

MINUTES
City of Newport Planning Commission
Regular Session
Newport City Hall Council Chambers
February 26, 2018

Planning Commissioners Present: Lee Hardy, Bob Berman, Rod Croteau, Jim Patrick, Mike Franklin, and Jim Hanselman.

Planning Commissioners Absent: Bill Branigan (*excused*).

City Staff Present: Community Development Director (CDD), Derrick Tokos; City Attorney, Steve Rich; and Executive Assistant, Sherri Marineau.

1. **Call to Order & Roll Call.** Chair Patrick called the meeting to order in the City Hall Council Chambers at 7:00 p.m. On roll call, Commissioners Hardy, Berman, Croteau, Patrick, Hanselman, Franklin, and Hanselman were present.

2. **Approval of Minutes.**

A. Approval of the Planning Commission work and regular session meeting minutes of January 22, 2018.

Croteau noted minor corrections to the minutes.

MOTION was made by Commissioner Croteau seconded by Commissioner Franklin to approve the Planning Commission meeting minutes with minor corrections. The motion carried unanimously in a voice vote.

3. **Citizen/Public Comment.** No public comments.

4. **Action Items.** No Action Items.

5. **Unfinished Business.** No Unfinished Business.

6. **Public Notices.** At 7:02 p.m. Chair Patrick opened the public hearing portion of the meeting by reading the statement of rights and relevance. He asked the Commissioners for declarations of conflicts of interest, ex parte contacts, bias, or site visits. Hardy and Franklin reported drive bys. Croteau and Hanselman reported site visits. Patrick called for objections to any member of the Planning Commission or the Commission as a whole hearing this matter; and none were heard.

A. **File No. 1-MRP-17-A.** Patrick opened the Public Hearing Appeal for File No. 1-MRP-17-A. Tokos presented the staff report. He noted that the appellant was arguing that a non-remonstrance agreement was an exaction. The City did not believe it was an exaction because there wasn't a property interest in play. He noted that they had been working on the language of the non-remonstrance agreement and there was some flexibility in the document but no flexibility on requiring the document. Tokos said City Attorney, Steve Rich was present to ask questions.

OPPONENTS: Peter Ginter and Cam Passmore, attorneys for Central Lincoln PUD, addressed the PC. Ginter said they disagreed with the staff report and noted that Criteria 3 made it sound like there was no flexibility but thought there actually was. He said it wasn't uncommon to do a waiver of remonstrance and was usually a cooperative item with a developer and the quid pro quo was to approve. The waiver would be such that if a LID was formed it would happen. He said that CLPUD was just selling the property and they weren't the developer that would be impacting the surrounding area. Ginter and Passmore felt that the time that development happened would be when the waiver conditions should be applied. They felt it was impermissible and unconstitutional and disagreed that it was plainly required.

Patrick asked if they were aware that the City collected waivers of remonstrance all the time in just this way. Ginter said if they went to court and proved their position, it was possible the City might have to stop doing this. Passmore referenced what an exaction was and said that because there was a demand for money, it was an exaction. He noted

that the Supreme Court overturned the Kuntz case and found they were functionally equivalent and the deciding authority could find a different path. He said the City could not have a rough proportionality against a development for which you couldn't speak to yet. Passmore said the Supreme Court decision was only three years old and things that Cities had been doing for years were no longer going to be constitutional under the fifth amendment of the US Constitution.

Berman asked what would be the detriment of a waiver of remonstrance and why they didn't want to sign it. Ginter said it affected the value and meant a lot of money. He stated that others had not seen a waiver required at this stage. Croteau asked for clarification on what the buyer was concerned about. Ginter said the cost benefit.

Berman asked Tokos if the PC could not waive the agreement because of the way the City code was written and if they could modify the agreement. Tokos said there was some flexibility on how the agreement could be written but he didn't believe it could be waived. He said the City was not asking for a money at that time and said agreement wasn't unconstitutional. It was a tool at the time of redevelopment to pay for frontage improvements of a LID. He said the owner would be able to contest that it was fairly proportioned.

Rich said he agreed with the appellant about the Kuntz case. He said it wasn't applicable because the City hadn't asked for money or any interest in the real property. Rich said the waiver didn't preclude the applicant from participating in voicing their objection at any time. He pointed out that the Larsen case was a non-remonstrance agreement that didn't survive and agreed with the staff report.

Ginter said that Tokos' comments that the City could not elect to apply a criterion in a municipal code that was plainly required were editorial. He noted another case in Utah from December 16, 2014 where he assumed the Director applied the same standard saying the criteria did not apply. Ginter felt just like in this case, it didn't apply to their client because they weren't doing anything with water, sewer, or streets. Passmore said in response to the City's Council comments, the reason the Oregon Supreme Court case wasn't heard was because they heard Schultz with a condition with an eye to a future development. He said the appeals held in 1994 and made law which said it had to tie into the application for which the impact of conditions were from. Passmore said the time of development would be the time to address the concerns. He noted that paragraph 4 on the non-remonstrance agreement said the client waived their ability to remonstrate. He felt the waiver of remonstrance was a demand for money even though there may not be an uncertain demand for money. Rich said what he referenced was the US Supreme Court case and said that Schultz did not involve a waiver of remonstrance. He felt it was a little overblown and it constituted an exaction, financial or otherwise, at that point and time. Passmore said he might have been confused on the waiver of non-remonstrance but Holden and Schultz was the same. He said you could not have a condition against an application when there was going to be a future application that actually created the impact.

Croteau asked if there was any way to have the agreement structured that would be acceptable for the buyer. Ginter said there would be a way to preserve their right to remonstrate. He said if the main concern was to have some criteria applied, that wouldn't normally be applied as a development, and might be the answer. He said maybe the limitation should be that it wouldn't allow any greater exposure to them if there was a development request. Croteau asked if the City didn't get an agreement, could they force the issue at a later date. Tokos said once it was developed the City would give up the ability to create a Local Improvement District as a way to fund public improvements. Rich noted that the buyer wasn't a certain and the decision shouldn't be based on a sale of the property. Hardy asked if Rich wanted CLPUD to form a LID. Rich said it was premature to say a LID needed to be formed. He said the waiver said they wouldn't remonstrate against the formation at a later date but they could object. He said the question would be whether or not they met the threshold for formation because the parcel would be counted in the threshold. He said the City Council at that time could listen to the objections and determine they could form an LID but decide not to. Ginter said if the City was saying they didn't care that there was a buyer, it is an exaction and felt it was odd. Berman asked if there wouldn't be a waiver if CLPUD was selling the whole lot. Tokos said yes. Patrick said the City had been collecting waivers and had yet to perform a single LID. He said they were working on how to do it.

Hearing closed at 7:41 pm

Hardy was inclined to agree with the appellant to a certain extent and wanted to look at the case law to make her own determination on what was constitutional or not. She felt there should be more consideration in the future to cleaning up the ordinance so they didn't run into this situation again. Berman said he was ambivalent and said the fact that there almost certainly would need to be a LID in the future, and the property would represent a significant block in the formation of the LID, it made him tend to think it should be done. He was torn and suggested the hearing be held

open to do more research at the next meeting. Croteau said he was ambivalent and had a hard time understanding why someone wouldn't want to agree to development in the future. He said the PC should look into the situation more and get more arguments from the City Attorney and appellant attorneys. Franklin said it needed to be looked into more. Hanselman said he would like to have a better handle on the constitutional rights. He said he needed more time to understand the input from the attorneys. Patrick thought the appellants were right about the constitutional rights but noted it wasn't current case law.

Tokos said in terms of the next steps, the PC had an option for the appellant and staff to provide reports. Croteau felt this would give the PC more time to consider things and allow some negotiation to find wording that was acceptable for all parties. Berman said there should be discussions with the buyers on what form of specific requirements in a non-remonstrance agreement they would agree to. He thought the PC couldn't make decisions on one potential buyer but thought it would be worth pursuing.

MOTION was made by Commissioner Croteau, seconded by Commissioner Hanselman to request the City and appellant prepare documents for consideration of File No. 1-MRP-17-A at the next Planning Commission meeting. The motion carried unanimously in a voice vote. (49:18)

Berman asked that Tokos reference what the PC could and couldn't do in his staff report.

B. File No. 1-ADJ-18. Patrick opened the Public Hearing for File No. 1-ADJ-18. Tokos presented the staff report. Tokos wanted it clear that it was an adjustment not a variance. He explained why the PC was required to have a public hearing on the matter. Tokos noted that additional comments were received and printed copies were given to the PC at the meeting. Tokos noted that the applicant asked the PC to look at the typical setbacks and note that they were providing a 200 foot setback and why they felt the concern on the height adjustment wasn't a factor. He noted the applicant moved the fire hydrant due to the Fire Department's concerns. Tokos said because of the slope the only properties to the southeast affected were at a lower elevation. The properties at the northwest wouldn't have a direct impact on view. He noted that it was the pitch of the building not the full width mass of the building they were considering. He felt the setback of 200 feet provided mitigation for the height.

Tokos noted that the applicants would be creating a stub street that would eventually be connected to Lakewood Drive to provide secondary access and was something the City would like to see. He noted that the access wouldn't be completed with this project and traffic would be loaded onto Harney, 31st and 36th Streets. Tokos noted that traffic wasn't a part of the consideration. Berman asked if a Traffic Analysis was done. Tokos said it wasn't required under the ordinance. Franklin asked if it had triggered any other infrastructure. Tokos said the applicant would have to do public improvements including the stub to Lakeview Hills on the north end; a curb, gutter and sidewalk to the south end of the property; and extend the sewer line on the property up to Harney Street.

PROPONENTS: Todd Woodley and Mike Phillips, with Wyndhaven Ridge, LLC, addressed the PC. Woodley said that he felt the staff report summarized their position. He noted that Building 4 had taken measures to recess the building a full story below the current grades. He said the physical appearance would be four feet below what it could be.

Franklin asked if the tallest point on Building 4 was higher than the others. Woodley said Building 4 was lower than Buildings 1, 2 and 5. Franklin asked if Building 4 had six feet of underfloor because of the grade of the lot. Woodley said yes. He said some of the ways it was calculated didn't make sense and had a roof line that was sitting lower than the other buildings. Franklin asked how the building height was measured. Woodley said it was an average of the height on each corner of the elevations. Berman asked if they were aware of the height limitations before they designed the buildings. Woodley said the design was a dynamic process and they tried to fit things as best to the grades as possible. He said there had been different interpretations and the heights were different than what they were used to. Hanselman asked for the finished ceiling heights on each of the three floors. Woodley said the first and second floors on all three buildings were nine feet each. He said the top floors on all three buildings were eight feet to meet the variance. He talked about common standards for building apartments and how it applied to the project. Hanselman asked if they had built all floors to eight feet would they have designed within the height limit. Woodley said yes. Hanselman thought it was on the developer to design to the City's standards. Woodley said when they realized the restrictions they made grading adjustments.

OPPONENTS: Kelsey Ingalls addressed the PC. She said she recently bought a home to the southeast of the proposed buildings. Ingalls thought it was important to have new housing but she had an issue with the buildings being above

the height limit. She noted that all of the homes in the area met the height limits and asked that the project meet the standards. Ingalls felt it could set a precedence in the future and wanted the developer to build a two story apartment buildings instead of three stories.

Kristin Yuille addressed the PC. She said she was a resident of the Lakewood Hills subdivision. Yuille noted that the County building height was 42 feet and was a reference on how tall the buildings would be. She said the properties that would be affected weren't in the staff report and asked the PC to have the builder comply with the code.

Tania Goicuria addressed the PC. She said she lived at the bottom of Lakewood Drive and was in opposition because of privacy issues. Goicuria was concerned about the apartment buildings being in front of her home and that they allowed people to see into her residence. She said she had fire safety concerns as well and thought that if there was a flame from an apartment fire it would hit her home. Goicuria was also concerned about noise from the apartment buildings.

Walter Morrey addressed the PC. He said he lived at the bottom of Lakewood Drive and opposed the height adjustment. Morrey said that adding a height adjustment will increase vehicle traffic and impact the residential neighborhoods in the area. He noted that in the Municipal Code the Type III land use law stated that a traffic conditional use permit required 50 trips per day and Tokos mentioned in his staff report 100 trips per day. Morrey asked why there was no traffic impact analysis done. Tokos explained that if a conditional use permit was required, then there would be a threshold on whether or not he or the PC could handle the decision, which did have a 50 vehicle trip limit. He said that this was not a conditional use as apartments were permitted outright at this location, and why it didn't apply. Morrey thought it was odd that there was no traffic impact analysis done when the developer was doing three phases, and felt it should have been done. He was concerned about the speed limit in the area and noticed that people sped on the street a lot. Morrey said 31st Street was noted in the report as being engineered but he was told it was just an access road. He was concerned about the privacy for his family and said Building 4 would impede his privacy as it was adjacent to his property. Morrey was concerned about fire safety as well. He felt the height limit was there to protect compatibility and felt it set a precedent on the other two phases of development. Morrey thought that Building 4 wasn't going to be reached by the Fire Department if there was a fire. He presented a petition of disagreement to the PC that had 71 signatures from local residents.

Sharon Lihou addressed the PC. She felt the height limits were in place for a reason. She felt that allowing the height adjustment created strains on infrastructure and streets, limited views, changed typography and aesthetically compromised the small town feel of Newport. Lihou said that 31st Street was a substandard road without drainage culverts. She said that Tim Gross said there were no plans to improve 31st Street with signals to access Hwy 101. She asked the City to evaluate the traffic on 31st Street before any development was approved.

David Boys addressed the PC. He reviewed the plans and said it would obstruct their view. Boys said that everyone that built in the area had to meet the code. He felt the developer didn't do his homework on the codes and said everyone in their neighborhood had benefitted from the height restriction. Boys asked the PC to think about balance and the need for more housing. He was concerned that if an adjustment was allowed for this property, the developer would ask for adjustments to the other properties he owned. Boys stated he opposed the height adjustment.

Adam Stachan addressed the PC. He said he was in opposition to the height adjustment and didn't feel the applicant made a case for the adjustment. Stachan said if they were allowed to do the adjustment, what would prevent them from doing it with their other properties in the future. He had a hard time believing the developer didn't know about the restrictions and felt they intentionally ignored them. Stachan thought there was an opportunity to go back and rework the design to fit the height restrictions.

Ramune Arlauskas addressed the PC. She said she was upset that neighbors outside of the 200 feet notification area weren't notified. Arlauskas opposed the height adjustment and said there was no compelling reason for a height adjustment. She suggested different options for building materials to meet the code requirements.

Dave Larson addressed the PC. He pointed out that many of the houses in the community had to maintained the height code.

Holly Studley addressed the PC. She said when she was building her home they had to deal with the height code and designed to it. Studley noted that her neighbors had to make an adjustment to meet the height codes as well. She felt everyone in the neighborhood should meet the requirements and opposed the adjustment.

Rebuttal: Mike Phillips addressed the PC. He felt they made their best efforts to meet the requirements. He noted that two of the five buildings were below grade and said they could change some structural design to meet the code requirements.

Woodley said he couldn't address the traffic issue concerns. He restated that the purpose of the adjustment was for Building 4 as it exceeded the heights by an 18 percent variation. Woodley said the issue with fire had been addressed. He said the surface in front of the building was under 30 feet. Phillips reminded that all the buildings would be built with fire sprinklers. Woodley thought the concerns about traffic generation was about the buildings being three stories and reminded that the density requirements stayed the same. He said the overall density of the parcel was less than the site utilization for traffic.

Hearing closed at 8:56 pm

Hanselman asked Tokos if there were any current three story buildings in Newport that meet the height ordinance. Tokos said yes and they used a different form of construction. Hanselman asked if a three story building could be built within the height limit. Tokos said yes. Hanselman said there were compelling reasons to have more apartments. He said he had no concerns about apartments but had concerns on heights. Hanselman was surprised that the applicant's rebuttal was that it was only 17 percent higher. He felt they needed to rethink the plans and come closer to the height limit. He felt it was a solvable issue on the developer's end. Tokos asked the PC to state if they thought it met or didn't meet the criteria so he could put together a decision.

Franklin said he heard the concerns and felt the height of 41 feet was misleading on Building 4. He reminded the audience that views were not protected and change was hard to take sometimes. Franklin said he didn't like a design with a flat roof because it would end up looking like a Holiday Inn. Croteau said he understood the concerns. He said the property was zoned R-4 and the issue was the height adjustment. He said that even if the particular apartment was brought down to code the impact would be the same. Croteau felt it met the criteria requirement.

Berman was concerned that the developers weren't aware of the height limits and didn't design to it. He didn't see how the adjustment would meet the requirements. He felt the adjustment didn't have any impact on traffic or on utilities. Berman didn't like that the developer didn't meet the height requirements and couldn't see the justification for an adjustment. He felt a redesign was in order.

Hardy said it was a narrow issue and the height adjustment wouldn't be the cause of additional noise and lack of privacy. She said the amount of building above grade wouldn't be 35 feet because only 30 feet was at the grade. She thought there should be considerations on shielding lights and their impact. Hardy was inclined to favor the height adjustment.

Patrick thought that height adjustments were only done for commercial. Croteau reminded Patrick it had been approved for residential. Patrick didn't think the adjustment for height should be given because it could set a precedent. He thought the developers needed to design to the rules. Croteau said he didn't see an impact if the PC granted the adjustment. He had a hard time relating the denial of the adjustment based off of the issues brought forward. Hanselman said that it was an example of a camouflage and the fact that they were talking about one building that was exceeding more than the other made it more complicated. Croteau said if looking at all the roof heights, he would see the argument. Berman reminded that all five buildings are being adjusted. Tokos explained that the reason that the hearing was in front of the PC was because one of the five buildings exceeded the limits that allowed him to make an administrative decision, therefore all of the buildings had to come to the PC for consideration. Croteau said this changed his view.

MOTION was made by Commissioner Berman, seconded by Commissioner Croteau to decline the adjustment for File No. 1-ADJ-18. The motion carried in a voice vote. Commissioners Hardy and Franklin were a nay.

Tokos asked for guidance on how the PC felt the matter didn't meet the standards so he could create a decision. Berman said Criteria A didn't meet the requirements by not equally or better meeting the requirement to control building heights. He said there was plenty of opportunities to meet the ordinance from day one and it wasn't done. Patrick said there were not any existing conditions on the property to support a height adjustment. Hanselman thought that Wyndhaven didn't have a compelling reason why they didn't meet the height restrictions and said they were obligated to know the limitations.

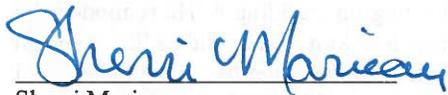
Croteau asked if there were no consideration for elevations, would there be a hearing. Tokos explained that it would have been an administrative decision. The City would have sent notification to adjacent property owners and it would have been subject to an appeal.

Larson asked why the PC had to justify why they denied. Tokos explained that if the applicant meet the criteria they would get the adjustment; if not, they wouldn't get the adjustment. He explained the PC's decision would have to show that the applicant did not meet the standards and that was why they were denied. Tokos said they had to apply standards related to the approval criteria and one of the standards had to be a reason.

Patrick said he could think of many ways the impacts could be mitigated for Criteria 2. He said there were a lot of practical ways to get the same amount of units in the height limit. Franklin asked if there was a grade issue limiting this. Tokos asked Patrick if he was saying that under Criteria 2 he felt the distance wasn't enough to mitigate the impacts. Patrick agreed. Tokos said he would put together a decision based on the PC's input.

- 7. **New Business.** No New Business.
- 8. **Director Comments.** No Director comments.
- 9. **Adjournment.** Having no further business, the meeting adjourned at 9:29 p.m.

Respectfully submitted,



Sherri Marineau
Executive Assistant