



Phone: 541-682-5481
www.eugene-or.gov/pc

AGENDA

Meeting Location:
Sloat Room—Atrium Building
99 W. 10th Avenue
Eugene, OR 97401

The Eugene Planning Commission welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hour notice prior to the meeting. Spanish-language interpretation will also be provided with 48 hour notice. To arrange for these services, contact the Planning Division at 541-682-5675.

MONDAY, SEPTEMBER 28, 2015 – REGULAR MEETING (11:30 a.m.)

11:30 a.m. I. PUBLIC COMMENT

The Planning Commission reserves 10 minutes at the beginning of this meeting for public comment. The public may comment on any matter, **except for items scheduled for public hearing or public hearing items for which the record has already closed.** Generally, the time limit for public comment is three minutes; however, the Planning Commission reserves the option to reduce the time allowed each speaker based on the number of people requesting to speak.

11:40 a.m. II. OAKLEIGH COHOUSING REMAND

Lead City Staff: Gabe Flock, 541-682-5697
gabriel.flock@ci.eugene.or.us

1:15 p.m. III. ITEMS FROM COMMISSION AND STAFF

- A. Other Items from Staff
- B. Other Items from Commission
- C. Learning: How are we doing?

Commissioners: Steven Baker; John Barofsky; John Jaworski (Chair); Jeffrey Mills; Brianna Nicoletto; William Randall; Kristen Taylor (Vice Chair)

AGENDA ITEM SUMMARY
September 28, 2015

To: Eugene Planning Commission

From: Gabe Flock, Senior Planner, City of Eugene Planning Division

Subject: Remand Deliberations: Oakleigh Co-housing PUD (City File PDT 13-1)

ACTION REQUESTED

To deliberate and take action on a remand decision from the Land Use Board of Appeals (LUBA), concerning an appeal of the Eugene Hearings Official's tentative approval for Oakleigh Co-housing PUD (PDT 13-1).

BACKGROUND INFORMATION

Extensive background information on this remand and previous decisions relating to the Oakleigh Co-Housing PUD is included in the full record provided separately, as well as the prior Agenda Item Summaries (AIS) and City Attorney communications on this matter.

Based on the Planning Commission's determination at our last deliberations meeting, held on August 17th, the record has been held open for additional testimony and evidence. The attached memo from Anne Davies, Assistant City Attorney, provides a detailed summary of what occurred during the open record sequence as well as what should be allowed for consideration as part of your deliberations and action. The memo provides a table of contents for the admissible record materials, to assist in locating various items presented for your review. It also frames the scope of remaining task before the Planning Commission as part of deliberations and action that need to occur on this remand no later than October 12th, 2015 in order to meet the statutory deadline for a final local decision.

DELIBERATIONS ON REMAND

Staff notes that the Planning Commission has already provided direction to resolve the landscaping issue on remand, with a revised condition of approval that will require "adequate screening" along the eastern boundary of the subject property in accordance with the PUD approval criteria at EC 9.8320(3). The draft language of that revised condition will be provided by staff prior to final action, for the commission's consideration.

As an initial matter prior to any further deliberations, staff recommends that the Planning Commission take action with a motion to accept the open record materials in accordance with the City Attorney's advice provided in the attached memo.

Following that determination, the Planning Commission's task is to consider all the testimony and new evidence allowed into the record to date in this remand proceeding. The commission needs to determine whether any of that testimony or and new evidence changes any of the

findings previously adopted with regard to the application when the commission first heard the appeal. The Planning Commission may choose to confirm its previous findings, or it may adopt revised findings and conditions of approval (such as with the landscaping issue), based on the full record to date. Ultimately, the Planning Commission's decision may re-affirm, or reverse, the previous final local decision to approve the tentative PUD.

NEXT STEPS

Pending further deliberation and direction from the commission on these remaining issues, staff will prepare a revised Final Order for consideration and action at your next meeting scheduled for October 5th.

ATTACHMENTS

A. City Attorney Memo and Admissible Open Record Materials (Paginated Index Provided)

The full record, prior to the most recent open record sequence, has already been provided to commissioners separately, and is also available to the public on the City's website at: <http://pdd.eugene-or.gov/LandUse/ApplicationDetails?file=PDT-13-0001>. The new open record materials will also be posted at this location for public review.

A hardcopy of the complete record can also be made available for free inspection at the Atrium Building, 99 West 10th Avenue, between 9:00 a.m. and 5:00 p.m. Monday through Friday. Copies may also be obtained at cost.

FOR MORE INFORMATION:

Please contact Gabe Flock, Senior Planner, City of Eugene Planning Division, at 541-682-5697 or via email at gabriel.flock@ci.eugene.or.us.

**Eugene City Attorney's Office****Memorandum**

Date: September 21, 2015
To: Planning Commission
From: Anne C. Davies
Subject: Oakleigh Co-housing PUD (PDT 13-1)

This memo is intended to assist the Planning Commission and serve as a road map in determining what materials that were submitted during the open record period to include in the record.

1. Recap

This matter is on remand from LUBA based in part on a procedural error committed by the City in noticing the hearing official's decision on this PUD application. The City neglected to provide notice to Simon Trautman of the hearings official decision or of the Planning Commission appeal hearing. Accordingly, LUBA sent the matter back to the City to allow the City to provide Mr. Trautman the opportunity to participate that he had been deprived of as a result of the procedural misstep.

2. Procedures on Remand

On July 28, 2015, the Planning Commission held a hearing to allow Mr. Trautman to appear and present testimony. While he did not appear in person, Mr. Trautman did provide a written submittal. In that submittal Mr. Trautman raised an issue related to the paving width of Oakleigh Lane. In short, Mr. Trautman pointed out that, although the paving width of Oakleigh Lane is approximately 19 feet at most points, about 5-6 feet of that paving lies outside the dedicated right of way on the south side of the road. Mr. Trautman alleged that only the paving that lies within the dedicated right of way can be considered when determining whether Oakleigh Lane will provide safe passage for pedestrians, bicycles, motor vehicles and emergency vehicles. On August 17, the Planning Commission decided to re-open the record until August 31 to allow Simon Trautman and his representative and the applicant and its representative to provide evidence regarding right of way pavement widths and whether pavement is available for safe passage of Oakleigh Lane, including information related to parking on Oakleigh Lane. The record was opened until September 4th for both sides to provide rebuttal responding to the evidence presented on August 31. Finally, the applicant had until September 11 to provide final argument, not including new evidence.

Question #1: Can individuals other than Simon Trautman participate and submit evidence or argument on their own behalf?

The Planning Commission clearly limited the open record period to the applicant and its representative and Simon Trautman and his representative. The rationale for limiting the open record to those parties is that, except for the landscape screening issue, the remand was only to provide an opportunity for Simon Trautman to participate. City staff received numerous letters from individuals other than Simon Trautman requesting that they be allowed to present evidence and argument during the open record period. Some, if not all, of those individuals participated in the local proceedings leading up to the LUBA appeal, and some were parties to both the LUBA and Court of Appeals proceedings. They argue that a state statute provides that when a decision maker re-opens the record to admit new evidence, the decision maker must allow "any person" to respond to the new evidence. While there is case law that contradicts that reading of the statute, it may not be worth the risk of a potential remand that could arise as a result of excluding their testimony. My advice is to allow this testimony. Open Record ("Rec.") at 19, 24, 239-40.

Question #2: What evidence submitted on August 31 can the Planning Commission consider?

On August 31, 2015, the applicant and Mr. Trautman submitted evidence and argument that followed the direction of the Planning Commission with regard to the scope of the issues; *i.e.*, the materials deal only with the paving width issue. Accordingly, you can consider all of those documents.

Question #3: What documents submitted on September 4 (second open record period) and after can be considered?

Before addressing this question, it is helpful to understand exactly what constitutes "new evidence." The state statute provides a definition of the term "evidence." ORS 197.763(9)(b) provides:

"'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."

In most instances, where a party submits new evidence, or facts offered to demonstrate compliance with a relevant approval criterion, the other side must have a chance to provide evidence in response. That said, it is not possible for this back and forth to continue *ad infinitum*. That is why decision makers often use the process that the Planning Commission followed in this case. During the first open record period, both sides may present new evidence and argument. In this case, that evidence and argument was to be limited to the issue of the paving width of Oakleigh Lane. During the second open record period, the parties may present only rebuttal evidence and argument that is responsive to the evidence and argument submitted by the other side during the first open record period. The final open record period is generally

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open only to the applicant to provide closing argument, but no new evidence is allowed. With some exceptions, the opponents will not have an opportunity to respond to or rebut the evidence submitted by the applicant in the second open record period. That is because the applicant carries the burden of proof and must have the last bite at the apple. With that summary, we turn now to the question of what submittals from the second open record period the Planning Commission should consider.

Mr. Kabeiseman, the attorney representing both Simon Trautman and Paul Conte, did not attend the August 17 meeting at which the Planning Commission announced the schedule for the open record period. Four days after the meeting, on August 21, 2015, Mr. Kabeiseman sent an e-mail to the city attorney asking for clarification of the open record period. Rec. 323. The city attorney replied with a summary clarifying that the second open record period included the ability to provide evidence in response to the evidence submitted on August 31 and urging Mr. Kabeiseman to view the video of the meeting. Rec. 323. The e-mail communications between Mr. Kabeiseman and the city attorney on August 21, 2015 are included in your packet of materials. Rec. 323-24.

On September 4, 2015, the applicant submitted additional evidence responding to the evidence submitted on August 31, 2015 by Mr. Trautman. Also on September 4, 2015, Mr. Trautman submitted an 11-page letter responding to the evidence submitted by the applicant on August 31, 2015.

On September 8, 2015, Mr. Conte submitted an e-mail requesting that the record be re-opened to allow him to respond to new evidence submitted by the applicant during the period the record was left open. It was not clear in the request itself whether Mr. Conte was seeking an opportunity to respond to applicant's August 31 evidence or applicant's September 4 rebuttal evidence.

The evidence Mr. Conte proposed to introduce included evidence that appears to be in response to the materials submitted by the applicant on September 4. Then, on September 9, Bill Kabeiseman, who represents both Mr. Conte and Mr. Trautman, objected to the "new evidence" submitted by the applicant on September 4. Rec. 331. According to Mr. Kabeiseman, Mr. Conte did not understand that the second open record period (September 4) would be open for "evidence" in response to the evidence submitted on August 31. Accordingly, he requested that the evidence submitted by the applicant on September 4 be rejected.

The city attorney responded to Mr. Kabeiseman, reminding him that he had been advised of the scope of the second open record period in an e-mail on August 21. Rec. 332 (e-mail sent September 9 at 2:01 p.m.). Despite the city attorney's previous clarification, Mr. Kabeiseman argued that that e-mail only provided a "summary" and that he chose to rely on the video recording and meeting transcript, which he understood to preclude any new evidence after the first open record period. Rec. 332 (e-mail sent September 9 at 10:28 p.m.; attached to the e-mail was a partial transcript of the August 17, 2015 meeting – Rec. 327-29). Upon receipt of Mr. Kabeiseman's e-mail asserting a misunderstanding of the rules, the city attorney, in an

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abundance of caution and in order to allow full briefing of this issue for the Planning Commission, advised Mr. Kabeiseman that, based on his misunderstanding of the Planning Commission's direction, he should consider filing a request to re-open the record and submitting rebuttal evidence limited to response to the applicant's August 31 submittal. Rec. 332 (e-mail sent September 10 at 2:59 p.m.). On September 14, Mr. Kabeiseman (presumably on behalf of Simon Trautman) submitted a letter requesting that the record be re-opened and submitting evidence that responds to the evidence submitted by the applicant on September 4. Rec. 334-35.

As explained above, an opponent is not entitled to provide any evidence after the second open record period. The evidence that the opponent seeks to submit is in response to the evidence submitted by the applicant on September 4, not the evidence submitted by the applicant on August 31. While I have included those requests to re-open the record, my advice is to reject them. Based on that analysis, I have not provided you with Mr. Conte's September 8 request or proposed evidence. Further, I have included a redacted version of Mr. Kabeiseman's e-mail request in which he proposed to provide evidence in response to applicant's September 4 submittal.

3. Conclusion

The materials that have been provided to you are all materials that the city attorney believes can be properly included in the record.

With regard to the paving width issue, your task is to determine whether the applicant has carried its burden to establish that, based on the entire record, Oakleigh Lane complies with applicable code provisions related to safe passage of motor and emergency response vehicles, either as Oakleigh Lane currently exists or with the imposition of reasonable conditions of approval. With regard to the remainder of the issues raised in Mr. Trautman's original July 27th submittal, you should determine whether the arguments presented alter your previous findings on those issues, keeping in mind that the applicant retains the burden of proof at all times.

ACD:abm