

RESOLUTION NO. 2235

A RESOLUTION OF THE CITY COUNCIL APPROVING THE STAGE I DEVELOPMENT PLAN, STAGE II FINAL DEVELOPMENT PLAN, CLASS 3 SITE DESIGN REVIEW (PHASE I), MASTER SIGN PLAN, PARTITION, SETBACK WAIVER AND SIGN WAIVER FOR WILSONVILLE ROAD BUSINESS PARK. THE SUBJECT SITE IS LOCATED AT 9900 SW WILSONVILLE ROAD ON TAX LOTS 100 AND 101 OF SECTION 23B, T3S, R1W, CLACKAMAS COUNTY, OREGON. GENE MILDREN, MILDREN DESIGN GROUP FOR TOM STERN & PAUL GRAM OF PACIFIC NW PROPERTIES, APPLICANTS.

WHEREAS, following the application for the above permits and a public hearing on the applications on April 12, 2010, the Development Review Board Panel A approved the above referenced permits by Resolution No. 194, and

WHEREAS, Jerry Reeves, a participant in the hearing before the Board, filed an appeal of the action of the Board on April 26, 2010, and in response, the City Council set the appeal hearing for an on-the-record review, which hearing was conducted on May 17, 2010, and

WHEREAS, said Resolution No. 194 and the entire public record of the Development Review Board, argument by participants below, and a staff report summarizing the issues, Attachment 1, were duly considered by the City Council at a regularly scheduled meeting conducted on May 17, 2010, and

WHEREAS, the City Council having considered argument and the Record of the subject appeal,

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

I. Findings.

1. The City Council of the City of Wilsonville adopts as findings the staff report dated April 12, 2010 located in the record at page 55 and the staff reports dated May 17, 2010, and June 7, 2010, attached as Attachments 1 and 2 incorporated herein as if fully set forth.

2. The City Council further finds as follows:

- 1) Zone Change/On the record hearing issue. As explained elsewhere in the findings, the allegation by Mr. Reeves that the zone change hearing must be *de novo* is not well taken, as this matter is quasi-judicial, the hearing before the DRB was an evidentiary hearing as required by law, and this hearing may be "on-the-record" and limited to argument only under Wilsonville Code section 4.022 (.05) and (.06) and ORS 227. 180 (1)(a)(B).
- 2) Admission of evidence not in the record. Council and city staff endeavored to limit the hearing to evidence in the record created before DRB. While new evidence was discouraged, it is a fact that new evidence made its way onto the Council hearing record. As explained in the Mayor's prehearing announcement, any new evidence that was introduced before Council, was to be disregarded. The Council has familiarized itself with the record before the DRB and is aware of the record created before it. Notwithstanding the existence of the new evidence, the City Council hereby expressly finds and declares that the land use decisions it makes herein are based *exclusively* upon the record before the DRB. Any extra-DRB record evidence introduced during the Council hearing is not being considered, and does not form the basis for any of the decisions herein.
- 3) Interpretation of TSP 4.2.1. Council adopts the interpretation of this section of the TSP recommended by staff in its report of June 7, 2010. That section, as staff and we interpret it, applies on a larger project area basis, such as the network alternatives analysis the Council will undertake in the future. If TSP section 4.2.1 is to have any reasonable interpretation, it must be construed to apply at a very general level and not to small road segments. Otherwise, the TSP would have little practical effect, resulting in the need or requirement to amend the TSP upon each and every land use application that touches upon the TSP. Such a process would make the existing TSP meaningless and would hold up quasi-judicial land use applications while the TSP is amended to address months and years of hearings with affected property owners on project area alignments not shown on TSP maps. If a reviewing body looks beyond this interpretation of Section 4.2.1 of the TSP and determines that the section applies to this case, the Council nevertheless finds compliance with the section, based upon the fact that 100% of the affected property owners over whose land the extension of Kinsman Road is designated (the applicants) have been involved in a public meeting to address such concerns.
- 4) OrePac opportunity to present case. Based upon the transcript in the record, including the extent and particularity of OrePac's presentation at the DRB, Council finds that OrePac had a fair opportunity to present its case. It appears that all of the evidence OrePac wanted to introduce, including its PowerPoint, is in the record before the DRB. All of the issues and arguments it made before the DRB have been repeated in the hearing before Council. Even so, the Council has given OrePac as much time as it wanted to make argument and fully present its case. Without constraint, OrePac proceeded to make its case, and when Council afforded further time, OrePac declined to present anything more. We find that OrePac had been afforded a full and fair opportunity to present its case before DRB. In any event, any perceived unfairness has been cured by the opportunity afforded it before Council.

- 5) General Relevance findings. The Council interprets and finds that the TSP requires the extension of Kinsman Road through the subject property. Inherent in this finding is the rejection that the TSP is interpreted or requires that Kinsman Road alignment south of Wilsonville Road be eliminated from the subject property, with north/south transportation accommodated by a different roadway, in a different location, such as Montebello. So too, is the rejection of the various attacks on the TSP or other assertions that the TSP must be modified prior to a decision in this case. The advocates of these positions have not demonstrated to Council the validity of these points or their relevance to approval or denial of this particular application, which involves the only property through which Kinsman Road is extended. For now, the above issues are collateral matters that may be explored in the future.

- 6) Specific Relevance findings. The Council finds that the pending litigation Jerry Reeves has against the Applicants (alleging that he has a property interest in what would be the extension of Kinsman Road through the property) has no relevance to the subject application. The issue of the existence of railroad crossing authorizations is a collateral attack on the TSP and not relevant to this case. The issue of city budgeting for the city portion of the cost of Kinsman Road through the property is beyond the record and irrelevant to the approval criteria for the application. Finally, the allegation that the Dolan rough proportionality figure should reflect a 100% cost to the city is based upon the premise that the subject property will be accessed by a private driveway and not by the extension of Kinsman Road through the property. As found elsewhere in these findings, the TSP requires the extension of the road, and the DKS-based, comparative impact analysis and associated rough proportionality cost sharing that appears in the approval conditions has not been shown by credible evidence to be in error.

II. Order.

Based upon the foregoing findings, the City Council hereby approves the following:

- A. DB09-0048: Stage 1 Development Plan
- B. DB09-0049: Stage 2 Final Development Plan
- C. DB09-0050: Class 3 Site Design Review (Phase 1)
- D. DB09-0051: Master Sign Plan
DB10-0001: Class 3 Waiver to the Sign Code
- E. DB09-0052: Partition
- F. DB09-0053: Class 3 Waiver to the Rear Setback

The Planning Director is authorized to issue administrative permits consistent with conditions placed upon these approvals as reflected in the Record.

III. Effective Date

This resolution is effective upon adoption.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting thereof this 21st day of June 2010 and filed with the City Recorder this same date


TIM KNAPP, MAYOR

ATTEST:


Sandra C. King, MMC, City Recorder

SUMMARY OF VOTES:

Mayor Knapp	Yes
Councilor Hurst	Yes
Councilor Ripple	Yes
Councilor Kirk	Abstain
Councilor Núñez	No

Attachments:

1. Staff report dated May 17, 2010
2. Staff report dated June 7, 2010

WILSONVILLE PLANNING DIVISION
STAFF MEMORANDUM
CITY COUNCIL
QUASI-JUDICIAL HEARING

DATE: May 17, 2010

TO: Honorable Mayor and City Councilors

FROM: Blaise Edmonds, Manager of Current Planning, Kristy Lacy, Associate Planner, and Paul Lee, Assistant City Attorney

SUBJECT: Stage I Development Plan, Stage II Final Development Plan, Class 3 Site Design Review (Phase I), Master Sign Plan, Partition, Setback Waiver and Sign Waiver for Wilsonville Road Business Park

I. DESCRIPTION OF ACTION:

The City Council is hearing the appeal of DRB Resolution No. 194 approving case files DB09-0048-0053, including Stage I and II Plan approvals, site design, signage, partition and waivers and the recommendation of a companion Zone Map Amendment from Residential Agricultural - Holding (RA-H) to Planned Development Industrial (PDI) which is treated separately in another staff report.

II. LOCATION:

Approximately 8.81-acre site located at 9900 SW Wilsonville Road, immediately west of the railroad tracks. Described as Tax Lots 100 & 101 Township 3 South, Range 1 West, Section 23B, Clackamas County, Oregon.

III. SUMMARY:

The applicants Tom Stern and Paul Gram - Pacific NW Properties propose to develop an industrial/office/commercial business park and appurtenant site improvements. The extension of Kinsman Road bisects the property. The right-of-way will set the stage for a two parcel partition and two (2) phase development. The proposed parcel east of the right-of-way, Parcel 2, will be developed as part of Phase 1.

The project includes a Stage I, Zone Map Amendment (RA-H to PDI) and Stage II approval for Phase 1 (Parcel 2) and Phase 2 (Parcel 1). The applicants are requesting Site Design approval for Phase 1 (Parcel 2) only. Phase 1 consists of four (4) single-story buildings; 70,731 sq. ft. of industrial, 10,290 sq. ft. of office and 8,814 sq. ft. of commercial. Future Phase 2 will consist of a two-story, 21,700 sq. ft. office building.

The approval decision of the Development Review Board by the Council would change the zone to PDI and give the Planning Division authority to issue the following land development permits:

- DB09-0048: Stage 1 Development Plan
- DB09-0049: Stage 2 Final Development Plan
- DB09-0050: Site Design Review (Phase 1)
- DB09-0051: Master Sign Plan
- DB09-0052: Partition
- DB09-0053: Rear yard setback waiver.

IV. BACKGROUND:

- A. The Appeal.** On April 26, 2010, Jerry C. Reeves, a participant in the hearing before the Board, appealed the Board's decision to the City Council. On May 3, 2010, the council acted to review the matter on the record at a hearing May 17, 2010.
- B. On the Record Review.** Council has chosen to review the action of the Development Review Board "on the record," under W.C. 4.022 (.05) A. This means that the hearing will not involve new evidence and testimony. Rather, it will involve receipt of oral arguments regarding issues raised and evidence submitted in the record before the Development Review Board. "Argument" means "assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision." "Argument" does not include facts." ORS 197.763 (9) (a). The hearing is not *de novo* and new evidence beyond that contained in the record will not be accepted unless the Council acts to reopen the record to admit it. "Evidence" means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision." ORS 197.763 (9) (b). Parties are limited to the issues raised in the record in the evidentiary hearing before the Board. Those issues must have been be raised and accompanied by statements of evidence in that record sufficient to afford the hearing body and parties an adequate opportunity to respond to each issue. ORS 197.763 (1).
- C. Staff Report Approach.** Given that the staff report and recommendation is in the Record, it will not be repeated here. Instead this report will: 1) identify the issues raised by the parties below, 2) identify how the staff and Development Review Board responded and 3) cite to the Record where the issue, relevant evidence and argument appear in the Record.
- D. Hearing Approach.** The full staff presentation is in the Record at p.55 to 186. At the council hearing, staff will present a brief overview and pictorially orient the Council with site maps. Parties will then be invited to present argument. Staff will endeavor to identify new evidence to be avoided or disregarded if improvidently placed on the Record. Staff may be asked to respond further with Record evidence/argument. The Applicant should then be afforded a final opportunity to respond with any rebuttal argument.

E. **Decision Options.** Staff will provide two sets of decision documents: 1) the grant of a zone change by ordinance and a resolution approving the other planning permits based upon staff and applicant-provided findings in the Record, and 2) denial of the zone change by ordinance and resolution denying the other planning permits based upon findings articulated by council or, on council direction, produced by the party successfully opposing the application at to the next council meeting.

V. **ISSUES AND RESPONSES.**

A. **OrePac issues.**

1. TSP Amendment Prior to Board Action. The primary concern of OrePac representatives is with the extension of Kinsman Road through the subject property, based upon Transportation System Plan language in section 4.2.1, Network Alternatives, which provides in relevant part:

"It is important to note that the proposed improvement, along with all related maps, figures, and table, are provided for conceptual purposes only. The improvement projects listed (e.g., S-1, C-6, W-3, etc.) are not necessarily the same in each alternative, but each one always refers to the same location. Specific design issues, including roadway alignment, and concerns regarding private property and the environment, will be addressed later during the design of each specific road improvement. At that point, project staff will hold public meetings with affected property owners and other interested parties to fully address such concerns. Record, Altman letter, p. 351, Bennett, Transcript, p.12.

OrePac stated on the Record that it is not opposing the subject development, but objects to the extension of Kinsman Road. Record, Altman letter, p. 330. As OrePac interprets the above TSP language, the process of designing the alignment is a "refinement" of a conceptual plan and must involve public hearings with affected property owners. Record, Bennett, Transcript p.30. Bennett letter Exhibit E1, p.363. Because these public hearings have not occurred, the DRB review of this application is "pre-mature." Bennett letter p. 363. The refinement is a predicate for action on this application. Bennett, transcript p.30. Because the "TSP must be amended" to adopt the Kinsman alignment "pursuant to your code," and "the DRB is not the proper forum for amending the City Transportation system Plan," Bennett letter p.363, Transcript p.30-31, the DRB "can't approve this project." (Bennett transcript p. 30.) OrePac asks the Board to continue this matter and refer the road alignment to the City Council to review the issue. Altman transcript p 31. As regards a preferred alignment, OrePac would eliminate the extension of Kinsman through the subject property and have access to south-of-Wilsonville-Road properties via the extension of Montebello Bennett transcript 30, SFA analysis of alternative street plan TSP Refinement, p.329. This is one of the alternative alignments staff has analyzed and proposes to take to council in the future. See, draft staff report by Michael Bowers, p.371.

1.1 Staff Analysis in the Record. The Wilsonville Transportation System Plan, Figure 4.7 and 4.8, Exhibits A2 and A8, Record pp. 189 and 221, shows the Kinsman extension south through the subject property and jogging slightly westward. The maps show the Kinsman Road alignment in the legend as 2 lanes, depicted by a line of squares. Neither Industrial Way, to the west of Kinsman Road, or the extension of Montebello, to the west of Industrial Way, is shown on TSP maps as roadway improvements. Exhibits A2, p.189, A8, p.221. Every TSP option in the TSP shows Kinsman Road extending through the subject property. Transcript Bowers p. 40. The staff interpretation that the TSP shows Kinsman extending through the subject property started with a pre-purchase meeting the applicant had with the city in 2008, continued on through pre-application, submittal of the application, and has been maintained consistently to the present day. Stern transcript p.27. Based upon this alignment in the TSP, the city has invested a million dollars in the intersection of Wilsonville Road and Kinsman Road. At this time, the "City is not about to move" the extension, given the existing location of Kinsman Road to the North. Bowers transcript p.39. In 2008, Jerry Reeves, applicant's seller, asked the City Council to amend the TSP to move Kinsman Road off the property. By letter of September 22, 2008, the City Manager advised that, upon consideration, the council unanimously denied the request. Record pps. 322 and 323. Kinsman Road, according to the Manager, was the primary north-south connector for industrial truck traffic.

Staff asserted that, however characterized, the movement of Kinsman Road off the subject site – its elimination for TSP maps and the designation of an alternative north-south connector, is an "amendment" to the TSP. Lacy memo p. 355. The choice of network alternatives to serve properties south of Wilsonville Road is, in the opinion of the City Attorney staff, not a subject for this proceeding. Bowers transcript p.40. To open up the TSP as advocated by OrePac would involve a multi-year debate. Transcript Bowers p. 40-42. Amendment to the TSP is an entirely different (legislative) matter for the City Council. Lacy memo p. 355. At this time, the City Council has elected not to embark on a road network refinement discussion. Transcript, Bowers, p140. Staff's position is that the issues raised by OrePac regarding road alignments do not bear on the approval criteria for this application. Consequently, evidence concerning street network alternatives for properties south of the site, and the property owner participation in the process under TSP section 4.2.1, is irrelevant to this application. Lacy Memo p.355.

Legally, the staff and DRB must apply the TSP as it exists now, showing the extension of Kinsman Road through the property. Compliance with the 120-day rule is an issue in this context. Lee transcript p.24.

1.2 Board Action. The Development Review Board unanimously adopted the staff report as findings in approving the application. Transcript p. 45. Like city staff and the City Council, it interpreted the TSP as requiring the extension of Kinsman Road through the subject property. The Board is not the body to decide TSP refinements. Transcript 43. While the Board considered a motion to continue the matter for a

public hearing process to amend/refine the TSP, that motion died for lack of a second. Transcript p.45.

2. Misinterpretation of the mixed use provisions in the PDI zone. The secondary concern of OrePac representative is with staff's interpretation of the mixed use provision of the PDI zone. OrePac asserts that the Applicant is proposing a total of 40,800 sq ft of retail office use (Bennett transcript, p 30). OrePac believes there should be a limitation on commercial office to 5000 sq ft in a single building, and 20,000 sq ft in a multi-building development (Bennett transcript p 30, letter p 364). They believe the interpretation does not meet the "intent when Planning Commission and council passed this as a restriction." (Kirk, transcript p. 32). OrePac testified that "office complex is. . .specifically with a dash . . . that's technology. So it limits office complex and technology centers." Altman transcript p.32. OrePac added that they did not see anything in the record that specifically limits the office area or Phase II, to technology-based operations Altman transcript, p.32. OrePac asserted that the proposal is well over 30% and well over 20,000 sq ft.

2.1 Staff Analysis in the Record The Wilsonville Development Code, Section 4.135 (.03) O subsection 1 and 3 provide limitation on service commercial and retail uses Edmonds transcript p 33. Staff interprets office use for Phase 2 as limited by subsection 2, "office complex," and cited the definition of the term in Section 4.001, page A-16 of the Development Code (Edmonds Transcript p 34) Based upon the definition of "office complex" and the provision of Section 4.135 (.03) O, staff found that Phase 2 is limited to a maximum of 30% 'office complex' and Phase 1 is limited by subsection 1 and 3 which provides for a maximum of 20,000 square feet of service commercial and retail uses in a multi-building development Edmonds Transcript p. 33.

2.2 Board Action. The development Review Board adopted the staff report in approving the application, reflecting adoption of the interpretation by staff as a lawful application of the Development Code. Transcript p.45.

B. Wilsonville Concrete Products Issue

1. Unilateral staff action under the TSP. By letter of April 12, 2010, Wilsonville Concrete products states: "The staff's unilateral decision on alternatives is of concern to our organization and as we understand it did not follow Policy 4.2.1 of the TSP which anticipates public review of refinements. Industrial Way is our private road and has served our needs well for many years, and it has served them safely." Record, p.367.

1.1 Staff Analysis in the Record. Staff responded to the compliance with TSP 4.2.1 as noted above. Staff has not unilaterally decided on a network alternative analyzed by a staff report to council for future modification of the TSP. Rather, interpretation of the TSP as showing Kinsman Road through the site is consistent with the current text and maps of the TSP

1.2 Board Action. By adopting the approval resolution, the DRB found, as staff recommended, that this TSP section was not implicated in the approval of the subject land use application.

C. Jerry Reeves Issues.

1. Property rights issue. Jerry Reeves and his attorney informed the DRB about the pendency of a lawsuit against the applicant wherein Mr. Reeves alleges that he has a property right in the roadway through the subject property. Transcript, Cobb and Reeves, pps. 35,36. If the circuit court rescinds a portion of his land sale contract with the applicant as Reeves requests, there would not be clear title to the property, and Mr. Reeves should therefore have participated in the application as an owner. Transcript, Reeves, p. 36. The proposed dedication of road right-of-way by the applicant cannot occur until the litigation is resolved. Transcript, Cobb p.35. Mr. Reeves introduced a Notice of Pendency of an Action, Exhibit E4, Record p. 401 and a Complaint for Partial Rescission, Conversion, Unjust Enrichment, and Breach of Contract filed in Clackamas County Circuit Court. Exhibit E5, Record 405.

1.1 & 2. Staff and DRB response and action. Staff questioned whether this information is relevant to the decision, as it did not bear on the satisfaction or non-satisfaction of the approval criteria. Transcript, Lee p.22. The Board agreed, finding that the record showed compliance with the code, passing the approval resolution unanimously.

2. Dolan Issues. Reeves asserts 1) that staff has not addressed Dolan findings and met its burden of proof, 2) the traffic report in the record is flawed in that it did not take into account any planning south of the area, 3) the 50/50 split is "not true" because he was not at the table and does not concur, 4) that the proportionality findings address improvements but do not talk about the taking of the land and 5) that the DKS figures regarding the amount of traffic generated from the development using the proposed road are "insane." Mr. Reeves testified that the 45% DKS figure is wrong because Kinsman Road should not extend through the property, and if it does, it should be a 100% City project. Transcript, Reeves, pps. 35-37.

2.3 Staff analysis. The Record shows that: 1) the staff has addressed the *Dolan* case with significant findings. Record pps. 60-63, 2) the traffic report is based upon planned uses of property south of the subject site, Record p.251, 3) the proposed 50/50 dedication/infrastructure cost sharing was arrived at in discussions with the owner of record. Transcript Stern p.27, 4) the proportionality finding clearly addresses the taking of land (required dedication, city assumption of costs for the public portion. Record pps.60-63, and 5) the DKS studies of the traffic generated by the subject property and the projected traffic from properties south show the property would produce 186 peak hour trips relative to 410 peak hour trips associated with build-out use of the street by properties south of the subject site. Record p. 251. When

considering the infrastructure costs of the development, a 50% public/private cost split is roughly proportional to this 45% traffic impact. Record p. 62.

2.4 Board Action. The Board Chair asked Mr. Reeves what evidence he had to counter the traffic count evidence from DKS. Mr. Reeves responded with his own figures. Transcript, p. 36,37. The record demonstrates that, beyond characterizing the traffic report as flawed based upon the figures he provided; Mr. Reeves did not explain how the Dolan findings presented in the staff report were deficient. The Board adopted the staff report findings and in so doing credited the DKS evidence.

3. Approval of the Development without the Kinsman Extension. Mr. Reeves testified that the TSP is flawed; advising that the railroad says it is not allowing any east/west crossing south of Wilsonville road Between Wilsonville Road and the river. Transcript Reeves 35,36. The TSP is not violated because TSPs are all about traffic getting from point A to point B, and service of properties south of the site can be accommodated without extending Kinsman Road through the property. Transcript p. 38. Mr. Reeves agreed with the position of OrePac. Not requiring the extension would make himself, the applicant, OrePac, and Wilsonville Concrete happy and save the city an \$800,000 fight. Transcript Reeves p. 38.

3.1 Staff Analysis. Staff responded with the same positions it took with respect to the OrePac issue regarding TSP section 4.2.1., above.

3.2 Board Action. On question from the Board, Mr. Reeves proposed to eliminate Kinsman Road going south from the TSP. Transcript Reeves p.38. The whole subject of access to the area to the south must be figured out. When the Board chair asked whether this was an issue for the DRB, Mr. Reeves declared that it should be a "legislative action." Transcript. p.36. The Board responded by adopting the staff report as findings in passing the approval resolution.

VI. CONCLUSION AND RECOMMENDATION

Staff submits that the Record fully supports an action to approve the requested Zone Change and subject land use development permits. Importantly, staff notes that with the exception of the mixed use code interpretation and the Dolan findings issue, no other issues were raised challenging the compliance of the application with all approval criteria. Because the Record demonstrates that the findings in this area are legally correct, and because the balance of the issues concerning the road network south of the site are irrelevant to a decision on this application, staff recommends approval of the Ordinance changing the zone and the Resolution approving the Stage I and II, site Design Review, Master Sign Plan Partition, Setback and Sign waiver for Wilsonville Road Business Park. It is likely that argument presented at the hearing requires findings specifically tailored to points of the argument. Staff may then recommend a continuance for supplemental findings.

Staff has prepared a comparable Ordinance and Resolution set denying the zone change and land use applications respectively. Should the council decide to adopt them, staff recommends that a draft set of findings be presented at the next council meeting for adoption.

**WILSONVILLE PLANNING DIVISION
STAFF MEMORANDUM
CITY COUNCIL
QUASI-JUDICIAL HEARING**

DATE: June 7, 2010

TO: Honorable Mayor and City Councilors

FROM: Blaise Edmonds, Manager of Current Planning, Kristy Lacy, Associate Planner, and Paul Lee, Assistant City Attorney

SUBJECT: Supplemental Staff Report for Public Hearing on Zone Change, Stage I Development Plan, Stage II Final Development Plan, Class 3 Site Design Review (Phase I), Master Sign Plan, Partition, Setback Waiver and Sign Waiver for Wilsonville Road Business Park (Stern Property).

I. INTRODUCTION TO CONTINUED HEARING:

Following a continuance from May 17 to June 7, 2010, the City Council is reviewing, "on the record," the appeal of DRB Resolution No. 194 approving case files DB09-0048-0053, including Stage I and II Plan approvals, site design, signage, partition and waivers and the recommendation of a companion Zone Map Amendment from Residential Agricultural - Holding (RA-H) to Planned Development Industrial (PDI). This staff report reiterates the "on the record" approach and touches two emergent issues.

II. ON THE RECORD REVIEW REVISTED

As explained in the staff report dated May 17th, an on the record review is a hearing that will not involve the taking of new evidence or testimony on the issue of the application's compliance with substantive approval criteria. Unless the council reopens the record, parties are invited to make argument based upon the record created before the DRB. Argument should not introduce new facts outside the record, but instead involves assertions and analysis regarding the satisfaction or violation of the legal standards for the decision. Argument should also be limited to substantive issues raised by the parties before the DRB, as statute requires that during the initial evidentiary hearing, participants must raise an issue accompanied by statements or evidence sufficient to afford the hearing body and parties an adequate opportunity to respond to each issue. ORS 197.763 (1). The DRB chair announced this "raise it or waive it" requirement, noting that issues not appropriately raised before it could not be the basis for appeal to the council or the Land Use Board of Appeals.

During the hearing, the parties should be discouraged from introducing new testimony or substantive issues, as that would be unfair to the other parties playing by the rules.

Examples of matters not appropriate for the argument include allegations that the city's Transportation System Plan is outdated, or illegally flawed, or that the city failed to budget money to fund the public portion of infrastructure to be developed as part of the approval. Should a party appear to stray from argument into testimony on substantive matters not in the record, the party should be interrupted, asked whether that testimony is in the record, and if not, the testimony should be curtailed and not considered.

III. EMERGENT ISSUES

1. Zone change hearing. Note that the "no-new-evidence" limitation applies to the analysis of *substantive* approval criteria. It can not apply to satisfaction of "procedural" requirements, or otherwise a party could not complain about a processing error the council might commit. At its May 17th meeting, Jerry Reeves, the appellant in this case, notified council of a potential procedural error, saying that the zone change portion of the appeal, being legislative in nature, had to be considered *de novo*, i.e., had to be opened for new testimony and evidence.

Staff responds to this issue by noting that under Oregon law, the zone change is not a legislative matter but rather a quasi-judicial matter requiring only a single evidentiary hearing (the hearing done before the DRB). ORS 197.763, 227.175. Legislative matters generally involve large or many tracts of land, do not involve the application of preexisting criteria to concrete facts, and are not bound to result in a decision. This zone change involves a single property, applies code criteria and must result in a decision. Review of the zone change on the record is proper.

2. TSP Section 4.2.1. As mentioned in the May 17th staff report, parties may allege that 4.2.1 of the TSP requires that this application be delayed. That section provides:

"Specific design issues [associated with improvement projects], including roadway alignment, and concerns regarding private property and the environment, will be addressed later during the design of each specific road improvement. At that point, staff will hold public meeting with affected property owners and other interested parties to fully address such concerns."

Staff asserted that the interpretation of the parties to the effect that this section required that the owners of property south of the subject site had to be consulted in a public hearing to "refine" the Kinsman Extension by eliminating the extension and relying on the extension of Montebello or some other north-south roadway to serve these properties.

The DRB, as the record shows, interpreted the TSP to require the extension of Kinsman Road through the property, and that the request to eliminate the extension amounted to an amendment to the TSP, was a legislative matter for the city council and therefore was beyond the authority of the DRB to act on in this proceeding.

The city council, being the body with the final interpretive authority over its enactments, may decline the parties request for elimination of the Kinsman extension or otherwise find no violation of TSP section 4.2.1. through interpretation. Staff notes that, based upon facts in the record, (Bowers transcript, pps. 39-42), the section applies to the process of evaluating network alternatives on a large area basis (on the level of street "projects"), an example being the analysis

and construction of potential alignments involving the 5th Street/Bailey Street, Brown Road and Kinsman extension (an analysis Community Development is planning to take to council in the future, Bowers transcript pps.39-40).

III. CONCLUSION:

Staff will have a brief power point presentation giving the council reacquainting council to the back round of this case. Following the hearing of argument, and deliberation, the council can choose to have first reading of the ordinance and resolution approving or denying the requested changes. Should council choose to reopen the record, staff will recommend a schedule to accommodate the submission and rebuttal of new testimony.