the criteria Council must consider. He first addressed RLDO Section 5.100. Tree Cutting and Section 6.231, which allows the Planning Commission to “*require a site review for any development [RLDO defines Tree Cutting as development] which is proposed in environmentally sensitive areas, a flood plain or as required in other sections of this Ordinance.*” The Planning Commission did require the site plan review, so there are two sets of criteria to apply in this case. One is the tree cutting criteria, and one is the site design review criteria.

Tree Cutting

Mr. Kabeiseman reminded Council that “*The burden is on the applicant to show that granting of a permit would be consistent with the stated purposes of this Ordinance*” and read and commented on the five criteria for tree removal:

1. “*The condition of the trees with respect to disease, danger of falling, proximity to existing or proposed structures, and interference with utility services or traffic safety.*” As noted in the Planning Commission's decision, none of the thirteen trees proposed to be removed are dead or dying, but the Planning Commission did not otherwise explain how this criterion should be considered. It appears that the purpose of this criterion is to allow the removal of dead or dying trees because the decision does stipulate that the Commission may require the retention of dead or dying trees located in wetlands, natural areas, or in order to provide wildlife habitat and natural processes. Council needs to determine if this criterion should play no role in their decision because the trees are not dead or dying; alternatively, Council could weigh this as one of the considerations and find that this criterion does not prevent the removal of the trees.

2. “*The necessity to remove trees in order to construct proposed improvements, or to otherwise utilize the applicant's property in a reasonable manner.*” The Planning Commission determined that the property

could be modified to save many trees and still provide reasonable use. The Planning Commission also noted it has required modification of several past tree removal permits; however, the appellant objects to this finding. The appellant argues that criterion is composed of two clauses that must be allowed independently and operate independently. Mr. Kabeiseman noted that the appellant's interpretation is plausible, but is not the only interpretation. Council will need to interpret this criterion.

3. *"The topography of the land and the effect of tree removal on erosion, soil retention, stability of earth, flow of surface waters, protection of nearby trees, windbreaks, and a desirable balance between shade and open space."* The Planning Commission concluded that removal of the trees would likely destabilize the earth and cause erosion during high water events. The Planning Commission cited several studies that the appellant asserts were not placed in the record. The appellant claims the Planning Commission's conclusion commits a logical error of inferring the likelihood of a specific fact, i.e., erosion, from a general one, i.e., that trees can stabilize riverbanks. Mr. Kabeiseman stated that the appellant is correct that the Planning Commission inferred the specific from the general, but it's the appellant's burden to demonstrate the granting of the tree removal permit would meet the purposes of the RLDO. Mr. Kabeiseman reminded Council that the applicant offered additional evidence from a biologist and arborist regarding the impact of the trees on the land.

4. *"The number of trees existing in the neighborhood; the character and property uses in the neighborhood, and the effect of tree removal upon neighborhood characteristics, beauty and property values."* The Planning Commission did find that the removal of the 13 trees would negatively impact neighborhood characteristics, beauty and property values. The appellant objected to this finding on the basis that it is conclusory and not supported by evidence. Once again, it's the applicant's burden to demonstrate the request is consistent with the purpose of the ordinances. They have submitted additional information about the effect of tree removal on neighborhood characteristics, beauty and property values, which Council should consider.

5. The Planning Commission also reviewed the criterion for the mitigation plan and the proposed 2 to 1 mitigation proposed by the applicant but recommended a 3 to 1 mitigation ratio. The applicant objected to the revised mitigation requirement. If Council accepts the appeal, they must require adequate mitigation. If Council denies the appeal, there is no need for mitigation.

Site Design Review

Mr. Kabeiseman advised that the site design review criteria located in RLDO Sections 6.234 and 6.235 give the City Council some flexibility because they allow the Planning Commission to *"require changes in a proposed project to ensure that the following general design criteria are met to the maximum extent practical in a particular development proposal."* City Council could require changes, but Council needs to review the site design criteria and determine if they are met.

(a) *"The project shall contain a safe and efficient traffic circulation system which meets the needs of both pedestrians and automobiles."* The Planning Commission found that this criterion is not applicable.

(b) *"The project shall not create any situations which contain significant hazard to life or property."* The Planning Commission found that the loss of trees has resulted in significant riverbank erosion in the past and loss of property improvements. The applicant objected noting the record did not reflect the circumstances in which there were hazards to life or property. Once again, the applicant has submitted additional evidence that should be considered.

(c) *"In an Environmentally area, grading, filling, and diversion of drainage ways shall be minimized."* The Planning Commission found that the proposed plan was designed in accordance with the FEMA Letter of Map Revision that was approved by the City. The appellant did not object to the finding.

(d) *"Natural vegetation, specifically large trees shall be preserved whenever practical."* Mr. Kabeiseman noted that criterion (d) was the key criterion of the site design criteria. The Planning Commission found

that the proposed plan was insensitive to the numerous and valuable attributes of the very large trees and the canopy they create for river shade and wildlife habitat. The Planning Commission also noted that there are no known homeowner needs that dictate that the proposed design is practical for the dwelling to be redesigned to be more consistent with this design criterion. The appellant objected, stating that RLDO 6.234 does not allow the Planning Commission to determine that the development proposal fails to satisfy this criterion whenever the Planning Commission determines without evidence that it is practical for an applicant to offer a different development approval. Mr. Kabeiseman argued that this argument seems contrary to the prefatory segment that specifically authorizes the Planning Commission to require changes to the development plan. The appellant is arguing that there is no evidence that a smaller, redesigned dwelling would not avoid tree removal or damage. This seems self-evidence since tree removal is likely required giving the size of the parcel, the location of the trees, and the size of the home. The appellant also argued that the Planning Commission asked the “wrong question.” The question is not whether it would be practical for the applicant to build something else that does not require removal of trees, but where it is practical for the applicant to preserve the trees on the property. Mr. Kabeiseman noted that that argument is inconsistent with the prefatory language that allows the Planning Commission to require changes.

(e) *“The proposed projects shall meet the criteria established in the Policies of the Comprehensive Plan when appropriate.”* As noted in the memo, this likely seeks a limited land use decision, which includes, but is not limited to site review and design review. There is a statute that says if the Comprehensive Plan provisions are not included in the RLDO, they cannot be applied. Mr. Kabeiseman agreed this was a correct reading of the law.

(f) *“Appropriate screening shall be provided between multi-family dwelling and existing single-family dwellings.”* The Planning Commission found this item to be inapplicable.

Mayor Kibbey opened the public hearing.

Appellants’ Response

Larry Todd, applicant, PO Box 210, Lake Oswego, OR 97034

Mr. Todd spoke first and explained that he has been building in Lake Oswego since 1979 and has never had a problem with tree mitigation or construction homes. He noted he just completed a small subdivision in Portland entirely in the floodplain and had no problem with removing trees.

Mr. Todd noted that he has met all the criteria for residential homes, including setbacks and height requirements, and it seems like the home should be approved. He stated it the new dwelling would be an asset to the community.

Steve Edelman, owner and appellant, 4640 Dogwood Drive, Lake Oswego, OR 97035

Mr. Edelman argued that Mr. Todd is not asking to build something that is out of the character for the City of Rivergrove if Council considers homes construction since the year 2000. Mr. Edelman detailed the exhibits that were included in the January 3, 2018 letter to Mayor Kibbey and City Council. He explained that current design trends require large homes with three car garages and homeowners want large grass backyards without many trees.

Mr. Edelman argued that the proposed home and proposed tree cover were not out of character for the neighborhood. Mr. Edelman claimed that there are only 7 lots in Rivergrove that still have 12 large, old-growth trees, like the 12 trees that will remain in the Water Quality Resource Area (WQRA) at 4620 Dogwood Drive. He went on to claim that 23 lots on Dogwood Drive have fewer trees and 7 lots have more trees. Mr. Edelman explained that the trees listed in Exhibit 3 were only those viewable from the street and he could not verify the actual number of trees on private properties.

Citing evidence from his exhibits, Mr. Edelman stated that what Mr. Todd is proposing is an effective and in-demand house style that fits the demands of the current market. He concluded by reminding Council

that the proposed home and trees to be removed are not in the floodway or the WQRA and would have no negative impacts.

Mr. Todd stated that he will authorize that Mr. Robinson and Mr. Edelman to speak for him for the rest of the evening.

Attorney Michael Robinson, 1120 NW Couch Street, 10th Floor, Portland, Oregon 97209

Mr. Robinson began by citing a letter from wetland Biologist Stacey Reed, who stated that the removal of the 13 trees would not have an impact on the river because the trees are not in the Water Quality Resource Area. The letter also stated that the tree removal would have no impact on erosion, shading, or wildlife.

Mr. Robinson then quoted an arborist report by Dustin Marchello that claims the trees are in a single tree stand and not in two separate groves. Therefore all of the trees proposed to be removed needed to be cut. Mr. Marchello also concluded that the removal of this stand of trees will not have an impact on the quality of the river or on erosion control.

Mr. Robinson noted that there was no arborist or biologist report that supported the Planning Commission's decision and claimed that the Planning Commission's decision was not based on any substantial evidence.

Mayor Kibbey disputed this claim, stating there was a City Arborist report in the record.

Mr. Robinson dismissed the use of the NOAA lawsuit in the Planning Commission's decision because the lawsuit is not specific to the lot and does not address the approval criteria.

Mr. Robinson addressed the approval criteria in RLDO Section 5.100, Tree Cutting:

1) "*The condition of the trees with respect to disease, danger of falling, proximity to existing or proposed structures, and interference with utility services or traffic safety.*" Mr. Robinson stated that the removal of trees will not interfere with the provision of public services.

2) "*The necessity to remove trees in order to construct proposed improvements, or to otherwise utilize the applicant's property in a reasonable manner.*" Mr. Robinson maintained that the trees in question are a reasonable amount to be removed, and they are in an appropriate location to require removal because the house size requires them to be removed. The house size and shape are reasonable for the neighborhood, as Mr. Edelman has demonstrated in his evidence. He argued that Mr. Todd is not proposing to build anything that has not previously been approved by the City.

3) "*In an Environmentally area, grading, filling, and diversion of drainage ways shall be minimized.*" He again cited the letter from wetland biologist Stacey Reed that addresses erosion and environmental concerns.

4) "*The number of trees existing in the neighborhood; the character and property uses in the neighborhood, and the effect of tree removal upon neighborhood characteristics, beauty and property values.*" Mr. Robinson again cited Mr. Edelman's evidence regarding home design, tree removal, and property values.

Mr. Robinson then addressed the relevant approval criteria in RLDO Sections 6.234 and 6.235, Site Design Review:

(b) "*The project shall not create any situations which contain significant hazard to life or property.*" He cited the letters from wetland biologist Stacey Reed and arborist Dustin Marchello as substantial evidence that the tree removal will not lead to a hazard of life or property. In Mr. Robinson's opinion, the NOAA lawsuit is not substantial evidence.

(c) *“In an Environmentally area, grading, filling, and diversion of drainage ways shall be minimized.”* Mr. Robinson claimed that the only reason that 4620 Dogwood Drive is considered an environmentally sensitive area is because tree cutting is considered environmentally sensitive in the RLDO.

(d). *“Natural vegetation, specifically large trees shall be preserved whenever practical.”* Mr. Robinson explained that the applicant believes that it is not practical for him to redesign the home. As stated in previous testimony, the applicant is proposing a common site design that has been built several times in Rivergrove. Mr. Robinson argued that even if the Planning Commission can decide what is practical and require an alternate design, the RLDO lacks specific guidelines regarding lot coverage requirement, tree removal, and housing sizes.

Mr. Robinson concluded by thanking City Council for granting the *de novo* hearing and urged the Councilors to ask questions before the record closes.

Before taking oral testimony, Mayor Kibbey and Councilor Nyberg asked Mr. Todd if he is willing to make minor changes to the home design if the changes will satisfy the City. Mr. Todd stated that he is open to making changes, but he needed to build a particular size for the home to be economically viable.

Mr. Robinson stated he would like Council to make the specific suggestions for the home redesign while the record is open.

Proponents

None.

Neutral

None.

Opposed

Jeff Williams, 4550 Dogwood Drive

Mr. Williams, the neighbor immediately to the east of 4620 Dogwood Drive, stated that he is not opposed to all development of the lot, but he is concerned about the current proposed home and the number of trees to be removed. Mr. Williams also cited a range of concerns regarding the proposed home, specifically:

- the unknown impervious surface area;
- the L-shaped garage with a 40' setback, effectively creating a 60' home setback from the road;
- a mitigation plan that does not require even a 1:1 replacement of trees on the riverbank.

Mr. Williams believes the home should be built around trees and the house design should not force the necessity of tree removal. He also explained that Mr. Todd's wife is a broker and it is likely that the letters presented to Council from Mr. Edelman are influenced and are not substantial proof. Mr. Williams closed explaining that he hopes to find a compromise with the applicant.

David Pierce, 5700 Childs Road

Mr. Pierce commented that the letter provided by the biologist included a revised tree mitigation plan and questioned whether City Council could approve a new mitigation plan without public notice.

Mr. Pierce noted that he would like the developer to work with the City and comply with the City's ordinances instead of threatening the community.

Mr. Pierce concluded by asking City Council to delay their approval until revised plans are submitted. He also requested that Council remand the decision back to the Planning Commission.

Mayor Kibbey noted that the City cannot extend the 120-day deadline for the decision, only the applicant can.

Brenda Ruble, 4840 Dogwood Drive

Ms. Ruble described the importance of trees and flora to her riverfront property. On November 22, 2016 Ms. Ruble lost a huge part of her riverbank in heavy rains even after planting over 6000 bank stabilizing plants and 20 trees. Ms. Ruble has over 400 trees on her bank alone. Ms. Ruble is concerned for the potential owners of the home who may have repercussions if the land is not managed correctly. Ms. Ruble expressed her hope that the appellant and the City would work together to make a new plan.

Michael Robinson's Rebuttal

Mr. Robinson began by commenting that the opposition all want the developer to do something different to save trees, but the ordinances do not give specific guidelines for how the applicant can meet the approval criteria.

Mr. Robinson disagreed that it would not be practical to remove all the trees, noting the arborist report by Mr. Marchello that claims there is only one stand of trees, not two.

Mr. Robinson also claimed that the emails from real estate professionals provided by Mr. Edelman give evidence that the removal of the trees would have no impact on home values

In response to Mr. Williams' claim that those communications with real estate professionals were biased, Mr. Edelman explained that the emails were solicited by his neighbor Connie Dalton, 4650 Dogwood Drive, who is a real estate broker. Ms. Dalton did not give context for the question or cause the respondents to be biased because of their relationship with the appellant.

Mayor Kibbey and Councilor Nyberg asked Mr. Todd again if he would be willing to adjust his design to meet the City's requirements.

Mr. Robinson stated that if a resolution could be reached, the appellants may be willing to extend the decision deadline to allow time to go back to the Planning Commission.

Mayor Kibbey asked Mr. Todd about the design of the perpendicular L-shaped garage and noted its impact on the front setback, placing the house far back into the lot and requiring the removal of many trees.

Mr. Todd noted that his architect decided to make the plan because of the guy wire and telephone pole at the front of the property. There would be a significant slope. Any slope that is 18" above or below the street makes a difficult sale. Mr. Todd also noted the difficulties of building in a narrow lot.

Note: Council took a brief recess from 8:06 – 8:14 p.m. to allow Mr. Robinson to confer with his client.

After reopening the meeting, Mayor Kibbey commented that she would like to propose a solution that gives the applicant a home that is the same square footage as the originally proposed house and that will also preserve the trees.

Mr. Edelman commented that he felt the November 6, 2017 Planning Commission meeting was closed abruptly without any specific site redesign proposals.

Mayor Kibbey said the City could grant a 10'-11' hardship relief, reducing the front setback from 25' to 15', to save trees. She mentioned that the reduced setback puts the home slightly in the floodplain and that there would need to be some creative grading because of the slope of the lot. Mayor Kibbey suggested that the rear crawl space of the home could be moved in a couple of feet and the rest of the home could be cantilevered. The applicant could then pick up living space over the garage. Mayor Kibbey

noted that of all the three-car garages in Rivergrove, 98% of them have flat fronts and are not L-shaped. The garages that are L-shaped have two stories.

Mr. Todd agreed that he could move the home forward 10', but requested to meet with a representative from the City to make sure the revised plans are on track.

Mr. Kabeiseman asked Mr. Robinson who he thought would be appropriate considering the circumstances.

Mr. Robinson noted that a member of Council would be an *ex parte* contact and that a special meeting would need to be scheduled.

Mr. Kabeiseman explained that Council already has an application to build a home of the lot and remove trees and that the variance would add an additional element to an application. Mr. Kabeiseman suggested the City send out a notice stating the hardship relief has been added to the application. If a Type II notice is sent out on January 9, 2018, City Council could meet as early as January 20, 2018. He then explained that the City would Notice as a Type II but follow Type III procedure during the meeting.

City Recorder Leanne Moll suggested a Monday, January 22, 2018 meeting at the River Grove Elementary School library, if available. She noted that the 120-day deadline for a decision is Monday, January 29, 2018.

Mayor Kibbey suggested a City delegation meet with Mr. Todd and Mr. Edelman to discuss City criteria and a potential revised site plan prior to the January 22, 2018 meeting. Mr. Edelman offered the conference room at his Greenwing Restorations office for the meeting.

Mr. Kabeiseman asked if there were any objections in the public.

Mr. Pierce shared his concern that the tree mitigation plan would not be circulated to the public prior to the decision.

Mr. Robinson explained that the actual site and mitigation plans to be approved would be available at or before the January 22 meeting and the public could view the new drawings.

There were no other objections.

Motion: Councilor Nyberg **moved** to continue the hearing on appeal to January 22, 2018 at 7:00 p.m., location to be determined. **Seconded** by Councilor Tuttle. **Motion passed 3-0.**

Councilors Carolyn Barhman and Brenda Ruble returned to the Council table after a brief recess.

CONSENT AGENDA

1. Minutes from December 11, 2017 Meeting

Council opted to discuss and finalize the minutes from December 11, 2017 to the next City Council meeting.

2. December Financials

Motion: Councilor Bahrman moved to accept the December 2017 financials as submitted. Councilor Nyberg **seconded. It passed 5-0.**

Note: City Council agreed to postpone the second item on the agenda under New Business, “Discussion of City Council goals for 2018” until the next City Council meeting.

PLANNING COMMISSION REPORT

Vice Chair of the Planning Commission Jonathan Sweet, gave a brief Planning Commission Report and noted the Commissioners had approved the raise and remodel of Councilor Nyberg’s home in the floodplain.

Note: Council postponed all Committee Reports and Councilor’s Reports until the February City Council meeting.

ADJOURNMENT

Motion: Councilor Nyberg moved to adjourn the meeting.

Councilor Ruble **seconded**.

The **motion passed 5-0**.

The meeting was adjourned at 8:33 p.m.

Respectfully submitted,

Leanne Moll
City Manager/City Recorder