

MINUTES FOR THE REGULAR MEETING

ASHLAND CITY COUNCIL

March 21, 2017

Council Chambers

1175 E. Main Street

CALL TO ORDER

Mayor Stromberg called the meeting to order at 7:03 p.m. in the Civic Center Council Chambers.

ROLL CALL

Councilor Slattery, Morris, Lemhouse, Seffinger, Rosenthal, and Darrow were present.

MAYOR'S ANNOUNCEMENTS - None

APPROVAL OF MINUTES

The minutes of the Study Session of March 6, 2017, and the Business Meeting of March 7, 2017 were approved as presented.

SPECIAL PRESENTATIONS & AWARDS

1. Annual presentation by the Mt. Ashland Association

Mt. Ashland Association (MAA) General Manager Hiram Towle provided an update on the Mt. Ashland Ski Resort. They had 71,600 skier visits this year and 28 feet of snowfall. MAA brought back the 7500' Crew Internship Program and increased Ski Hopper pick up times eliminating 30,000 pounds of Co2. Other events included the Dummy Downhill and the Winter Wellness program designed for the underserved population. He submitted a document into the record regarding the lodge remodel project and described changes MAA wanted to make.

2. Annual presentation by the Tree Commission

Tree Commission member Christopher John and Staff Liaison Cory Darrow provided the annual Tree Commission update. Commissioner John explained the majority of Tree Commission work entailed reviewing and making recommendations on planning actions in regards to trees and their care. The Commission reviewed 52 planning actions, a few requests for street tree removal, and the Plaza tree enhancement project this past

year. The Commission participated in the Wildfire ordinance discussion, made recommendations to the Ashland Beautification project, conducted Arbor Week events for 2016, and participated in a community planting day at Southern Oregon University. Ashland was recertified as Tree City for the 32nd year. During Arbor Week 2017, the Tree Commission and the Parks and Recreation Department would host an event at the Nature Center on tree planting. The Commission would also participate in Earth Day on April 22, 2017.

Commissioner John confirmed the Tree Commission was working with the Wildfire Mitigation Commission on conifers recommendations.

PUBLIC FORUM

Roy Laird/419 Willow Street/Was a co-owner of the Ashland Book Exchange and commented on the activity occurring at the corner of Lithia Way and Pioneer Street. He described incidents of men cursing at people inside a salon nearby, deliberately spitting as people passed by, and throwing dog feces at stores. This group harassed children getting off buses to attend the Oregon Shakespeare Festival. Some had mental health issues while others simply did not value civility or respected its unspoken codes.

Susanna Richter/2301 Siskiyou Boulevard/Wanted to know how citizens could petition the Council regarding the camping ordinance to include community service for individuals and low-income families as a first alternative to the fines associated with the ordinance.

Louise Shawkat/870 Cambridge/Referenced the Bonneville Environmental Foundation (BEF) letter to Director of IT/Electric Utility Mark Holden. The BEF recommended a measured approach with as much due diligence as possible on the front end to maximize the project economics and benefits to the City of Ashland. This included a rare species survey, a utility interconnection request submitted to Pacific Corporation, a conditional use permit submitted to Jackson County, and a substation capacity. This information would help with other projects as well.

Aletna Nowitzky/102 Garfield Street/Worked as an usher at the Oregon Shakespeare Festival (OSF) and spoke on behalf of the homeless. She shared her personal experience being homeless with her daughter, while working at OSF. She asked for compassion when dealing with homelessness.

Mayor Stromberg noted this past year through collaborating with the faith community, there were now five shelter nights. There were also experiments occurring with car camping in

church parking lots.

Huelz Gutcheon/2253 Hwy 99/Spoke on wind, solar, and nuclear energy. France generated 80% of their power through nuclear energy until the nuclear disaster in Fukushima Japan occurred and they shut their plants down and were now installing windmills and solar panels. Bill Gates was working on nuclear energy and supported adding white Sulphur speckles to the atmosphere in order to reflect the sun as a solution to greenhouse gas issues.

Councilor Lemhouse/Slattery m/s to move #XI. New and Miscellaneous Business agenda items after XII. Ordinances, Resolutions and Contracts, and switch agenda item #2 under XI. New and Miscellaneous Business with agenda item #3. Voice Vote: all AYES. Motion passed.

CONSENT AGENDA

- 1. Approval of minutes of boards, commissions, and committees**
- 2. Liquor license application for Gill Anderson dba Platt Anderson Cellars**
- 3. Liquor license application for Andrew Meyer dba Hold Fast Wine Company**
- 4. Liquor license application for Efstratio Efstratiadis dba Plancha**
- 5. Approval of a special procurement for Fregonese Associates**
- 6. Adoption of a resolution titled, “A resolution modifying solid waste franchise rates and fees”**
- 7. Award of a professional services contract in excess of \$75,000 for design of a 2.5 MGD water treatment plant and a 2.6 MG potable water reservoir**

Councilor Slattery pulled Consent Agenda items #5 and #7 and Interim City Administrator John Karns pulled Consent Agenda item #6 for discussion.

Community Development Director Bill Molnar addressed Consent Agenda item #5 and explained the \$38,000 would cover a six-month period that would result in a package for Council to review and determine whether to proceed with a hearing process.

Mr. Karns noted a correction to the resolution in Consent Agenda item #6. The **2.1%** stated in **Recitals (B)** was transposed to **1.2%** in **Section 2** under **The City of Ashland Resolves as Follows**.

Engineering Services Manager Scott Fleury addressed Consent Agenda item #7 and explained the adoption of the 2012 Master Plan laid out the rate structure that helped facilitate these projects. The rate structure would fund the debt service associated with

moving forward with the projects. The entire project, including the \$342,334 was built into the rate structure. There were two loan packages. One would expire in 2018 and the other for \$14,000,000, expired three in 2019. Staff tracked all costs attributed to capital projects and would provide that information in future updates.

Councilor Slattery/Rosenthal m/s to approve the Consent Agenda Items. Voice Vote: all AYES. Motion passed.

PUBLIC HEARINGS

1. Public hearing and Rogue Credit Union appeal

Mayor Stromberg opened the hearing at **7:45 p.m.** for Planning Action No. PA-2016-01894 to appeal the Planning Commission's denial of a request for Site Design Review approval to construct a 4,508 square foot (sq. ft.) single story credit union building with a drive-up window as part of the phased development of the properties located at 1651 Ashland Street. The appeal also included requests for a property line adjustment and a permit to remove eight trees. Rules for the conduct of the hearing were available in the **Public Hearing Format for Land Use Hearings – A Guide for Participants and Citizens** in the back of Council Chambers.

ABSTENTIONS CONFLICTS EX PARTE CONTACTS

Councilor Rosenthal declared he spoke to the chair of the Planning Commission regarding the accuracy of a local newspaper article but not on the merits of the issue. Councilor Darrow declared she read the article in the paper. Councilor Seffinger had nothing to declare. Mayor Stromberg declared a brief exchange with the chair of the Planning Commission. Councilor Lemhouse declared he read the headline but not the newspaper article itself. Councilor Morris declared a site visit to the location and talked with two Planning Commissioners about the matter prior to the submittal of the appeal. Councilor Slattery read the newspaper article and had a discussion with a Planning Commissioner regarding the article's accuracy.

The Mayor and Council individually read aloud the following statement: **“I have not prejudged this application and I am not prejudged or biased by my prior contacts or involvement; I will make this decision based solely on the application of the relevant criteria and standards to the facts and evidence in the record of this proceeding.”**

Mayor Stromberg read the grounds for the appeal identified by the appellant:

1. The Planning Commission failed to consider properly the Appellant's request for an exception to the strict Floor Area Ratio standards due to the Appellant's unique use (i.e. a drive-up).
2. The Planning Commission improperly construed the Ashland Municipal Code in determining the use of a Shadow Plan to meet Floor Area Ratio standards is discretionary on the part of the Planning Commission, rather than discretionary on the part of the Appellant.
3. The Planning Commission improperly considered Appellant's two contiguous parcels to be separate parcels, contrary to the Ashland Municipal Code, which provides that contiguous parcels under the same ownership shall be considered a single parcel for purposes for development.
4. The Planning Commission improperly applied the Ashland Municipal Code with respect to Shadow Plans.
5. The Planning Commission provided no findings in rejecting appellant's offering a restrictive covenant to ensure a minimum Floor Area Ratio of the property (consisting of two parcels).

The appeal on record was limited to these five grounds.

CHALLENGES – None

STAFF REPORT

Community Development Director Bill Molnar explained the Planning Commission closed the record March 10, 2017 and oral testimony was limited to the people who submitted arguments prior to the record closing.

Associate Planner Derek Severson clarified the application did not have an affordable housing component proposed. There was some discussion of the applicants looking into the possibility of affordable housing but it was discussion only. They would sell the second piece of the property and not be involved in development. There was not a 34 unit affordable housing project associated with the request as stated in the newspaper article.

The subject property was at 1651 Ashland Street and comprised of two parcels. The applicants proposed a 4,508 square foot (sq. ft.) building on Ashland Street across the street from the Ashland shopping Center. The lots fronting on Ashland Street were zoned Commercial C-1. Property directly behind the lot was R-1 single family with one section

zoned for higher density multi-family R-3 off Walker Street. In addition, all of the commercial properties on that corridor were in the Detail Site Review Overlay zone.

Component requests included the following:

- Site Design Review approval to construct a 4,508 square foot, single-story credit union building with drive-up window as part of the phased development of the properties located at 1651 Ashland Street. A shadow plan involving adjoining properties that will be outside the future control of the applicant has been provided to show how the minimum Floor Area Ratio (FAR) of 0.5 could be met in a later phase; however, the applicants are requesting an Exception to the minimum FAR standard. (As proposed, the 4,508 square foot single-story building on Lot 2 achieves a .247 FAR. The shadow plan shows how additional buildings could be constructed on Lot 1 with a FAR of .624. If considered together this would yield a combined FAR of .506 between the two parcels.)
- A Tree Removal Permit to remove eight of the site's 24 trees – not part of appeal request
- A Property Line Adjustment – not part of appeal request

Floor Area Ratio (FAR) was the ratio of the floor area of the proposed building to the lot area. A 0.50 minimum requirement on a 10,000 sq. ft. lot would require a single story building to have 5,000 sq. ft. of floor area or more to meet the standard. FAR was a measure of building intensity. It often applied to transit corridors, bus routes in order to work towards a certain concentration of a building that would house residents, employees, and patrons going to the site to support a transit. It should occur with other design standards.

Ashland Municipal Code (AMC) 18.4.2.040.C.1.an Orientation and Scale required developments to have a minimum FAR of 0.50. In situations where there is one-half of an acre or greater in size, the FAR requirement may be met through a phased development plan or a shadow plan that demonstrated how development may be intensified over time to meet the minimum FAR. The AMC used “shall” as a requirement of the code and the word, “may” as a guideline that implied some discretion. The Planning Commission interpreted the use of “may” as implying there was some discretion used in determining whether the plan met the standard required review or whether it met the FAR standard. A multi-story building let the applicant meet the FAR by having more square footage in a smaller

footprint. The applicant's request on Lot 2 was proposed at 0.247 FAR and 0.50 was the minimum that could increase if lot one was considered as part of the shadow plan, it would then be 0.624. If Council considered both lots, the FAR would be 0.506.

AMC 18.6.1 defined a shadow plan as a schematic or conceptual design for future land development when a lot could be developed at a higher intensity. A shadow plan demonstrated that the proposed development would not impede the future use of the lot to be fully developed to the required building intensity standards (i.e. Floor Area Ratio), and that the proposed development has been planned to prevent piecemeal and uncoordinated development.

The purpose of the Floor Area Ratio (FAR) Standard

- Intensity standard to create a deliberate environment supportive to transit, similar to a minimum residential density.
- Seeks efficient use of available commercial land in keeping with R.P.S. commitments and the associated goals and policies.
- Built Environment – Seeks to provide a sense of enclosure to the streetscape (AMC 18.4.6.040.A.2 “All streets in Ashland shall be designed using the following assumptions: ... Building setbacks and heights create a sense of enclosure.”)

Exception to the Site Development & Design Standards – The approval authority may approve exceptions to the Site Development and Design Standards of part 18.4 if the circumstances in subsection either 1 or 2, below, are found to exist:

1. There is a demonstrable difficulty meeting the specific requirements of the Site Development and Design Standards due to a unique or unusual aspect of an existing structure or the proposed use of a site; and approval of the exception will not substantially negatively impact adjacent properties; and approval of the exception is consistent with the stated purpose of the Site Development and Design; and the exception requested is the minimum which would alleviate the difficulty; or
2. There is not demonstrable difficulty in meeting the specific requirements, but granting the exception will result in a design that equally or better achieves the stated purpose of the Site Development and Design Standards.

The Planning Commission was concerned knowing that the two properties while they were

contiguous properties under a single ownership would not develop together or remain in under the applicant's ownership. A shadow plan on that basis did not meet the intent of providing coordinated planning where each lot developed together. The Planning Commission opted to state the shadow plan could not be considered because the two properties were not developing together under that same ownership, the shadow plan pulled the development back from the street detracting from that sense of enclosure, and pushed the bulk of the development back adjacent to the residential.

The applicant framed their Exception Request in terms of #2 under **Exception to the Site Development & Design Standards**. The Commission did not think the applicant met the burden of proof.

City Attorney Dave Lohman clarified the first Exception #1 was not just applicable with site development but could also be applicable when the particular proposed use was unique. It was how they planned to use it that could be considered. Mr. Severson further clarified in terms of the use of this site, one of issues the Appellant's raised was the Planning Commission did not adequately consider the drive up component of the use and the constraints it put on the development of the site. The applicant framed it in terms of Exception #2 and the Planning Commission did not think they met their burden of proof. For Exception #1, the applicant as a credit union was subject to a charter that prohibited them from being a landlord. Mr. Molnar further explained the majority of the Planning Commission determined the drive up use and additional circulation requirements was not demonstrated to be that imposing. Council could consider both Exceptions.

The applicant provided a detailed shadow plan for both properties but since they planned to sell one lot, it would not be a coordinated development. The applicants offered a possible deed restriction requiring new property owners to develop at .624 FAR. If the applicant purchased one lot, it still failed to meet the FAR. The applicant made a boundary line adjustment to accommodate circulation. The lot by itself would not meet the requirements without an exception.

Planning Commission Decision - Deny "without prejudice" – This would allow a new application to be submitted within one year

- The shadow plan fails to meet the standard.
- The requested Exception does not equally or better achieve the level of intensity of development or sense of enclosure of the street sought by the standard.

Appeals on the Record

- Council is to review only the five specific errors raised in the appeal request.
- The Council may not consider new facts or information.
- The Council must decide: 1) Whether there is substantial evidence to support the Planning Commission's decision; and 2) If the Planning Commission committed an error.
- The only people allowed to speak at this hearing are City staff and the applicant/appellant. Other participants did not provide written arguments in advance.
- The applicant/appellant is allowed ten minutes to summarize their written arguments.
- No one can introduce new information or facts.

Appeal Issues

1. **The Planning Commission failed to properly consider the Appellant's request for an exception to the strict Floor Area Ratio standards due to the Appellant's unique use (i.e. a drive-up)**
 - There are two sub-criteria for an Exception. The application spoke to the second (no demonstrable difficulty, Exception is equal or better)
 - The first has to do with a demonstrable difficulty based on a unique aspect of an existing structure or the proposed use.
 - The Commission nonetheless considered both possible sub-criteria as detailed in the Council Communication: Page 5 of 6 January 10, 2017 Ashland Planning Commission Minutes, Deliberations, and Decision in Attachment 5, and Section 2.3 beginning on Page 8 of the February 14, 2017 findings in Attachment 4.
 - "The Planning Commission finds that accommodating the proposed drive-up use and the associated site planning, circulation and parking configuration necessary to address the special use standards for drive-up uses has not been demonstrated to impact the site planning to a degree that would prevent accommodating a larger footprint on Lot #2. Commissioners recognized that this was one of only 12 drive-up windows allowed in Ashland, and that the criteria for locating allowed drive-up uses within the city puts constraints on where a drive-up use may be allowed, limited the

applicants' ability to select a suitable property, but the Planning Commission finds that the drive-up component of the request has not been demonstrated to create specific difficulties in meeting the FAR standard on the subject property.”

- The Planning Commission further finds that as a credit union, being subject to charter regulations preventing them from pursuing speculative development proposals does not constitute a unique or unusual aspect of the proposed use of the site, as this is ultimately an aspect of the specific user (Rogue Credit Union) and not the proposed use as a financial institution. The Planning Commission finds that there is not a demonstrable difficulty in meeting the standards due either to a unique or unusual aspect of an existing structure or the proposed use of the site, and that as such, an Exception is not merited.

In staff's view, the Planning Commission fully and properly considered the unique aspects of the appellant's proposed use of the property, both in terms of a financial institution and of a drive-up use, in ultimately reaching the decision that an Exception was not merited. Without the drive up window, a half-acre parcel would require a 10,000 sq. ft. building with parking and would likely result in a second floor.

2. The Planning Commission improperly construed the Ashland Municipal Code in determining the use of a Shadow Plant to meet Floor Area Ratio standards is discretionary on the part of the Planning, rather than discretionary on the part of the Appellant.

- By definition, a shadow plan is to demonstrate that the proposal will not impede the future use of the lot to be fully developed to the required building intensity standards (FAR) and that the proposed development has been planned to prevent piecemeal and uncoordinated development.
- **AMC 18.4.2.040.C.1.a.** provides that, “...Where a site is one-half an acre or greater in size, the FAR requirement may be met through a phased development plan or a shadow plan that demonstrates how development may be intensified over time to meet the minimum FAR.”
- “The Commission further finds that the allowance for the use of a shadow plan in the code is discretionary on the part of the Planning Commission (i.e. the standard language in AMC **18.4.2.040.C.1.a.** uses “**may**” rather than “**shall**”). The Commission finds that the shadow plan provided is counter to the intent of providing more intense development along the Boulevard corridor to contribute to a

sense of enclosure of the streetscape, while instead pushing the more intense future development nearer to residentially-zoned neighbors at the rear of the property, and further finds that the current application and shadow plan provided as part of that application fails to meet the Detailed Site Review Standard regarding Orientation and Scale in 18.4.2.040.C.1.” See Subsection 2.3 on page 6 of the 02-14-17 findings (Attachment 4).

In staff’s assessment, the Commission was exercising what they found to be appropriate discretion “to prevent piecemeal and uncoordinated development” because they found that the development illustrated in the shadow plan provided was “counter to the intent of providing more intense development along the Boulevard corridor to contribute to a sense of enclosure of the streetscapes, while instead pushing the more intense future development nearer to residentially-zoned neighbors at the rear of the property.”

A potential remedy was building a two-story building at the street, or bringing in the future shadow plan with larger buildings closer to the street. Detailed Design Standards along the corridor generally pushed towards two story buildings along Ashland Street.

The appellant referenced a shadow plan considered by the Planning Commission regarding Goodwill Industries that was not included in the staff report because it was not part of the record. It was briefly discussed at the meetings. In that shadow plan, the Commission was looking at an existing lot that had significant constraints and they looked at the shadow plan in terms of whether it met the parking, building height, circulation issues, and if it met large scale design standards. The Planning Commission looked at it in terms of not just that a shadow plan was identified, but that it was analyzed by the Commission in terms of meeting a number of standards to demonstrate if it were built, it could conceivably get through the process and meet all the standards that were likely to apply. In that case, the applicants provided utility sizing to accommodate the larger building and appeared to move forward installing utilities to support that plan. Additionally, it was a single site versus a contiguous parcel and eventually not under the applicant’s control.

The effect of the applicant’s intent to sell the second property was a later issue. AMC stated two contiguous parcels under one owner are considered one parcel. In this case, the applicants made clear from the beginning they did not intend to develop that property and it would not remain under the same ownership. For the Planning Commission, that precluded its use as a shadow plan and precluded it in terms of the purpose of the shadow plan providing for coordinated development of the property.

The Planning Commission found, as a credit union, subject to their charter regulations that prevented them from pursuing speculative development proposals did not constitute a unique or unusual aspect of the proposed use as it was ultimately an aspect of the proposed user, the credit union, and not a proposed use as a financial institution.

3. The Planning Commission improperly considered Appellant's two contiguous parcels to be separate parcels, contrary to the Ashland Municipal Code, which provides that contiguous parcels under the same ownership shall be considered a single parcel for purposes of development.

- In **AMC 18.6.1**, a lot is defined as, **“A unit of land created by a partition or a subdivision or a unit or contiguous units of land under single ownership, which complies with all applicable laws at the time such lots were created. Any contiguous ownership of non-conforming lots will be considered one tract of land.”**
- Applicant currently owns the two contiguous properties here, the application materials and testimony made clear that the applicant was precluded from development of the second parcel through their charter as a credit union and would be selling the property and have no involvement in its future development although they would be willing to place a deed restriction which would have required that the second property develop in the future according to a higher minimum 0.624 Floor Area Ratio to comply with the proposed shadow plan.
- “The Planning Commission finds that the shadow plan provided poses some concerns. First, the applicants have explained that neither as a credit union, they are unable by charter to act as developers and as such can neither develop the remainder of the site with buildings other than the credit union nor can they add a second story that would then be rented to tenants other than the credit union. As such, while a shadow plan is provided, the remaining lot would not be under the applicants control and would instead be sold and developed by the future buyer. The Planning Commission finds that by definition, the Ashland Municipal Code provides that contiguous lots under a single ownership may be considered a single property for planning purposes, however in this case it is clear that development is not to occur while the properties are under the same ownership and as such the Planning Commission finds that they should not be considered together as part of a shadow plan.” See Subsection 2.3 on page 5 of the 02-14-17 findings (Attachment 4).

The Commission made the determination that while contiguous properties under a single ownership were considered to be one lot for planning purposes, in this instance because it was made clear by the applicants that the two properties would not be under the same ownership for the development of Lot #1, they would not provide for coordinated planning of the site and thus should not be considered together initially.

Mr. Lohman thought the Planning Commission's decision was reasonable because the same ownership shall be the single owner for purposes of development. They will not own the entire parcel. Mr. Severson added even if the parcel were considered together, the Planning Commission determined the shadow plan was not doing what it was intended to do.

4. **The Planning Commission improperly applied the Ashland Municipal code with respect to Shadow Plans (as a guarantee of build-out).**
 - In **AMC 18.6.1**, a shadow plan is defined as, **“A schematic or conceptual design for future land development when a lot could be developed at a higher intensity. A shadow plan demonstrates that the proposed development will not impede the future use of the lot to be fully developed to the required building intensity standards (i.e., Floor Area Ratio), and that the proposed development has been planned to prevent piecemeal and uncoordinated development.”**
 - As discussed in #2 above, the Planning Commission found that there was discretion on their part as to whether the shadow plan adequately addressed the stand, and found that: **“...the shadow plan provided is counter to the intent of providing more intense development along the Boulevard corridor to contribute to a sense of enclosure of the street scape, while instead pushing the more intense future development nearer to residentially-zoned neighbors at the rear of the property, and further finds that the current application and shadow plan provided as part of that application fails to meet the Detailed Site Review Standard regarding Orientation and Scale in 18.4.2.040.C.1.”** See Subsection 2.3 on Page 6 of 02-14-17 findings (Attachment 4).

In staff's assessment, the Commission was not seeking to require assurance that development will occur as depicted, although the applicant had offered to deed restrict the property with a guarantee that development would occur at a specific intensity. The Commission was instead exercising discretion “to prevent piecemeal and uncoordinated

development” because they found that the development illustrated in the shadow plan provided was “counter to the intent of providing more intense development along the Boulevard corridor to contribute to a sense of enclosure of the streetscape, while instead pushing the more intense future development nearer to residentially-zoned neighbors at the rear of the property.”

5. The Planning Commission provided no findings in rejecting appellant’s offering a restrictive covenant to ensure a minimum Floor Area Ratio of the property (consisting of two parcels).

- The Planning Commission findings with regard to the appellant’s offering of a restrictive covenant were as follows: “...the Commission finds that the suggestion to impose a real estate development covenant on proposed Lot #1, requiring a future owner to develop to a density of at least 0.624 FAR, does not cure the problems with the proposed shadow plan in this application. The two lots would be separate lots, under separate ownerships, and for totally separate developments, which does not meet the definition or intent of a shadow plan in the Land Use Ordinance.” See the last paragraph of Section 2.3 on Page 9 of the 02-14-17 findings (Attachment 4).

The Commission made the determination that while contiguous properties under a single ownership were considered to be one lot for planning purposes, in this instance because it was made clear by the applicants that the two properties would not be under the same ownership for the development of Lot #1, they would not provide for coordinated planning of the site and a covenant addressing only the FAR would not provide the desired coordination.

It was assumed the second lot would be developed as mixed use. In C-1 zoning for multiple buildings, 50% of the lot had to be dedicated to commercial uses. Using either special permitted or permitted uses other than residential. The bulk of the ground floor would be commercial uses and the upper two floors residential. A different ownership might be able to meet the requirements. The Planning Commission did not think this proposal achieved that.

Councilor Slattery/Lemhouse m/s to extend the public hearing to 10:30 p.m. Voice Vote: all AYES. Motion passed.

APPLICANT/APPELLANT’S PRESENTATION

Matthew Stephenson/1370 Center Drive, Medford, OR/Executive Vice President of Rogue Credit Union/Explained it was unfortunate the process reached this point. For years, they had worked to find a “win-win” for the Credit Union and the City. The Credit Union had been in the Ashland area for almost fifty years and was a not for profit financial cooperative, locally owned and operated. The current location on Lithia Way now had over 12,000 members with over \$173,000,000 in deposits. The branch did the work of four normal branches. Credit Union members wrote 1,200 letters to the Credit Union requesting they petition the City regarding the application. As a credit union, they were restricted from doing development. Instead, they reached out to the Jackson County Housing Authority and Columbia Care Services who were interested in the second lot.

Mark Bartholomew/14 North Central Avenue, Medford OR/Attorney/Provided a brief presentation:

Shadow Plan

- When a lot is half an acre or greater in size, FAR “may be met through a phased development or a shadow plan that demonstrates how development may be intensified over time to meet the minimum FAR.” AMC 18.4.2.040(C)(1)(a)
- Shadow Plan – “A schematic or conceptual design for future land development when a lot could be developed at a higher intensity. A shadow plan demonstrates that the proposed development will not impede future use of the lot intensity standards (i.e. FAR), and that the proposed development had been planned to prevent piecemeal and uncoordinated development.”

This was contrary to the Planning Commission’s findings who applied non-criteria in violation of Oregon law.

Applicant’s Shadow Plan

- Applicant submitted a shadow plan, which included the adjacent 1.02-acre Lot 9201.
- The Applicant also owns Lot 9201.
- Because lot 8700 and 9201 are contiguous and under the same ownership, they constitute one “lot” under the Code.
- A “lot” is a “unit or contiguous units of land under single ownership.” AMC 18.6.1.030

Mr. Bartholomew addressed an earlier inquiry from Council to the City Attorney regarding whether the Planning Commission made a proper definition of “lot” and strongly disagreed stating the words “development purposes” did not exist in the definition of “lot.” Therefore, the Planning Commission committed an error and Council was getting an incorrect definition of “lot” from staff. The two contiguous parcels created one lot.

- The shadow plan demonstrated the ability to achieve a FAR of 0.506 on the combined “lot.” Above minimum standards.
- Only one criterion for use of a shadow plan – FAR “may be met through a phased development or a shadow plan that demonstrates how development may be intensified over time to meet the minimum FAR. AMC 18.4.2.040(C)(1)(a).
- Shadow plan met the above criterion. Planning Commission made no finding that the shadow plan did not show how development may be intensified over time to meet the minimum FAR. Denied on other grounds...

Planning Commission Decision

- Planning Commission denied the application in part, because the Applicant does not itself plan to develop the “lot” (consisting of two lots) further and the adjacent lot would be sold to a future buyer.
- Planning Commission refused to consider the adjacent lots as one lot for planning purposes because one lot would be sold.
 - There is no provision in the AMC that distinguishes between adjacent lots based on the subjective intentions of the current owner.
 - Such a distinction is not supported in the Code and is beyond the range of discretion permitted in law.
 - Legal error

There was no requirement in the code that a lot for planning purposes remain in common ownership. There was no requirement the lot be developed according to the shadow plan. This was the imposition of nonexistent criteria and in violation of law.

- Planning Commission findings regarding the adjacent lots and unknown future development by a future owner present a misapplication of the Code.
- Shadow plans are described in the Code as “conceptual,” “potential,” development that “could” meet the FAR standards later.
 - Shadow plans are not actual approved plans. They merely show that development is not irrevocably committed to the point that FAR standards cannot be met in the future.
 - They are not a guarantee that a certain development will occur in the shadow plan area.
 - Applied correctly in Goodwill.

Goodwill Building – Inconsistent Code Application

- Planning Commission approved a Goodwill Industries project with .280 FAR in December 2016.
- Goodwill submitted a shadow plan that showed the theoretical ability to add two additional stories to the building to achieve a FAR of .500.
- Staff confirmed to the Planning Commission during that hearing that Goodwill was under no obligation to build out the shadow plan.
- The application of the shadow plan was correct for Goodwill. The shadow plan showed the theoretical potential to meet the shadow plan, which is the only criterion.
- Shifted the goalposts for the current applicant-requiring additional assurances that are not supported in the Code and not required of Goodwill.
- Practically speaking, the adjacent 1.02 acre lot 9201 will be developed. It is unlikely that Goodwill is going to add two additional stories.

Planning Commission Decision

- Planning Commission also rejected shadow plan because it found that it had discretion to approve the plan.
- Focused on the word “may.”

- FAR “may be met through a phased development or a shadow plan that demonstrates how development may be intensified over time to meet the minimum FAR.” AMC 18.4.2.040(C)(I)(a).
- Planning Commission believed that it had no obligation to accept the shadow plan because of the permissive nature of the word “may.”
- Legal error. Only criterion is that the shadow plan demonstrates how development may be intensified over time to meet minimum FAR.
- “May” mean that Applicant has the option but not the obligation to use a shadow plan to meet the criteria.
- Planning Commission went on to identify additional reasons for denial that are not criteria.
- Legal error

Ashley Manor Case

- LUBA case – Ashley Manor Care Centers v. City of Grants Pass, 38 Or LUBA 308 (2000)
- 17.112 Criterion for Approval, Property Line Vacations. The City Council may by ordinance, vacate the property line unless the resultant property configuration would create a substandard condition relative to the requirements of this Code, such as placing two single family dwellings on one lot where only one single family dwelling per lot is allowed.
- Applicant in that case met the applicable criteria above.

In this case, the applicant appealed to LUBA who found they had to approve despite the word “may.” The Ashley Manor case was similar to this one regarding the use of “may” meeting the FAR standard in the shadow plan. It also referred to the applicant “may” instead of Council. He did not think LUBA would agree with the Planning Commission’s finding.

The bottom line was there was one applicable standard. It showed the development could be intensified in the future on the contiguous combined lot. That was the only criteria and it was apparent to Mr. Bartholomew the Planning Commission thought that the text of the code supported the shadow plan doing more than it actually did. The reality was the shadow plan did not have the “teeth” the Planning Commission wanted it to have. The

remedy for realizing a deficiency in the code was amending the code and not making up criteria and applying it to the application. Floor Area Ratio was not in the code. A staff created standard did not constitute criteria and could not be applied per Oregon law.

Mr. Lohman explained if Council wanted to request a deed restriction, they would do that tonight. Council options were affirm the decision, reverse it, move to modify it and direct staff to prepare Findings, or send it back to the Planning Commission. Council could add a deed restriction by choosing to modify the decision or by sending it back to the Planning Commission. Mr. Bartholomew added Council could approve the application with the condition the applicant record a deed restriction acceptable to the City Attorney.

Jerome White/253 Third Street/Architect/Early in the process they submitted a shadow plan as part of a “pre-app” application. Staff said it was not acceptable and they suggested they go for the Exception instead.

Mr. Bartholomew addressed other comments from City staff regarding the shadow plan. The plan failed to create a sense of enclosure. This requirement was in the Street Design Standards and not applicable to the shadow plan. City staff thought it was piecemeal development and contrary to the definition of the shadow plan. By definition, a shadow plan was piecemeal development. It was also denied because it did not meet the intent of the FAR standards. There was nothing in the code stating what the intent of the FAR standards was when the code did not indicate those standards period.

Mr. Severson explained the shadow plan was intended to look at larger projects like Bi-Mart and Shop n Kart. Goodwill Industries was different. It was a single property, with one building. The applicants proposed a second and third story to meet the FAR requirement. He agreed with the appellant that it seemed unlikely they would build the extra stories. Goodwill hired an architect to design it elsewhere in town instead of building on their current facility. The shadow plan was not a “have to.”

Mr. Lohman clarified the shadow plan was relevant and read the definition. Piecemeal was not a random word and used in the definition. Mr. Severson added in terms of large parcels, the applicant had to show how they would develop incrementally, in phases and that requirement that showed it as coordinated and not piecemeal.

The deed restriction was not acceptable to the Planning Commission but Council could find that as an error and that it provided sufficient uncertainty. The deed restriction would not remedy the issue of the parcels being split and coordinated. Once sold, the owner had

no control. It would solve the FAR problem but would not comply with site design standards. The Planning Commission found to the contrary. That did not mean Council had to adhere to that finding. The deed restriction alone did not meet City standards.

The Planning Commission had an issue with the development happening closer to the residential than the street. Council could decide the 0.624 covenant to restrict the FAR was acceptable on that specific appeal point realizing all the other issues would be dealt with through the site design process. A shadow plan with a 0.624 FAR would be in compliance within the City's existing development standards and could be a solution but according to the Planning Commission was not a good one because it pushed the intensity back to the residential area.

Public Hearing Closed: 10:00 p.m.

ADVICE FROM LEGAL COUNSEL AND STAFF

Mr. Lohman clarified this was a hearing on the record. It was not a hearing where Council weighed who had the most persuasive arguments. Council must affirm the decision of the Planning Commission unless their decision was erroneous. Council could say it was erroneous if there was no substantial evidence in support of their findings. It could be erroneous if Council thought they made an error in the law and the finding was not authorized by the law, was contrary to the law, or improperly applied. The appellant's were making the case that it was improperly applied.

COUNCIL DELIBERATION AND DECISION

Councilor Morris/Slattery m/s to reverse the decision of the Planning Commission and support the written appeal, and direct staff to prepare written findings for adoption by Council. DISCUSSION: Councilor Morris thought both the Planning Commission and the applicant had made errors in that the Planning Commission failed the request for exception regarding the drive-in and that the applicants were not developers. The application was not direct enough. Appeal Issues #2 and #4 involved the shadow plan. He did not find the use of the shadow plan as discretionary. There was never criteria prohibiting selling requirements to build specific to the plan. For Appeal Issue #3, keeping the parcels separate was arbitrary. He could not make the nexus for Appeal Issue #5.

Councilor Slattery could not uphold the Planning Commission's findings based on the information presented. Councilor Lemhouse agreed with Councilor Slattery. He wanted to reverse Appeal Issues #3 and #4. The finding on Appeal Issue #3 was improperly considered. It fit the code, and the applicants followed the law. For Appeal Issue #4, it

seemed unfair to find the shadow plan insufficient. It was a concept and there were no guarantees it would work. The finding was incorrect, the shadow plan was sufficient. Councilor Seffinger agreed with what was already stated and wanted to know if the deed restriction was included if the decision was reversed. Councilor Lemhouse responded he would make an amendment to retain the deed restriction.

Councilor Rosenthal thought the plausibility of argumentation based on code language was a problem. Appeal Issue #4 was an issue for him. The shadow plan was hypothetical and he thought there could be a problem with LUBA. He would support the motion as presently stated. Councilor Darrow found issue with Appeal Issue #3 and speculating what may or may not happen in the future and not focusing on present facts.

Councilor Lemhouse/Seffinger m/s amend the main motion that a deed restriction be placed on property to ensure the original FAR be achieved should the property be sold. DISCUSSION: Councilor Lemhouse explained the deed restriction protected community interest, and allayed the Planning Commission's concerns. Councilor Seffinger agreed. Councilor Morris would not support the amendment. The deed restriction would only achieve the 0.624 FAR and whoever developed the lot would probably exceed that FAR.

Roll Call Vote: Councilor Slattery, Seffinger, and Lemhouse, YES. Councilor Morris, Rosenthal, and Darrow, NO. Mayor Stromberg broke the tie with a NO vote. Motion failed 4-3.

Roll Call Vote on the main motion: Councilor Seffinger, Morris, Lemhouse, Darrow, Rosenthal, and Slattery, YES Motion passed.

Mr. Lohman noted staff would prepare written Findings for a future Council meeting within the 120 days.

UNFINISHED BUSINESS

1. Results of the Downtown Business Survey

Item delayed due to time constraints.

ORDINANCES, RESOLUTIONS AND CONTRACTS

1. Approval of first reading by title only of an ordinance titled, "An ordinance amending AMC 9.30.020 to extend the current smoking ban to include 175 Lithia Way and any space within 20 feet of pathways for smoke to enter places of employment or enclosed spaces open to the public" and move on to second reading

Item delayed due to time constraints.

2. Approval of First Reading by title only of an ordinance titled, “An ordinance amending Chapter 11.26 to limit the use of public parking lots for purposes other than parking vehicles” and move onto Second Reading.

Item delayed due to time constraints.

3. Approval of first reading by title only of an ordinance titled, “An ordinance amending Chapter 10.120.010 to include City of Ashland’s 175 Lithia Way parking lot within the Enhanced Law Enforcement Area” and move on to second reading

Item delayed due to time constraints.

NEW AND MISCELLANEOUS BUSINESS

Councilor Morris/Slattery m/s to address item #2 Modification of existing Jefferson Avenue loan/grant contracts under New and Miscellaneous Business first. Voice Vote: ALL AYES. Motion passed.

1. Approval of contract for Plaza tree enhancement project

Item delayed due to time constraints.

2. Modification of existing Jefferson Avenue loan/grant contracts

Councilor Lemhouse declared a conflict of interest and recused himself. He was a former employee of Brammo and currently still held stock options. Councilor Morris declared a potential conflict of interest that would not inhibit his ability to make a decision on the matter. His late parents had stock in Brammo that would go to the estate if it sold.

Councilor Lemhouse left the meeting at 10:26 p.m.

City Attorney Dave Lohman explained Brammo owed the City \$275,000 on three parcels secured through a trust deed and wanted to sell one of the lots. Craig Bramscher was asking the City to accept a \$60,000 repayment of principle in return for removing the trust deed application from the parcel for sale and applying the remaining \$215,000 to the other two parcels.

Councilor Slattery/Morris m/s to recuse Councilor Lemhouse. Voice Vote: ALL AYES. Motion passed.

Councilor Slattery/Seffinger m/s to accept the request for modification to the Trust

Deed and Security Agreement between the City of Ashland and Brammo, Inc. as proposed and direct the City Administrator to execute the contract documents necessary to complete the transaction.

Roll Call Vote: Councilor Morris, Slattery, Darrow, Seffinger, and Rosenthal, YES. Motion passed.

3. Downtown parking management strategy

Item delayed due to time constraints.

OTHER BUSINESS FROM COUNCIL MEMBERS/REPORTS FROM COUNCIL LIAISONS

Item delayed due to time constraints.

ADJOURNMENT OF BUSINESS MEETING

Meeting adjourned at 10:30 p.m.