



City of Tigard Tigard Business Meeting – Minutes

TIGARD CITY COUNCIL & LOCAL CONTRACT REVIEW BOARD (LCRB)

MEETING DATE/TIME: July 14, 2009/6:30 p.m. Study Session and 7:30 p.m. Business Meeting

MEETING LOCATION: City of Tigard – Town Hall, 13125 SW Hall Blvd., Tigard, OR 97223

Mayor Dirksen called the meeting to order at 6:30 p.m.

Roll Call:

<u>Name</u>	<u>Present</u>	<u>Absent</u>
Mayor Dirksen	✓	
Council President Wilson	✓	
Councilor Buehner	✓	
Councilor Henderson	✓	
Councilor Webb		✓

Staff Present: City Manager Prosser, Assistant City Manager, Assistant to the City Manager Mills, Community Development Director Bunch, Human Resources Director Zodrow, Engineering Manager McMillan, Associate Planner Caines, Code Enforcement Officer Darnell, City Recorder Wheatley

- **EXECUTIVE SESSION:** The Tigard City Council went into Executive Session at 6:30 p.m. under ORS 192.660(2) (e) and (h) to discuss real property transaction negotiations and for consultation with counsel concerning legal rights and duties regarding current litigation or litigation likely to be filed.

Executive Session concluded and Study Session convened at 7 p.m.

STUDY SESSION

<u>Name</u>	<u>Present</u>	<u>Absent</u>
Mayor Dirksen	✓	
Council President Wilson	✓	
Councilor Buehner	✓	
Councilor Henderson	✓	
Councilor Webb		✓

- I-5 South Study

Mayor Dirksen reported that the Mayor of Wilsonville is asking other cities along the I-5 corridor to support a letter to indicate the importance of doing the South Corridor Study. A copy of the draft letter was distributed to the City Council and is on file in the City Recorder's office. Tualatin Mayor

Lou Ogden has advised he is concerned with some of the language and Mayor Dirksen responded with a suggested change. Mayor Ogden appeared to like this change, which would allow the study to proceed concurrently with developing plans for other transportation improvements and identifying new urban-growth boundary expansion areas. Mayor Dirksen said he would recommend endorsing/signing the letter if this language change is made because he would not want the Study to be used as a reason to disallow other things from being done.

Council President Wilson did not support the letter. He said this corridor study is important, but there are many important needs out there. For Tigard this is not our No. 1 project; the connector was more important. Mayor Dirksen said the draft letter is asking the I-5 South Study to be first. Council President Wilson pointed out there have been many corridor studies (217, Westside Bypass) – but nothing has been built. There was discussion on what has occurred in the past and what projects have come to fruition.

In response to a question from Councilor Henderson, Mayor Dirksen reported that there was support to wrap the light rail study into this study. Our consultant's response was that the "best way to kill a transit project (would be) to wrap it up with a highway project." Our position was that light rail going down 99W should be considered as part of this study, but it does not displace the separate study for the light rail. The language in the letter addresses the light rail study the way the City of Tigard prefers.

In response to a question from Councilor Henderson, City Manager Prosser advised that the City Council is not being asked to make a decision on the letter, but the Mayor is asking for input from the City Council members. Mayor Dirksen added that City Council was not being asked to endorse the letter; he, as the Mayor of Tigard is being asked to endorse the letter. Councilor Henderson said he would defer to the Mayor's judgment.

➤ Discuss City Manager Evaluation Criteria – Human Resources Department

Human Resources Director Zodrow referenced the packet of review forms used by the City Council for last year's annual performance review of the City Manager. Consensus of the City Council was to use these forms for this year's review. The review is scheduled for August 11, 2009.

➤ Street Maintenance Fee – Councilor Henderson advised he would be gone next week when this item is discussed. He will provide the City Council with his written comments.

➤ Administrative items were reviewed by City Manager Prosser:

- City Council received a copy of a corrected Page 8 of the TPOA Agreement (Consent Agenda Item No. 4.3). The correction was to Article 13.5, Phone Calls on Duty, changing the time from 15 minutes or longer to 7-1/2 minutes or longer.
- City Council received a copy of written testimony from Ernie Platt, HBA of Metro Portland, regarding the legislative hearing on the tree code amendments, Agenda Item No. 7.
- City Council received a copy of the Agenda Item Summary for Agenda Item No. 8 regarding the request to authorize the City Manager to sign the Purchase and Sale Agreement for the John H. Zuber property. This material was also provided to the City Council in the Friday newsletter packet.
- Verizon Franchise Audit Results:
 - Tigard is owed \$87,228; we paid \$14,007 for the audit.

- Settlement agreement language was negotiated with Verizon by Attorney Nancy Werner; the Agreement is conditioned upon all cities accepting its terms.
- The Intertwine – City Council agreed to scheduling a Metro representative to present information on The Intertwine, which is a new network resulting from the “Connecting Green” groups.
- Canterbury Heights Condominiums – City Council received copies of information on this subject. Community Development Director Bunch advised the City received a complaint about sight-distance on the corner when cars are parked on the street. The condominium development also complained about lack of parking on Canterbury Lane. Staff investigated sight-distance. There is no room to park cars along portions of Canterbury Lane without causing a hazard. A copy of the information reviewed by the City Council is on file in the City Recorder’s office. The condominiums have adequate parking; that is, it meets the requirements of the Code. In response to a suggestion by Councilor Buehner, Community Development Director Bunch advised additional parking might be made available on the condominium site if they request a modification. Community Development Director Bunch said the condominium property owners might find additional parking spaces if they evaluate the layout of their parking lot.
- Urbanization Forum Resolution – City Manager Prosser advised that the Washington County Board of Directors adopted the resolution, but they also approved a letter of transmittal, which was incorporated into the resolution. The City Council received a copy of the resolution and letter of transmittal. City Manager Prosser pointed out that the letter of transmittal was not discussed with other participants of the forum. The letter makes it clear that nothing in the resolution precludes Washington County from opposing or refusing to consent to “cherry-stem” annexations. City Manager Prosser urged the City Council members to read the letter of transmittal to determine if changes would be needed to the consideration of a similar resolution by the City of Tigard. City Attorney Ramis pointed out that whether Washington County opposes a cherry stem annexation does not control whether it is permissible.

Study Session concluded at 7:29 p.m.

1. BUSINESS MEETING

1.1 Mayor Dirksen called the City Council and Local Contract Review Board to order at [7:40:16 PM](#)

1.2 Roll Call

<u>Name</u>	<u>Present</u>	<u>Absent</u>
Mayor Dirksen	✓	
Council President Wilson	✓	
Councilor Buehner	✓	
Councilor Henderson	✓	
Councilor Webb		✓

1.3 Pledge of Allegiance [7:40:44 PM](#)

1.4 Council Communications & Liaison Reports: None

1.5 Call to Council and Staff for Non-Agenda Items: None

[7:41:07 PM](#)

2. CITIZEN COMMUNICATION

- Citizen Communication – Sign Up Sheet: None
- Follow-up to Previous Citizen Communication: None

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3. PROCLAMATIONS

Mayor Dirksen issued the following proclamations:

- a. PROCLAIM TIGARD AS A 2010 CENSUS PARTNER
- b. SUPPORT GIVE 10 TELL 10 CAMPAIGN

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Mayor Dirksen reviewed the following Consent Agenda:

4. CONSENT AGENDA:

- 4.1 Approve City Council Minutes for May 12 and 19, 2009
- 4.2 Receive and File:
 - a. Council Calendar
 - b. Tentative Agenda
 - c. Notes from June 30, 2009 Fifth Tuesday Meeting
- 4.3 Adoption of Tigard Police Officers Association (TPOA) New Collective Bargaining Agreement for FY 2009-2011, and Authorization of City Manager to Sign - Resolution No. 09-48

A RESOLUTION ADOPTING A NEW COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF TIGARD AND THE TIGARD POLICE OFFICERS ASSOCIATION (TPOA) FOR 2009-2011, AND AUTHORIZING THE CITY MANAGER TO SIGN

- 4.4 Approve an Updated Employment Agreement for the City Manager, Extending the Term and Incorporating Amendments
- 4.5 Approve Budget Amendment #10-01 to Recognize the Edward Byrne Grant Revenue in the Amount of \$86,099 for the Police Department– Resolution No. 09-49

A RESOLUTION TO APPROVE BUDGET AMENDMENT #10-01 TO RECOGNIZE RECEIPT OF THE EDWARD BYRNE GRANT REVENUE AND MAKE CORRESPONDING APPROPRIATIONS IN THE COMMUNITY SERVICE PROGRAM (POLICE DEPARTMENT) IN THE GENERAL FUND

- 4.6 Reappointment of Board Members David Burke and Cecilia Nguyen, Appointment of Scott Hancock as Board Member and Appointment of John Storhm and Grace Amos as Alternates to the Tigard Library Board– Resolution No. 09-50

A RESOLUTION REAPPOINTING DAVID BURKE AND CECILIA NGUYEN, CURRENT LIBRARY BOARD MEMBERS, TO FOUR-YEAR TERMS EFFECTIVE JULY 1, 2009 THROUGH JUNE 30, 2013; APPOINT SCOTT HANCOCK AS LIBRARY BOARD MEMBER FOR A FOUR-YEAR TERM EFFECTIVE JULY 1, 2009 THROUGH JUNE 30, 2013 AND APPOINT GRACE AMOS AND JOHN STORHM AS ALTERNATES FOR TERMS EFFECTIVE JULY 1, 2009 THROUGH JUNE 30, 2011

- 4.7 Approve Application to the Department of Justice for a Strategic Enhancement Mentoring Program Grant
- 4.8 Approve Application to the Department of Justice for a Gang Prevention Youth Monitoring

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Program Grant

4.9 Authorize Submission of an Energy Efficiency and Conservation Block Grant to Install a New Energy Star Roof on the Permit Center

4.10 Approve Intergovernmental Agreement with Washington County Accepting \$142,000 in Community Development Block Grant Funds for Garrett Street Sidewalk In-fill

4.11 Approve Workers' Compensation Insurance for Volunteers – Resolution No. 09-51

A RESOLUTION EXTENDING CITY OF TIGARD'S WORKERS' COMPENSATION COVERAGE TO VOLUNTEERS OF THE CITY

4.12 Approve Standard Utility Franchise Agreement with Electric Lightwave LLC - Resolution No. 09-52

A RESOLUTION GRANTING A NON-EXCLUSIVE UTILITY FRANCHISE TO ELECTRIC LIGHTWAVE LLC PURSUANT TO TIGARD MUNICIPAL CODE SECTION 15.06.060

4.13 Approve Wetland Mitigation Site Deed Restriction on City Property

4.14 Local Contract Review Board:

- a. Authorize City Manager to Negotiate and Sign a Three-Year Municipal Lease with Panasonic Finance Solutions
- b. Award Contract for Audiometric Services
- c. Award Contract for Application of Slurry Seal on Various City Streets under the FY 2009-10 Pavement Major Maintenance Program

Motion by Council President Wilson, seconded by Councilor Buehner, to approve the Consent Agenda.

The motion was approved by a unanimous vote of Council present.

Mayor Dirksen	Yes
Council President Wilson	Yes
Councilor Buehner	Yes
Councilor Henderson	Yes
Councilor Webb	Absent

Mayor Dirksen acknowledged the presence of the following Library Board appointees: Mr. Hancock, Mr. Storhm, and Ms. Amos. He asked them to stand to be recognized by the City Council and thanked them for volunteering to serve on the Board.

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5. ADOPT PARK SYSTEM MASTER PLAN

Parks Facilities Manager Martin introduced MIG (Consultant) Project Manager Ryan Mottau, who worked on this project. City Council is being asked to consider adoption of the Park System Master Plan.

City Council met last month with the Park and Recreation Advisory Board (PRAB) to finalize additional work to be included in the Plan. Mr. Mottau reviewed the changes made since the last review of the Master Plan and

those changes are outlined in his July 1, 2009, memorandum to the City Council, which is on file in the City Recorder's office.

Councilor Buehner said she hoped there will be annual updates to the Master Plan to keep it as current as possible. Parks Facilities Manager Martin advised staff plans to do more work to describe each greenspace and park area. Mr. Mottau said he hoped this will be a living document for the City. Ongoing interactions between PRAB and the City Council will give the opportunities to identify updates needed for the Plan.

Councilor Henderson commented on the document. He said he attended several of the PRAB meetings and the document is much larger than what he imagined. He referred to the outline of a recreation program and how it could be established and transitioned to become a stand-alone program. In response to a request from Councilor Henderson for more description of what is envisioned in a recreation program, Mr. Mottau advised that through the work done to gain information for the Plan, the increase in recreation opportunities in the City is a "huge" desire from citizens. Based on experiences of other agencies, the Plan provides that a recreation program does not have to be a big, huge program.

One of the most effective methods to develop a Recreation Program is to begin collecting the various programs available in the community already and start to centralize these programs to make it easier to access the programs. Then we can start filling in some of the relatively small gaps not being met by the public/private/non-profit providers. The funding piece is about the coordination role. An important aspect of making recreation opportunities a big part of what our City is about is to position the City as a central clearinghouse for all of the opportunities available. There must be someone who has the job of lining up the important pieces: the users, the spaces, the instructors, and the supplies. Most recreation programs pay for the operation of classes; however, you cannot expect to jump immediately to a self-paid program. The coordinator needs to be allowed some time to develop a program.

Mr. Mottau advised the Plan describes a reasonable approach to building a recreation program based on some of the opportunities already available from the City and other organizations. Councilor Henderson commented on the volumes of information contained in the Plan document and thanked the consultant for his work.

Council President Wilson noted there has been quite a bit of enthusiasm on the Park Board to start a recreation program. The concern has been how to fund such a program; i.e., ask voters to support a levy or fund the program with money from the General Fund? The funding remains as a concern for Council President Wilson; although, he thinks the Plan calls for an incremental installation of a recreation program and he appreciates this as a valid approach. However, in this economy, we are not going forward with new programs and this would likely have to wait.

Councilor Henderson said a recreation program appears to be the people's choice. Council President Wilson said he is not totally convinced of that – the survey shows a marginal increase in support for a recreation program and this was before the economic downturn. Council President Wilson sees support for other things ahead of a recreation program; i.e., preserving greenspaces. There is a whole range of choices in the Plan and priorities will need to be determined. As a document, Council President Wilson said he thinks the Master Plan represents our aspirations.

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Mr. Mottau said there was huge amount of support in the community for an ongoing program of acquiring open space and parkland. Recreation programming can help build support for other things that are important because it adds users to the park system.

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Mayor Dirksen added to Council President Wilson's comments on actions recommended within the Plan that are aspirations. There are many things within the Plan that cannot be done right away or, possibly, things that can never be done; however, if we do not aspire to accomplish these things, then they will never get done.

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Motion by Councilor Buehner, seconded by Councilor Henderson, to adopt Resolution No. 09-53.

RESOLUTION NO. 09-53 – A RESOLUTION ADOPTING THE CITY OF TIGARD'S PARK SYSTEM MASTER PLAN

The motion was approved by a unanimous vote of City Council present.

Mayor Dirksen	Yes
Council President Wilson	Yes
Councilor Buehner	Yes
Councilor Henderson	Yes
Councilor Webb	Absent

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6. CONTINUATION OF LEGISLATIVE PUBLIC HEARING FROM MAY 12, 2009 – PROPOSED DEVELOPMENT CODE AMENDMENT REGARDING SENSITIVE LANDS PERMIT REQUIREMENTS (DCA2008-00005) TO REMOVE CRITERION THAT PROHIBITS PATHWAYS LOCATED WITHIN OR ADJACENT TO THE FLOODPLAIN TO BE BELOW THE ELEVATION OF THE ANNUAL AVERAGE FLOOD (18.775.070.B.5)

REQUEST: To remove Section 18.775.070.B.5 of the Sensitive Lands Permit requirements which reads:

"5. The plans for the pedestrian/bicycle pathway indicate that no pathway will be below the elevation of an average annual flood;". Removal of this section would allow pathways to be installed in areas which would benefit the public's access to and educational appreciation of ecological areas. On April 6, 2009, the Planning Commission recommended the City Council replace the subject section with "Pedestrian/bicycle pathways within the floodplain shall include a wildlife assessment to ensure that the proposed alignment minimizes impacts to significant wildlife habitat." **LOCATION:** Citywide. **COMPREHENSIVE PLAN DESIGNATION:** All City Comprehensive Plan Designations. **ZONE:** All City Zoning Districts. **APPLICABLE REVIEW CRITERIA:** The Statewide Planning Goals and Guidelines adopted under Oregon Revised Statutes Chapter 197; [Goal 1, Public Involvement; Goal 2, Land Use Planning; Goal 5 Natural Resources, Scenic and Historic Areas, and Open Spaces; Goal 7, Areas Subject to Natural Hazards; and Goal 8 Recreational Needs]; any federal [FEMA] or state statutes or regulations found applicable; any applicable METRO regulations; [Metro Code Sections 3.07.300, Urban Growth Management Functional Plan; and Title 3, Water Quality and Flood Management]; any applicable Comprehensive Plan Policies; [Goal 1, Public Involvement; Goal 2, Land Use Planning; Goal 7, Hazards; Goal 8, Parks, Recreation, Trails, and Open Space]; and any applicable provisions of the City's implementing ordinances [TDC 18.130, 18.380, 18.390 and 18.775].

- a. Mayor Dirksen announced that this is a continuation of a legislative public hearing from May 12, 2009.
- b. City Attorney Ramis advised the procedure read into the record in the previous hearing is the procedure being followed. If, since that time, there have been any ex parte communications or if anyone has discovered a conflict, this would be the time to disclose. There were no declarations or challenges.

- c. Associate Planner Pagenstecher presented the staff report. The Council packet materials included the supplemental staff report dated June 29, 2009, which repackaged the information from the previous proceedings, added new Goal 5 findings, and included staff's response to public testimony heard at the May 12, 2009, City Council hearing.

The staff report includes the staff's and Planning Commission's recommendation for wildlife assessment in the Proposal Summary, Section 1. The Options Analysis presented to the Planning Commission is in the Alternatives to Proposal, Section 7. The Two-Year Flood Inundation Exhibit presented at the first Planning Commission hearing was attached for reference.

The new Goal 5 findings are on Page 9 in the staff report and are also contained in the Supplemental Goal 5 findings, dated July 7, 2009, the City Council received in the City Council newsletter.

Associate Planner Pagenstecher referred to the staff's response to the public comments contained in the staff report.

- d. Public Comment

Mayor Dirksen requested public comment be restricted to new information.

John Frewing, 7110 SW Lola Lane, Tigard, Oregon advised his concern with this amendment is that the proposed requirement for a wildlife assessment is not a clear and objective approval standard. Mr. Frewing advised he sees it as simply a submittal requirement. He referred to his previous testimony and said that "wildlife assessment" has not been defined as he requested.

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Mr. Frewing referred to a response from Associate Planner Pagenstecher on a comment Mr. Frewing had made. Mr. Frewing said that Associate Planner Pagenstecher advised that because Tigard previously adopted an ordinance, which implemented the Nature in the Neighborhoods Program that it could not have included a requirement for a wildlife assessment. Mr. Frewing said this sentence does not make sense. The Metro Code requires clear and objective standards. The staff report does not say that this is a clear and objective standard and Mr. Frewing said he did not think this was a clear and objective standard where there should be one. Even if, at some earlier date, Tigard adopted an ordinance to comply with Metro programs, what is occurring now is a "take away." One can say we are coming "out of compliance" with what we had on the day that we adopted the ordinance that brought us into compliance with Metro programs. Mr. Frewing said there would be no reason not to incorporate the clear and objective standards requirement of Metro, including a clearer definition of a wildlife assessment into this regulation.

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Mr. Frewing said the discussion of the Parks Master Plan, just approved by the City Council, is also new information. He said he thinks the Parks Master Plan is an aspirational document and has very little to say about what open space will actually be protected in future years. He said he would prefer that there would be more specifics in this regard rather than the specifics in other regards because of the importance of open space and greenspaces to the people of Tigard. He said he is happy that there is a Park Master Plan, but it does not take the place of defining those areas where we will not have trails, the natural areas. Tigard needs to be move forward on planning open spaces by saying where we are going to have trails and where we are not going to have trails.

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Mr. Frewing advised he has not seen the Goal 5 findings submitted on July 7, 2009, and said he would like an opportunity to look at them and provide comments. He asked for additional time so he could review the findings.

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Associate Planner Pagenstecher apologized to Mr. Frewing regarding the additional Goal 5 findings for which Mr. Frewing had not had a chance to review.

Associate Planner Pagenstecher referred to the sentence that Mr. Frewing said did not make sense. He advised that he meant to convey that Metro has already found that Tigard complies with the Nature in Neighborhoods. Whatever criteria we would come up with would be over and above compliance. Associate Planner Pagenstecher said he was not asserting that wildlife assessment criterion was clear and objective. Mr. Frewing responded that when Metro approved Tigard's compliance with Nature in Neighborhoods, it included the requirement that no trails will be built below the annual average flood. Now, we are taking that away. If this is approved, then we will have something less than we had when we complied with Nature in the Neighborhoods. Associate Planner Pagenstecher summarized that the background section of the staff report identifies why the existing criterion is an ineffectual elevation standard. The wildlife assessment is a way to identify sensitive habitats that we do not have today. In staff's opinion, we are not giving away anything – we are gaining a tool to site trails and design them for the preservation of habitat. Mr. Frewing acknowledged this was clear statement.

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e. Staff Recommendation

Associate Planner Pagenstecher recommended the City Council approve the proposed Development Code Amendment and adopt the proposed ordinance.

f. City Council Questions

Councilor Henderson referred to the Sensitive Lands Permit (Item B) where it states that, "Within a 100-year floodplain -- The hearings officer shall approve, approve with conditions, or deny an application request within the 100-year floodplain based upon findings that all of the following criteria have been satisfied." He said he does not know what "approved with conditions" means. Would the hearings officer be allowed to make more conditions? City Attorney Ramis responded that this language means that the hearings officer would have the discretion to impose conditions so long as those conditions were designed to assure that the application complied with the criteria. Some unrelated condition could not be invented. To the extent the hearings officer's judgment is that it is necessary to limit the project to be sure it complies with the criteria, then that kind of condition is allowable. Councilor Henderson asked about this section, as it would pertain to the wildlife assessment. City Attorney Ramis, and Associate Planner Pagenstecher concurred, that he would think a valid condition would be one that ties the design of the project to whatever the wildlife assessment says is necessary to protect habitat. Associate Planner Pagenstecher added that the wildlife assessment would result in a series of recommendations regarding how to preserve habitat and those would be then required of a design to satisfy the hearings officer that the proposal complied with that criteria.

g. Mayor Dirksen closed the public hearing and called for consideration of the proposed ordinance, which includes the supplemental findings prepared by the City Attorney's office dated July 7, 2009.

Motion by Councilor Buehner, seconded by Council President Wilson, to adopt Ordinance No. 09-11, including the supplemental findings prepared by the City Attorney's office dated July 7, 2009.

ORDINANCE NO. 09-11 - AN ORDINANCE AMENDING THE TIGARD COMMUNITY DEVELOPMENT CODE SECTION 18.775.070.B.5, REMOVING A CRITERION WHICH PROHIBITS PATHWAYS LOCATED WITHIN OR ADJACENT TO THE FLOODPLAIN TO BE BELOW THE ELEVATION OF THE AVERAGE ANNUAL FLOOD AND, INSTEAD; REQUIRE THAT PEDESTRIAN/BICYCLE PATHWAYS WITHIN THE FLOODPLAIN INCLUDE A WILDLIFE ASSESSMENT TO ENSURE THAT THE PROPOSED ALIGNMENT MINIMIZES IMPACTS TO SIGNIFICANT WILDLIFE HABITAT (DCA2008-00005).

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City Council discussion followed:

Councilor Buehner said she appreciated the memorandum from the City Attorney, which she found helpful in answering questions she had regarding Goal 5. With respect to the specifics of the ordinance and the discussion resulting from Mr. Frewing's comments regarding Metro's standards, she said that Metro is also responsible for pushing and assisting us in getting the various trails completed, such as the Fanno Creek Trail. Other jurisdictions are also looking at trails within the annual floodplain to meet Metro's requirements. Councilor Buehner advised she did not think this ordinance would affect our relationship with Metro with regard to greenspaces.

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Council President Wilson said he agreed with Councilor Buehner. He said he thinks the language regarding the wildlife assessment could be clearer to assist the hearings officer in imposing conditions. He said he was also concerned, as he stated in the previous hearing, that we needed to balance the needs of wildlife with the recreational needs of people. This could be interpreted that to minimize the impacts to wildlife that extreme measures could be required, such as requiring eight-foot high boardwalks or pushing a trail to the absolute edge of the property making it less functional or less attractive for pedestrians to use. He did not think this was the intent of the ordinance. Council President Wilson said he would prefer to modify the sentence to reflect this.

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Mayor Dirksen suggested that the ordinance could be adopted this evening and have staff go back to develop a clearer statement. He said that it appears that what the City Council is looking for with the wildlife assessment is to find the balance between wildlife habitat and the needs of citizens. He said it was sufficiently clear to him regarding its purpose. Council President Wilson suggested wording such as, "A wildlife assessment shall be conducted and used to ensure that the proposed alignment balances impacts to significant to wildlife habitat with the recreational goals of the community."

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Councilor Buehner indicated she would be fine with the change suggested by Council President Wilson. She asked City Attorney Ramis if the City Council could approve the ordinance tonight with the direction that staff comes up with a different definition? City Attorney Ramis suggested the City Council give staff direction and staff would come back to the City Council with adjusted language and, perhaps adjusted findings, to support that language and then have a final adoption.

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Councilor Henderson agreed with the City Attorney's recommendation. He said there was a question at the last hearing whether the proposed ordinance would affect all of the greenways. He would like to

have a clear definition. Councilor Henderson said the citizens want to use greenways and he would like to find a way for this to happen.

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In response to a request for Mayor Dirksen for Council President Wilson to describe the changes he would like, Council President Wilson advised:

“I’d like to do two things. I’d like to achieve a balance instead of just to minimize because that is sort of an extreme thing. But, I’d also like to indicate that the wildlife assessment be used to actually inform the design, that the design respond to it in some way – not just that you do one...”

Mayor Dirksen suggested the following wording:

“...it shall include a wildlife assessment that shows that the proposed alignment minimizes impacts on significant wildlife habitat.”

The above wording would make it clear that not only would an assessment have to be prepared, but also the conclusion of the assessment would be that there is no significant impact.

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Councilor Buehner commented that the Mayor’s suggested wording might fall within Council President Wilson’s concern that the balance might be leaning so far in favor of protecting the wildlife, that you have effectively minimized the viability of a trail in a reasonable location. She said she believed Council President Wilson’s proposal was for a balance of interests. Council President Wilson said there are clearly trade-offs. The best thing for wildlife might be to build no path. He said he wants the Code to acknowledge that we are possibly causing some habitat degradation; however, we are going to do it in such a way that we consider the needs of wildlife and, if it is something extreme (i.e., an endangered species is severely impacted) then we might choose not to do it. He said that if it is common wildlife and a minor imposition, then we ought to design it in such a way that is the most desirable route for recreational purposes.

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Mayor Dirksen read proposed wording suggested by City Manager Prosser:

“Pedestrian and bicycle pathways within the floodplain shall include a wildlife assessment that shows that the proposed alignment minimizes impacts to significant wildlife habitat while balancing the community recreational and environmental educational goals.”

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Council consensus was for support of the above language. The Council also discussed whether they could approve the proposed ordinance tonight. City Attorney Ramis apprised the City Council of his concern insofar as he would like the staff to have the opportunity to review the language against the findings they have made, particularly related to Goal 5, to make sure that we are still in the parameters of Goal 5 and Metro’s requirements.

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Mayor Dirksen agreed that it would be better for staff to review and have this come back before the City Council again.

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Community Development Director Bunch said the findings are now saying that trails are no different from the other conflicting uses currently allowed in these areas. Staff will need to research this to develop an affirmative statement that the language meets the intent of the City Council. He recommended for this to come back to the City Council at a later date.

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City Manager Prosser advised this matter could be scheduled for the August 11, 2009, City Council meeting.

Consideration of Ordinance No. 09-11 was carried forward to August 11, 2009.

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City Attorney Ramis advised that the record, at this point, is closed. There will be no further testimony.

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7. CONTINUATION OF PUBLIC HEARING – PROPOSED DEVELOPMENT CODE AMENDMENT REGARDING TREE REMOVAL DCA2009-00001
LEGISLATIVE PUBLIC HEARING – PROPOSED DEVELOPMENT CODE AMENDMENT REGARDING TREE REMOVAL (DCA2009-00001) – COUNCIL GOAL #1B – UPDATE THE TREE CODE TO MEET COMPREHENSIVE PLAN

REQUEST: To amend the current Tigard Development Code to clarify how an applicant for development is to demonstrate compliance with the City’s stated preference for tree protection over removal wherever possible. The complete text of the proposed Code Amendment can be viewed on the City’s website at http://www.tigard-or.gov/code_amendments. **LOCATION:** Citywide **ZONE:** All City Zoning Districts
APPLICABLE REVIEW CRITERIA: Community Development Code Chapters 18.380, 18.390, and 18.790; Comprehensive Plan Policies 1.1.2, 1.1.3, 1.2.1, 1.2.6, 2.1.2, 2.1.14, 2.1.24, 2.2.1, 2.2.6, 2.3.1, 2.3.6, 6.1.6, 6.2.3, 6.2.4, and 6.2.5; Metro Functional Plan Titles 1, 2, and 3; and Statewide Planning Goals 1, 2, and 6.

- a. Mayor Dirksen opened the public hearing, which was continued from May 12, 2009.

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- b. City Attorney Ramis reviewed the hearing procedures.
- c. Declarations or Challenges: None.
- d. Staff Report: Community Development Department

[8:37:57 PM](#)

Associate Planner Floyd presented the staff report for this matter. He referred to the Planning Commission recommended changes to Chapter 18.790 of the Development Code, which regulates Tree Protection. The changes were before the City Council. Staff also included additional suggestions in response to public comments, feedback from City Council, and advice from the City Attorney. These additional suggestions were also before the City Council. (Changes were contained in a document marked “Exhibit A” and also discussed in a memorandum marked as “Attachment 4” in the City Council meeting packet.)

[8:38:43 PM](#)

The purpose of the amendment is to clarify existing ambiguity in the Development Code. This ambiguity is a stated preference for tree preservation over removal wherever possible, but this same chapter contains no corresponding mechanism through which an applicant may demonstrate this preference, or for the city to verify conformance.

[8:39:04 PM](#)

As a result, the proposed amendment modifies the requirements for information included in a site plan and for the design and construction techniques to be use to carry out a tree plan. No land in the buildable lands inventory will be rendered unusable as a result of this amendment. Because no impact on the supply of buildable lands is associated with the proposed amendment, the City's inventories of residential, commercial and industrial lands remain in compliance with Goals 9 and 10.

[8:39:31 PM](#)

Specific changes included in this amendment are:

- Updated definitions
- Softening of the City's stated preference for "tree protection is preferred wherever possible" to "wherever practicable" to allow applicants more flexibility to deal with site conditions given the available means, resources, and project conditions.
- Expanded informational requirement, including
 - Submission of a narrative answering eight questions related to the design process used, and
 - Allowing either an arborist or landscape architect to approve these plans
- Creation of approval criteria for tree plans
- Creation of a modification procedure

[8:40:15 PM](#)

The practical intent of this amendment is to ensure that the arborist or landscape architect has been consulted by other members of the project design team to inform design decision as they occur, rather than being brought in to salvage what is left after a specific site plan has been developed. Associate Planner Floyd said, "Unfortunately, this latter scenario is often the case, as observed by staff in project submittals and as reported to staff by professional arborists who work or consult in the region."

Associate Planner Floyd advised that the Homebuilders Association (HBA) has concerns about the proposed amendment. Representatives are present tonight and they would like to speak to their concerns. HBA representatives have also requested a continuance of this item to deal with some of their concerns. Associate Planner Floyd said staff's inclination is to recommend adoption of the proposed amendment, with a commitment to revisit this within six months or after the first application comes in.

[8:41:54 PM](#)

Councilor Buehner asked Associate Planner Floyd if he has had an opportunity to review the suggested language from Ernie Platt of HBA. Associate Planner Floyd said he had reviewed the language submitted. This language would not change the effect of the ordinance.

e. Public Testimony: Proponent – Opponents

[8:42:44 PM](#)

Ernie Platt, 15555 SW Bangy Road, Lake Oswego OR 97035 testified in opposition:

- Represents Local Government Affairs, Homebuilders Association Metro Portland.

- Referred to the staff report. There are potential areas not completed covered or where unintended consequences could develop because of the wording. HBA made suggestions for changes that were rejected by the staff. The HBA is opposed to the proposal; however, they would be willing keep working on this.
- Referred to “Section B.5. of Exhibit A (Page 3) – “A narrative and site plan demonstrating how the following design and construction techniques will be utilized to the extent practicable. The format of the narrative must address each technique with a ‘yes’ or a ‘no’ answer...” Eight techniques are listed. Mr. Platt said there are some techniques listed that will not be applicable or appropriate for a particular application. A “yes” or a “no” is not possible to these questions. There are four possible answers to the questions: “yes” “yes, to the extent practicable” “no” and “not applicable.”

Mayor Dirksen commented to Mr. Platt that most of the language changes suggested by the HBA are to clarify that the trees being talked about are existing trees that are proposed to be preserved. Mr. Platt confirmed that this was correct. Mayor Dirksen said he did not understand why staff would be opposed to this. Community Development Director Bunch advised that the intent is to clarify the City’s position that we wish have a preference for the protection of trees rather than removal. If there is an instance where someone decides that the trees to be preserved after a site plan has been done – the roads designed, grading has occurred, lot lines laid out, utilities developed – that essentially, by its very approach, will go against this principle to give a preference to protection of trees over removal. One needs to start from another position to reach this goal; that is, identify the trees on the site and determine which trees can be preserved through an arborist or a landscape architect’s collaboration with the developer early in the process. Staff does not substitute their judgment for the arborist or the landscape architect. The proposal is for a predetermination by the developer of the property which trees shall be preserved after the design. Mayor Dirksen said he perceives the difference and said what Community Development Director Bunch was saying is with the language change being proposed, the only trees that need to be addressed are those that the developer has proposed to be preserved as opposed to addressing all of the trees on the property and how to preserve as many of those as possible. Community Development Director Bunch said if there is a situation where 90 percent of the trees have to be removed and the arborist agrees, staff would not substitute their judgment for the arborist.

[8:51:05 PM](#)

Mayor Dirksen said he agreed that “not applicable” should be added as a choice. He suggested also that under “approval criteria” (d) – that even if something is “not applicable” there would need to be justification why. In addition, the answer could be “no,” but the “no” answer must be justified.

[8:51:56 PM](#)

City Attorney Ramis agreed with Mayor Dirksen. This makes sense because in almost all contexts pertaining to the land use process, we often ask for justification for a particular conclusion. The unique part about this ordinance and this drafting enterprise is that we have to develop an ordinance that has clear and objective criteria. We do not have procedure for a discretionary judgment by the City about whether the design is practicable or not. This ordinance represents an interesting experiment by the staff; that is, to see whether or not we can design an ordinance so the staff’s and the hearings officer’s judgments are clear and objective (yes or no). The applicant would be asked, early in the process, to engage a professional who will make those discretionary judgments. The staff is looking for an ordinance where it is a requirement that there be an arborist early on to be engaged in these questions as to whether something is practicable or not. When the application comes to the City, the City would simply be inquiring whether or not these questions were answered “yes” or “no.” If they are all answered yes, the staff will approve. City Attorney Ramis said this is a unique concept.

[8:53:31 PM](#)

Council President Wilson commented that a condition of approval would be that “they all get to ‘yes.’” City Attorney Ramis agreed that this is the way it is written. This raises the question about what would happen if you answer “not applicable” or what happens if the answer is “not practicable.” If “not applicable” and “not practicable” count as “yes,” then you get approved. However, City Attorney Ramis said he is not sure that is the intention.

[8:54:00 PM](#)

Council President Wilson said that that the way he would read the code is that “nothing would be allowed under the drip line of existing trees,” because all existing trees are to be preserved.

[8:54:28 PM](#)

Mayor Dirksen said he did not read it the same way as Council President. Community Development Director Bunch added that this was not the way it was intended. He said, for example, if one of the criteria does not apply and the arborist confirms it was considered and it does not apply to the project for a set of particular reasons, the response would be “yes” to that criterion.

[8:55:35 PM](#)

Community Development Director Bunch responded affirmatively to a question from City Attorney Ramis in that if the answer is “not practicable,” then the answer would be “yes.”

[8:55:42 PM](#)

Councilor Buehner referred to her background as a real estate attorney and she said she was having difficulty understanding his explanation above.

[8:56:10 PM](#)

Associate Planner Floyd said the goal here is to make sure people have considered these criteria during design process. The techniques are being incorporated to the extent practicable (see Section 5, Page 3). Councilor Buehner challenged “what does the extent practicable mean?” Associate Planner Floyd referred to the definition section and “extent practicable” means reasonably capable of being done or accomplished with available means or resources. This an area debated by the Tree Board and the Planning Commission. Because trees are living organisms, every site is unique. There is a built in “reasonable person’s standard here.” The arborist and landscape architect will make the call. There is no intent to limit development, reduce number of units, or square footage, etc. Councilor Buehner said the definition does not say that the intent is for no requirement in the reduction in the number of units to be built.

[8:57:48 PM](#)

Associate Planner Floyd referred to Page 1, Section C. The Code recognizes that is necessary to remove trees to accommodate structures, streets, and utilities. He said the Code could be made more explicit. Councilor Buehner said we should have a Code that allows a developer to build to the allowable units per acre.

[8:58:48 PM](#)

Community Development Director Bunch said the current Development Code does not limit the allowable density on the site; this is specified elsewhere in the Code. We have adopted standards that allow developers to build to 80 percent minimum density. The City does not get in the way between a developer and their development program and this is explicit elsewhere in the Community Development Code. This Code language is intended to accommodate development as allowed by the Community Development Code, but we are requiring that an arborist or landscape architect involved

early on in the process. Experience has shown that when there is this involvement, we get a higher level of tree protection. This is an experiment trying to take a process forward that is clear and objective to the extent practicable.

[9:00:04 PM](#)

Councilor Buehner commented that it appears that HBA does not have any problem with a Code that would require getting an arborist or architect involved early in the process.

[9:00:25 PM](#)

Council President Wilson commented pointed out that staff has to explain what they mean rather than to read it and understand what is meant. He said the proposed language sounds “so absolute in A-H” and what staff really means is that the developer should try to implement each of these techniques you can, one by one, to the extent they can. Mayor Dirksen added he could see that some of these techniques where the answer would always be “no.”

[9:01:43 PM](#)

Community Development Director Bunch agreed staff could clarify the language “to the extent a developer can,” as long as it also does not interfere with their use of the property as otherwise provided by the Community Development Code.

[9:02:06 PM](#)

Councilor Buehner suggested that staff and the HBA representatives work together on this language.

[9:02:29 PM](#)

Community Development Director Bunch said staff has spent several months on this draft ordinance with the Tree Board and the HBA representative resigned. We have a broader constituency and the Tree Board is concerned about fulfilling the direction to continue to involve citizens in this process as well. Councilor Buehner responded that this current iteration is very unclear and as it is currently written, she cannot vote in favor of the proposed language. The language needs some modifications to make it more user friendly. Community Development Director Bunch agreed that, upon City Council direction, staff can bring back revised language.

[9:03:44 PM](#)

Mayor Dirksen summarized that Council President Wilson’s point is well taken: “...under 5, it needs to be clear in each case, that it means ‘to the extent practicable.’ Otherwise, at a later time, a Development Director or staff is going to read this and say, ‘Unless, you say absolutely yes to all of these, then your application is rejected.’”

[9:04:00 PM](#)

Council President Wilson shared photographs of Blue Heron Subdivision (photos are on file in the City Recorder’s office). This was a Planned Unit Development that was considered when he served on the Planning Commission – about the year 2000. He pointed out there are trees standing that an arborist might have said could not have survived (i.e., paving all around the tree). He said he was concerned that more trees might be required to come down. He said that in the Blue Heron development, many houses were built close together and a great number of trees were saved. He would not want to approve language that would be counter-productive and encourage developers to get rid of trees because they would not want to take a chance of them dying. The proposed language needs more work and, possibly adding the words “to the extent practicable and allowing for a not applicable” answer might address the problems.

[9:06:34 PM](#)

Associate Planner Floyd responded that Council President Wilson's remarks are consistent with what was discussed at the Planning Commission and the Tree Board. The intent was never to be absolute. So, adding the language "to the extent practicable" at the end of every question, was actually discussed. The decision was made to leave it with the first sentence because it seemed to be repetitious and hard to read. Council President Wilson and Councilor Buehner commented that it needs to be made clear. Associate Planner Floyd said staff would address this.

[9:07:13 PM](#)

Community Development Director Bunch reiterated that the language is not intended to substitute staff's judgment for that of a landscape architect or an arborist. The arborist and the developer can propose a tree protection/tree preservation program as long as they consider the basic, relevant factors. Staff can make the language more clear and have the City Attorney review to make sure it is clear and objective.

[9:08:04 PM](#)

City Attorney Ramis said that the answers that are possible under Section 5 – "yes," "practicable," "no," or "not applicable" -- are also restated in the standard in Section E. We will need to make sure that where Section 6 allows the plan to be signed by an arborist or a landscape architect that this should also be reflected in the approval criteria that either can sign off.

[9:08:35 PM](#)

Councilor Buehner said her concern is to make sure that the language is readable to someone who is not an experienced attorney or land use planner. In the effort to make the language clearer, it might end up being "a little longer."

[9:09:00 PM](#)

Mayor Dirksen said it clear to him that the intent of "both sides" is the same. The language needs to be clarified.

Craig Brown, 160774 SW 103rd Avenue, Tigard, Oregon testified in opposition:

- The primary concerns are those that were just discussed. There is no clarity with regard to the intent of the language.
- He was uncertain that staff and those who have testified in opposition were intending the same thing. It is evident that additional work needs to be done.
- He referred to the aerial photographs in the Town Hall. Since the earliest photo to present day, there are many more trees – these came from development. There will be more trees when the trees planted by development in this current decade have matured.
- He would like to see the City Council acknowledge that development has increased the tree canopy. As the City grows, housing is needed. Trees need to be removed and there are impacts from housing development, but it also encourages and supports the tree canopy.
- He is involved at this time with Metro on the Reserve Committee (North Bethany – Bull Mountain Reserves). Planners need to take into consideration issues such as grades/slopes. Very few sites are ideal. It is easy to write the Code, but many times it is difficult to apply it – there needs to be some latitude.
- Little concern has been given to the fact that most homebuyers want a yard. If the development is on a site where there are many trees, area needs to be cleared for a reasonable yard.
- In Section 7.90.030 – Tree Plan Requirement – the measurement to the nearest 1/10th of an inch is not reasonable. He suggested a revision "to the nearest inch."

- He asked for consideration be given to a development on smaller lots. It is more difficult to save trees that will remain healthy after the impacts that have occurred during construction. It would be better to plant new trees after the homes are built.
- He referred to Paragraph 6.E. – and if all questions have been answered, it is not clear if the application has been approved or if this would mean that it has been accepted and then the application could be disapproved. He said that he does not know what Paragraph 6.E.1 means.
- He referred to Paragraph 6.F – he said the requirement is excessive. [9:17:13 PM](#) There needs to be more latitude.

Community Development Director Bunch responded the intent is to provide clear and objective standards in the process to ensure the design and development considers the City's preference to protect trees over removal, to engage arborists and landscape architects in the design of these projects. The intent is to allow development to occur at the density intensity allowed by the Development Code. Yards can be provided now, but many have to pay mitigation fees. Ultimately, in the process, staff wanted to address the tree mitigation concerns.

Community Development Director Bunch referred to the concerns for smaller yards and the language was intended to avoid requiring an applicant to go through a new application procedure.

Associate Planner Floyd commented that the intention of the Code is to provide flexibility. We are asking the applicants to demonstrate that they give consideration to issues regardless of site conditions. He referred to measurements and this was an attempt for standardization. Mr. Brown noted the measurement as now proposed serves little purpose and described the difficulty encountered when measuring trees.

Mr. Brown asked if a site is zoned for 10 units, but it could be developed at 8 units, is it a legitimate request for the City to “say we only want you develop 8 lots, because you can save more trees?” Community Development Director Bunch referred to Metro Functional Plan, Title 1, which requires cities to develop projects at 80 percent minimum density. Tigard has placed this in the Code. Staff allows development to 100 percent density. “We developed our housing target on meeting the 80 percent minimum density. What Council has also asked us to do is go back and remove that 80 percent minimum density in our ordinance to provide for a larger range of flexibility. We have been discussing that with Metro and they believe, once we re-designate our downtown, we can do that, because we would be able our 6,792 housing units that they want us to accommodate by 2017. Yes, 80 percent minimum density is as low as Metro wants us to go.”

[9:23:43 PM](#)

Mr. Brown responded to Community Development Director Bunch that this was not the question. “The question was, in your view, is that a legitimate thing for the City to require, that we develop at 80 as opposed to 100 percent so that we can save additional trees.” Community Development Director Bunch apologized as he misunderstood the question. Mayor Dirksen said, the short answer is “No.” Community Development Director Bunch agreed with the Mayor. The City cannot require this.

[9:24:29 PM](#)

Councilor Buehner said she is concerned about the “orphaned tree” situation. Her experience was that three large trees were left at the property line on her homesite and after a storm, these trees ended up “in our house.” We need to be careful as we draft the Code that we are not creating the “orphaned tree” situation – this happened a lot on Bull Mountain.

[9:25:19 PM](#)

Associate Planner Floyd referred to Page 3, Section 5A: “The question is, does the project protect and retain existing non-hazardous trees that are not likely to become a hazard during or soon after development, given

their existing condition, ability to withstand unavoidable development-related impacts, proximity to proposed land uses and structures, and susceptibility to wind-throw.” Councilor Buehner noted this is a concern as she continues to see this as developers try to save trees to meet Code.

[9:26:16 PM](#)

Community Development Director Bunch said “we want to take our staff out of that kind of decision, because the developer will engage a professional arborist or landscape architect to make those decision. However, they have to consider it. Will they get it right all of the time – we don’t know.”

Council President Wilson said he agreed the 1/10th of an inch measurement comments by Mr. Brown – to the nearest inch is acceptable.

[9:27:31 PM](#)

Phil Grillo (attorney), on behalf of the Homebuilders Association, Miller Nash, 3400 US Bancorp Tower, 111 SW Fifth Avenue, Portland, Oregon 97204-3699, said what has been testified tonight represents some of the unintended consequences that may occur based upon on the current Code as the proposed draft has come to the City Council. His comments included:

- Described to the City Council how the Code works now with regard to tree plan requirements. [9:28:32 PM](#)
- Staff proposed to convert the tree plan process into a permit because of the approval criteria. This is a concern because, if you are making discretionary decisions in the context of application requirements and converting them to approval criteria, you may be delegating discretionary decisions into a situation where no one can test those decisions. He proposed, that instead of creating approval criteria for a tree plan, to create a protocol. A protocol would be gone through as part of the pre-application conference and if everything has been submitted, the application will be complete and the applicant can move forward. [9:31:05 PM](#) This way you would not be creating approval criteria that is potentially a delegation problem.
- He referred to a habitat-friendly ordinance (about 2-1/2 years ago) that amended the Sensitive Lands provisions. It is not a good idea to create new approval standards for tree removal because most of the tree removal that will be happening is going to be because of habitat areas. Habitat areas are one of the five types of Sensitive Lands. In this ordinance he referenced, it was very clear (in Council’s deliberations) that no new development regulations were going to apply to the habitat areas. He said “that’s exactly where these provisions of these tree codes are going to take place...they are going to create new development regulations. There is no Goal 5 analysis supporting that, there is no Goal 9 analysis, no Goal 10 analysis – the kind of homework that you really need to do, has not been done with regard to those upland areas.”
- [9:32:51 PM](#) He said they are trying to work cooperatively to have reasonable protocols to occur, but not make them into approval criteria.

Community Development Director Bunch advised that staff followed the City Attorney’s recommendation to bring these forward as approval criteria that would be clear and objective. The 180-day completeness criteria were discussed. The hearings officer or decision body would have to determine the sufficiency of the application based upon the completeness criteria, which is a reason why staff did not pursue this. Regarding whether this is Goal 5, staff discussed this in great detail with the City Attorney’s office – because this is clear and objective and we are not substituting staff’s discretionary criteria, the Goal 5 application is not necessarily applicable. In fact, staff recognized that for those upland areas that we would have to go through a Goal 5 analysis and the ESEE analysis to protect the trees. Staff proposes to take the feedback presented tonight, make this much clearer. The intent is to provide clear and objective standards to meet the City’s goals to allow development to occur at the density and intensity allowed by the development code.

[9:35:48 PM](#)

John Frewing, 7110 SW Lola Lane, Tigard, OR 97223 testified in opposition. There are premises underlying this “honorable effort” including a presupposition that the project arborist, who is hired by the developer, has

some power that “I don’t think he has.” The developer will hire the arborist who will give the answer the developer wants. The concept of practicable is a problem for Mr. Frewing.

Mr. Frewing referred to his question, earlier in the process, who determines “feasible.” On Attachment 3, Page 7, it says that “The intended meaning is that something that the applicant determines fully and totality.” There is no role for the City to determine feasibility or practicality – that’s an applicant choice. “If we are going to be stuck using this kind of a fuzzy word, I think it would be clearer to the world if we said something like, ‘The word means anything developer means it to mean.’ – I mean just give it away...I don’t like the use of these fuzzy words.”

[9:38:16 PM](#)

Mr. Frewing said he does not like the words “feasible, practicable, or possible” without some clarification. Mayor Dirksen advised Mr. Frewing the City Council has heard this testimony before. Mr. Frewing said he wanted to suggest an alternative: “If a particular practice has been found to be utilized in at least five other instances in the Portland Metropolitan area, within the past five years, it is deemed feasible.” He said this is objective.

[9:39:06 PM](#)

Mr. Frewing noted the Tree Board’s desire to add items to a previous Director’s Interpretation on this matter. The Homebuilders Association is interested in addressing mitigation. During the discussion, the staff’s position was to keep the scope within the Director’s Interpretation. However, staff has added things such as the definition of a tree and tree measurement requirements. There is no clear basis for adding these things outside the bounds of the Director’s Interpretation. Mr. Frewing said he has suggested the definition of “hazardous tree” be clarified, as being a tree that is hazardous that cannot be fixed by normal arboricultural practices. He asked the City Council to ask staff to include this kind of a clarification.

[9:40:59 PM](#)

Mr. Frewing said that having the applicant respond with “yes” or “not applicable” is only a submittal requirement as far as he is concerned, unless there is something in the Code that requires the applicant to speak the truth. He asked the City Council to make sure the Code has a requirement for the applicant to speak the truth and there would be consequences if the truth was not being spoken.

[9:42:08 PM](#)

Mr. Frewing said there is requirement that the plans be signed by the arborist. The plans also ought to be signed by the developer. This is a joint effort to develop a tree plan.

[9:42:39 PM](#)

Mr. Frewing referred to the Blue Heron Subdivision mentioned by Council President Wilson. He said the same developer did the Ash Creek Estates and the developer removed trees because of where utility ditches were dug. In addition, trees have been lost on this site that were designated as “saved trees.”

[9:43:42 PM](#)

Ken Gertz, Gertz Fine Homes, 19200 SW 46th Avenue, Tualatin, Oregon testified in opposition. He said he is a landowner, stakeholder, and a member of the Homebuilders. Although, he advised he was not talking on behalf of the Homebuilders. His comments included:

- He addressed the “attacks on Alan Deharpport” who went to Tree Board meetings. Mr. Gertz said Mr. Deharpport was “made to feel that his input was not really necessary or wanted.” Mr. Gertz said he understood why Mr. Deharpport resigned.
- Mr. Gertz said he was directed by his attorneys to “stay clear” of the Tree Board meetings.

- Clear decisions are needed on the Code. You need a yes or no decision. He referred to an appeal by Mr. Frewing on a development that he did and referred to the issues Mr. Frewing raised. Most of the issues could have been avoided if there were clear statements provided in the Code.
- Mr. Gertz noted his issue with the “what is practicable” where there is no yes or no standard. He suggested: “Practicable means reasonably capable of being done to accomplish with the available means or resources, which is open-ended as far as cost goes – you really need to add something to do with why is it not practical. The practicality is that is it costs too much to do it.” He offered the following wording, “With the cost to accomplish being less than or to equal to the cost to mitigate the tree as per 18.790.030(B)(2)(c).”
- As a developer, he likes to save trees. The proposed Code “...is hindering us from doing our job and that’s to save trees.” This is why he wants language that refers to cost.
- Mr. Gertz referred Section 18.790.020A.7. He suggested the text should read “above the 54-inch and not below the 54-inch.” He submitted photographs depicting why the text should read “above.” The photographs are on file in the City Recorder’s office. He commented on the photographs with regard to mitigation costs. He noted that the developer would have incentive to keep inferior trees. His photographs illustrated the incongruity of mitigation fees for an overgrown bush versus a stately tree. He said he would like City Council to direct staff to give his money back for a lace leaf maple tree he had to pay mitigation costs for and he considers this to be an example of the “tree code gone awry.”
- People are using the standards to stop development. Any tree can be saved with enough money. More clarity is needed.
- Mr. Gertz questioned Section 18.790.030B.1 and whether adding the tree canopy provisions will be readable on the plans.
- Mr. Gertz said that according to LUBA under the current Code, any tree can be removed as long as its mitigation is paid or a replacement occurs.
- A new title needs to be added: “18.790.020C. to read – ‘With the exception of Tigard Heritage Trees, any tree may be removed to facilitate development provided 18.790.030 is followed.’” This would take the question out of whether you can cut down a tree.
- Mr. Gertz said the measurement of a tree to the 1/10th of an inch is absurd.
- Mr. Gertz referred to 18.790.030B.5.d. and said it should only be applicable to commercial buildings or development that has the final building plans submitted with the development, otherwise more trees will be cut down than necessary. Developers are developing single-family lots and they have no idea what the builder will build on the lot. “You can’t really put a footprint of a house on the lot if you are not the builder.”
- Mr. Gertz said, “I also believe that 5.e. and 5.f. are mostly geared towards commercial and PUD-type developments where the building is submitted with the land use plan. It doesn’t really make sense to apply that to a single-family home. So, it should be noted what type of uses those sections are for. This has possibly already been addressed.”
- Mr. Gertz said, “Just as a clean-up note, I noted on B6, you have fee-in-lieu-of planning. And, to be consistent, wouldn’t you just call that mitigation?”
- He said in his experience he has always tried to save as many trees as possible. He described how he went about saving trees. If a tree must come down later on, he said “you got to be able to cut it down without being penalized for it.” [9:57:30 PM](#) Questionable trees should have a mitigation level of about 25 percent less stringent than requirements for other trees.
- Mr. Gertz said that staff has their own set of rules of how mitigation is returned to the builder. Planning has some rather “funny ideas” on how to save trees. These ideas are not in the Code. As an example, “for trees under 12-inches, they want me protect them, which costs me money. They want me to put a deed restriction on a tree – that’s from a six-inch to a twelve-inch tree – these are not mitigatable trees – so a deed restriction to a customer is like a red flag. No homeowner wants to a house from me that has a deed restriction on it. Basically, by saving that tree, I’m losing customers. The tree takes up space...I can’t plant in that space anymore...so why would I ever want to save that tree. I don’t any credit for it...so it’s easier

to cut the...tree...down than it is to save it – and that’s stupid. A builder, like myself, should be able to save those trees, not be penalized for it and actually get credit for it.”

- Mr. Gertz said, “My opinion of your current [9:59:44 PM](#) street code is that it absolutely absurd, needs to be thrown out, and you need to start totally fresh. And, forget trying to marry the new Code into this existing one, it’s just a boondoggle.”
- Mr. Gertz said, “replanting rules are pretty stupid too.”

Associate Planner Floyd responded to Mr. Gertz’s comments. He said he thought everyone agreed that mitigation is not achieving the objectives we want. Unfortunately, this amendment is not meant to address this. He reminded the public that there is an Urban Forest Master Plan process going on now to look at a comprehensive overhaul of the system. Mr. Gertz’s comments would be useful.

Associate Planner Floyd said the definition of tree, which Mr. Gertz was concerned about is an ISA definition introduced by the staff arborist. Mr. Gertz said this is a problematic area and referred to the LUBA appeal and said this needs to be addressed.

Mr. Gertz said he would like to meet with the City Attorney, review the LUBA appeal, and then do the corrections that need to be done in the Code. [10:01:35 PM](#) He referred to the costs for LUBA appeals.

Associate Planner Floyd commented that Mr. Gertz’s comments are getting off-topic. Mr. Gertz acknowledged that he was off-topic. Associate Planner Floyd suggested that Mr. Gertz come to the Planning Commission and talk to staff about the process.

Associate Planner Floyd said Mr. Gertz talked about the problems of having to commit to building footprints and dealing with changes “down the line.” The staff has inserted a major and minor modification process, which addresses some of Mr. Gertz’s concerns. Mr. Gertz said that was a great improvement.

[10:03:12 PM](#)

Community Development Director Bunch said that staff has made a lot of efforts to respond to the Director’s Interpretation as directed by the City Council to come back and codify it with something clear and objective. Mr. Bunch said he wanted to take some time to think about a strategy to go forward and avoid a repeat of this evening. He said staff would work these issues out “offline” and get them addressed as much as possible. Mitigation was not the topic of tonight’s meeting. Tonight’s meeting was a way to try to get clear and objective standards – to bring a landscape architect or arborist into the process early to consider how trees could be preserved. Staff will go back with what they have heard tonight. They will work with the Homebuilders and Mr. Grillo to get some language to clarify this. Mr. Bunch said he’s glad there is a commitment to work on this. After the language has been clarified, staff will take it to the Tree Board to try to achieve the objectives Mr. Bunch outlined earlier. With regard to mitigation and those “other tough issues,” we really try to work these things out to make them as clear as possible “before we get back to a public hearing.” Mitigation will be incorporated as part of the Urban Forest Master Plan. Mr. Bunch said “we really need people engaged and involved consistently.

[10:05:19 PM](#)

Mayor Dirksen recommended to the City Council that we go forward with Mr. Bunch’s proposal. City Attorney Ramis concurred with Mayor Dirksen that the hearing should be left open and continued to a date not certain. This hearing will be re-noticed.

[10:05:52 PM](#)

Mayor Dirksen said it is worthwhile to “take this around the block” one more time. However, we do have the Urban Forest Master Plan, which is intended to pull this entire section out and reinsert new language. If we

cannot come to an agreement the next time around, he suggested waiting for the next few months until the draft Plan comes out. He asked people to consider if it would not be worth it to give this a few months of trial to determine how this works.

[10:06:42 PM](#)

Community Development Director Bunch reminded that once the Code language is adopted, it “won’t be there forever.” Periodic evaluations can be done to evaluate how it is working.

[10:07:17 PM](#)

Councilor Buehner commented about her service on numerous citizen committees. Trees tend to be a passionate subject. It is important for those who represent the development industry to recognize the fact that there are many people who are passionate trees, but it does not mean that they have a bigger voice. She added that it is really important “to have folks from the development industry stick it out and participate in the committees.”

[10:08:34 PM](#)

9:35 PM

8. AUTHORIZE THE CITY MANAGER TO SIGN THE PURCHASE AND SALE AGREEMENT FOR THE JOHN H. ZUBER PROPERTY

Motion by Councilor Buehner, seconded by Council President Wilson, that the City Council authorize the City Manager to sign the purchase and sale agreement for the John H. Zuber property.

Mayor Dirksen explained this is a piece of property that is necessary to go forward with the Burnham Street and Ash Avenue improvements in the downtown. The purchase price is \$540,000. The majority of the property can be redeveloped after the right of way needed has been removed.

The motion was approved by a unanimous vote of City Council present.

Mayor Dirksen	Yes
Council President Wilson	Yes
Councilor Buehner	Yes
Councilor Henderson	Yes
Councilor Webb	Absent

9. COUNCIL LIAISON REPORTS: None

10. NON-AGENDA ITEMS: None

[10:09:34 PM](#)

11. ADJOURNMENT

Motion by Councilor Buehner, seconded Council President Wilson, to adjourn the meeting.

The motion was approved by a unanimous vote of City Council present.

Mayor Dirksen	Yes
Council President Wilson	Yes
Councilor Buehner	Yes
Councilor Henderson	Yes
Councilor Webb	Absent

/s/ Catherine Wheatley
Catherine Wheatley, City Recorder

Attest:

/s/ Craig Dirksen
Mayor, City of Tigard

Date: August 25, 2009

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