

TOLEDO PLANNING COMMISSION MINUTES

A regular meeting of the Toledo Planning Commission was called to order at 7:00 pm by President Terri Strom. Commissioners present: Linda Brodeur, Stuart Miller, Anne Learned-Ellis, Paul Schneidecker, and newly appointed Planning Commissioner Jerry Seth. Excused was Dawn Grafe.

Staff present: Community Development Coordinator (CDC) Rusty Klem, City Manager (CM) Michelle Amberg, and Secretary Arlene Inukai.

VISITORS: Craig and Rebecca Hoffman, Tad Brown, June Brown, Bob Deming, Rick Wright, Patricia Patrick, Loren Joling, Mark Camara, Dennis Bartoldus, Bob Wienert, Steve Carver, Bud Shoemake, Don Amberg, Stephen Webster, Kurt Carstens

APPROVAL OF THE JANUARY 13, 2010, MINUTES:

It was moved and seconded (Learned-Ellis/Brodeur) to approve the January 13, 2010, minutes as circulated and reviewed by the Planning Commission. The **motion passed** unanimously, noting the absence of Grafe.

PUBLIC HEARING: ZONING ORDINANCE AMENDMENT TO ESTABLISH THE LIMITED USE TOLEDO INDUSTRIAL PARK OVERLAY (ZOA-1-10), REQUESTED BY THE CITY OF TOLEDO:

President Strom opened the public hearing by stating the nature and purpose. After calling for declarations of ex parte contact, bias, or conflict of interest, Commissioner Learned-Ellis reported she knows the Hoffman's and they have talked about the elevation of the City shops in the past, but it will not affect her decision. The statements of rights and relevances and rights to appeal were then read.

Staff Report: CDC Klem reviewed the staff report as on file at City Hall. He reported that the City is close to receiving a grant from DLCDC to evaluate industrial lands in the City. Once awarded, Cascades West Council of Governments (COG) will undertake the study and analyze all commercial and industrial lands to make sure the zones are consistent with the economic development that should occur. It is expected to be an 18-month project. Planning Commissioners and some City Councilors have expressed a way to protect the Toledo Industrial Park (TIP) area, which is in the bottom center of the bowl in Toledo. The Planning Commission held a workshop last month to review a draft ordinance and, after discussions, the ordinance was slightly revised. One item that came to light questioned why only properties identified on the Toledo Industrial Park Plats were listed versus all properties in the area. CDC Klem reported that it was a valid concern and the proposed ordinance includes all properties, set by boundaries of the railroad track, Depot Slough, and boat dock.

The proposed ordinance does not change the underlining zone, but adds one additional requirement for a conditional use permit for undeveloped property. Existing use can be expanded and are exempt from the proposed regulation. The Planning Commission considers the conditional use permits and citizens have an opportunity to respond. Conditional use permits take about four to six weeks to complete. The proposed ordinance contains the review procedures. The staff

memorandum addresses the criteria for zoning ordinance amendments and states the request is in compliance with the Comprehensive Plan. Staff recommends adoption of the proposed ordinance. The Planning Commission must make a recommendation to the City Council, who has final authorization for all ordinances. If the Planning Commission chooses an alternative to staff's recommendation, the proposed motion will need to be revised.

CDC Klem noted that the proposed ordinance is innocuous. He then read the purpose statement and the defined boundaries of the district. Existing uses can remain and be expanded and the underlining zones will remain unchanged. The only change is for a new use to be reviewed through the conditional use process. He reported that notices of the proposed ordinance were sent to affected property owners and to properties within 300 feet of the district boundary. A worksession for the ordinance amendment was held last month before the Commission. The staff memorandum included a zoning map, notification list map, and the overlay boundary map. The conditional use process is listed in the proposal, which is the same as what is currently listed in the zoning ordinance. CDC Klem wanted the process to be restated for clarity and so it could be a stand alone regulation.

Applicant Testimony: The staff report addresses the request and no applicant testimony is needed.

Proponent Testimony: None.

Opponent Testimony: Kurt Carstens of Litchfield and Carstens LLC, 407 NW Coast Hwy, Newport, reported he represents Wienert Investments (Bob Wienert), who owns lots affected by this project. He has discussed this proposal with fellow attorney Dennis Bartoldus, and he urged Commissioners to also listen to Mr. Bartoldus' presentation. In order to get it onto the record, Mr. Carstens provided a written handout for testimony and provided the following objections to the proposed ordinance, as summarized below:

- The public hearing notice lists the City Council hearing in seven days. There is a 14-day appeal period and this conflicts with the hearing schedule. He believes this is handled inappropriately.
- Staff noted that this is a temporary measure, but the ordinance does not mention it. There should be a sunset date if it is temporary.
- The proposed ordinance does not change uses, but rather eliminates all outright uses. There is no way to determine what is allowed outright. Normally, cities have three categories—outright, conditional, and prohibited, but the City wants to no longer have outright uses. A developer has the right to rely upon certain regulations because it is on the list.
- He believes the ordinance is a bad idea and it should not be supported. There are legal arguments—legislative, judicial, and executive—why the proposed ordinance is unlawful. He urged Commissioners to review the information for themselves, analyze what has been presented in order to make an informed decision, and look at the big picture.
- For 20 years, Toledo has been self-proclaimed as the industrial hub and much of Lincoln County depends on this. The Lincoln County Comprehensive Plan even notes that Toledo's industrial sector is important to the County. In the 1980's, Georgia-Pacific donated the TIP property to the City and the City saw a way to provide industrial opportunities and make money. The property was subdivided and lots were sold. There was no funding for improvements, but because there was citizen backing, grants were awarded for the development. Excerpts from the City applications reported to the State were included in the packet. The City represented industrial and economic development for Toledo. People purchased industrial lands, some were developed and some remain vacant. The City now

wants to shut down what they relied on when the property was sold. When this type of change occurs, it is misrepresentation and it leads to litigation. There are legal theories that will lead to lawsuits.

- The City is mandated to follow its own Comprehensive Plan. The written presentation deals with the Comprehensive Plan, public records and grant funding, master planning for the park, challenges that the area is unique, and comments to the staff report. This proposal affects more people than just those in the boundary. He knows there are some strong feelings in the community, but urged Commissioners to gather the facts and apply the law.

Dennis Bartoldus (PO Box 1510, Newport) reported he represents Mountain Pacific Investments LLC (Alan Brown Tire and family) and GVR Investments (Tryon family). These families purchased properties in the TIP area based on existing ordinances. Mr. Tryon bluntly stated that if this ordinance is passed, they want a refund and want to walk away from the area. The impacts to these families are tremendous. Mr. Bartoldus distributed written material to the Commission, which is the basis for his presentation. His statements are summarized as follows:

- The January 13, 2010, minutes noted that this has been a topic of discussion for some time, but the Brown's and Tryon's have only known about this through the notice a few weeks ago. Their opinions were never requested. The Tryon's are the second purchaser of their property and the Brown's purchased their property from the City. There is a significant issue with meeting the requirements of citizen input.
- Mr. Bartoldus questions under what authority the City has to adopt this ordinance. He asked if the City wants all development to stop. Noting that the grant to review industrial properties will take 18 months to complete, there is no timeline on the ordinance and it stays in effect until it is amended.
- The statement that the conditional use process is not a tough process and can be done in 1½ months is not always the reality. If one objection is received, the decision could be taken from the Planning Commission, to City Council, to the Land Use Board of Appeals (LUBA), and to the Court of Appeals. This could take years. One and a half months is the timeline if all parties are in agreement. Otherwise, it can take years, cost a lot of money and force some to walk away from a project all together. The 120-day rule is just an illusion. Once a decision is appealed, it can go back and forth many times between the City and the courts.
- This ordinance gives the City the ability to deny any or all uses.
- The staff memorandum stated that all development should be cautiously reviewed until the industrial study is complete. When reviewing the area, there is little difference or uniqueness with this area compared with other areas in Toledo. According to infrastructure maps, the TIP area is ready for development and he questioned why the City would want to squelch development.
- Representations were made to entice people to buy TIP properties. The City sold the property and owners made their due diligence in deciding to buy. The City has now done a 180 degree reversal from what was originally planned.
- The TIP plat map shows the properties are zoned Light-Industrial and shall be developed in accordance with the Toledo zoning ordinance and land division orders. Mr. Bartoldus believes this is a deed restriction on the plat, which cannot just be changed.
- The public hearing notice listed criteria for ordinance amendments as Toledo Municipal Code 17.80 and the Comprehensive Plan. The City should go through each criteria in the codes to determine the ordinance has met criteria. Findings were noted in the memorandum, but are not attached to the proposed ordinance. The City needs to adopt findings that address all criteria. The findings should be specific, lead to a conclusion, and be detailed enough to provide evidence for the record. There is no evidence to support a decision. Staff made some

conclusions, but they are not findings and are inadequate.

- A Comprehensive Plan amendment should be prepared if this ordinance is accepted. If something has changed to necessitate this amendment, the City needs to identify the change in the Comprehensive Plan. The Comprehensive Plan was adopted in 2002 and TIP was developed before 2000. They need to know what has changed since the adoption of the plan, which would justify the proposed amendment. For years, the City promoted industrial growth, but this proposed ordinance slams the brakes on industrial development. The City does not explain the need, nor does it match the Comprehensive Plan. The staff memorandum also does not list other criteria, identify what has changed in the community since the passage of the Comprehensive Plan, or identify adjacent property owners affected by new industrial development. Are there concerns about liability, aesthetics, or is it in response to a few people's opinions? The proposed ordinance cannot be adopted without amending the Comprehensive Plan or it would violate the Comprehensive Plan policies. The area is identified as an industrial center, so what has changed since approving the industrial park. The findings are inadequate to address the ordinance. Each Comprehensive Plan article needs to be addressed, objective by objective. How can the zoning ordinance be amended if there are no findings to support it? This is considered a quasi-judicial land use decision, but is legislative in nature. The ordinance does not show how it is in compliance with the Comprehensive Plan.
- Mr. Bartoldus believes the conditional use permit is an open evaluation process. The City has the ability to shut down a project or to apply enough conditions to stop growth. He questions if some uses will be reviewed more fairly than others and if all owners will have fair treatment. Having outright uses continues fair treatment. The City is taking an objective use allowed outright and making it a subjective decision.
- The packet includes deeds of ownership. He provided a history of the transfers for his clients. He does not feel there has been adequate opportunity for citizen involvement. This is a major change and impacts a lot of property owners.
- ORS 227.137 talks about standards that cannot be too ambiguous. The conditional use permit is a discretionary permit and sets conditions, violating ORS 227.173. According to the draft, the City can condition many things onto a conditional use permit. He cited the *Dolan v. City of Tigard* case, which imposed obligations onto the property owner and that there has to be a reasonable nexus between the conditions and the impacts. When Mr. Dolan went through the process to build, they were required to donate a bike path. The decision eventually went to the US Supreme Court.
- Imposing these regulations establishes an estoppel legal theory because the area has been sold for industrial development for several years. The area was considered shovel-ready and many businesses have proven interest in the property. The City was willing to take the money, but is unwilling to show good faith to allow development. By adopting the regulations, it creates a moratorium on industrial development. To shut down development, there are certain ORS regulations for moratorium procedures that need to be followed. It is a de-facto moratorium because the City does not have to grant any conditional use permits.
- Equal protection is pertinent in this case because everyone needs to be treated equally. How is this property different from other similarly zoned properties? Everyone is entitled to make use of outright uses, but if this ordinance is accepted, they have to ask to build an outright use. The City owns property in the TIP and this creates a competitive disadvantage. The City can approve a conditional use permit on their lots, so how will this affect other property owners? There is no fairness for applicants.
- Mr. Bartoldus concurs with Mr. Carsten's presentation and reported they will move forward if the ordinance is adopted. He expressed certainty that the ordinance will be reversed because

the ground work is not completed and rules are not followed.

Mr. Bartoldus wants a complete record and requested that the hearing be held open at least 7 days to allow additional information.

Rick Wright, PO Box 722, Newport, reported he is the co-owner of two lots in the TIP. He is in opposition of the proposed change. He feels he has been a good neighbor. He was the first to buy the properties around 1995, thinking it was a good place to invest. At that time, they were ready to move forward, but could not because the City could not yet finalize the sale, so they settled on a lease option. Eventually they built a nice building that fits with the community. The new City Shops were going in and the City could not use the bridge when building the shops, so they allowed the City to access across their two lots. They built, landscaped, etc. everything they were asked to do. The attorneys did a nice job presenting the case of opposition and Mr. Wright requested that the Commission consider not going forward with the proposal.

Bob Deming, PO Box 872, Toledo, reported he was a former member of the planning commission when the Comprehensive Plan was adopted. He stated that when he was on the Commission, he argued that there should only be outright uses listed in the zoning ordinance and no conditional uses. He does not like conditional use permits. The two attorneys talked about property uses, but no one talked about the differential from police power to eminent domain and takings. Everyone affected by the proposed change has a serious consideration. He voiced opposition to the ordinance and asked for the Commission to consider the attorneys presentations.

Craig Hoffman, 816 NE Alder Street, Toledo, stated Mr. Wright covered his concerns. He stressed that he has invested a lot into his property. Even though the ordinance will allow expansion of his building, he does not understand why this has to be adopted solely for the TIP and why not City-wide and see what happens to property values.

June Brown of 126 SE 1st Place, Newport, reported she is a member of Mountain Pacific Investments. They purchased the property for the Alan Brown Tire Center and they have invested a lot into the property. They still have plans to develop some of the vacant areas, but this ordinance will affect that decision. She asked to go on record as opposed to the proposal.

Tad Brown of 186 Hidden Valley Road, Toledo, stated he operates Alan Brown Tire Center and wishes to speak as a business owner versus property owner. When they wanted to expand their Newport operation, they looked all over the state and even into California for a location. The City of Toledo offered to sell the former City Shop property, which they felt would make a good warehouse to support their Newport store. They eventually opened a new store and planned to eventually develop the back of the property. The property has dual-zoning of commercial in the front and industrial in the back. They have considered storage or other shops on the vacant area, but this ordinance will limit what they can do with the undeveloped property. Businesses must evolve and things may not be the same 10 years from now. This ordinance could potentially hurt their business as it evolves and diversifies. A business change will involve begging all citizens to allow the change and one opponent could take years to resolve. This is a temporary proposal, but it has long-term effects. Mr. Brown stated that the proposed ordinance is most likely not legal, but it also is not fair to owners in the TIP. He compared it to a child playing a game and once the child begins losing the game, he changes the rules to win. Development at TIP involves millions of dollars, many families livelihood, and potential litigation.

*Addition to the minutes adopted March 10, 2010, to include the sentence, "Change is an inherent part of the community as it continues to evolve and grow, and the community's goals and visions are different."

Stephen Webster of 113 SE Bay, Newport, reported he is a member of Front Street Marine, located near the Port office and bank. He asked to go on record opposing the ordinance. He agrees with many people testifying tonight. He understands an existing use can be maintained, but there could be a number of different uses inside the building over time. The policy is very confusing. He believes zoning is a good thing, but there should be clearly interpreted uses that can be seen and he can determine if suitable for his endeavors. Instead, the City wants to overturn the outright uses and turn the process into a kangaroo court. He feels the policy is a waste of resources and time and is a senseless regulation.

Bud Shoemake with the Port of Toledo, reported he talked about this ordinance with Port Commissioners and was directed to testify at tonight's hearing. He relayed the concerns with how the proposed changes will affect property values, the Port's ability to actively market properties, and their ability to sell properties without having an approved conditional use permit. The new requirement would limit the number of businesses willing to locate in Toledo.

Other Interested Parties: None.

Questions by Commissioners: Commissioners discussed the ability to determine a sunset date for the ordinance, as it is planned to be a temporary measure. The timeline should run concurrently with the grant until a recommendation comes out of the study. At this point, setting a date could be off within a few months. Commissioner Miller stated he hoped to protect citizens from adverse uses, but this ordinance may not achieve his desired results. He questioned the rationale with the Dolan case and how it would apply in this case. Mr. Bartoldus reported that there are no firm standards for developers and conditional uses give the Planning Commission extreme authority to condition projects. Applicant's must accept those conditions in order to move forward and the Dolan case shows how conditions of approval can be applied.

Commissioner Brodeur is not interested in a complete blanket approach, but rather refining the definitions in the zoning ordinance. She stated there has been some concern that the language is vague and it should be clarified in order to make a clear decision. The goals and vision of the community have changed over time.* She added that the Planning Commission does not want to restrict everything nor want extreme authority, but wants to make sure Toledo is protected from problems. There has been a number of citizens expressing concerns with the TIP area and the Commission attempted to address the concerns. This conditional use permit regulation is not a long-term solution, but a tool to have until a complete analysis is completed. Commissioners discussed clarifying items in the zoning ordinance, changing circumstances in the community, and a Comprehensive Plan amendment. The new policy may not meet some Commissioner's goals to correct problems.

Commissioner Learned-Ellis requested the public hearing remain open. She noted that more information may be necessary for the findings of fact, Comprehensive Plan review, and to review interim dates for the ordinance. CDC Klem clarified that many of the concerns voiced tonight would apply to both the conditional use permit overlay and if any changes are proposed to the underlying zones to remove or expand uses from the current list. Commissioner Miller did not feel this ordinance would fall under a takings, since cities change zoning regulations all the time. His main objective is to clarify existing requirements and believes the ordinance is too much of a blanket approach and does not have a sunset date.

It was moved and seconded (Learned-Ellis/Brodeur) to continue the public hearing until the next

scheduled Planning Commission meeting and to leave the record open for 14 days. The **motion passed** unanimously, noting the absence of Grafe. Commissioners clarified that the 14-day appeal period is for an appeal to a decision, not a Planning Commission recommendation to the Council.

Visitors left the hearing at 8:50 pm.

Commissioner Brodeur questioned where the term "industrial hub of Lincoln County" was coined, since she had never heard it. Commissioner Learned-Ellis reported it has been around a long time and speaks to the benefits of having rail, water, and highway transportation. CDC Klem added that it is also in the Comprehensive Plan. Commissioners discussed the industrial zone language in the zoning ordinance. CDC Klem felt the zoning ordinance language is fine for now, believing that staff can make a determination based on the purpose statement. Commissioner Miller expressed reservation requiring all uses, harmless as some are, to go through the conditional use process. The risk of litigation also increases, which the City cannot afford. Commissioners requested City Attorney review and comment in light of the attorney's presentations tonight. They also discussed the timeline and what happens with conditional use permits after the industrial study is completed. Commissioner Miller expressed his preference to fine-tune the industrial zone language in the zoning ordinance. CDC Klem is comfortable with the existing language in the zoning ordinance in the interim, which allows some discretion. He added that the staff memorandum provided sufficient findings for the proposed ordinance and a Comprehensive Plan amendment is not necessary. Commissioners reviewed the Periodic Review schedule for the Comprehensive Plan and noted the City is about 10 years into the 20-year document. Through the proposed grant application, COG and DLCD will work on the zoning ordinance and look at the Comprehensive Plan policies for the industrial zones.

CM Amberg announced the City was awarded the grant from DLCD. An agreement/contract has not been signed, but the City expects to work with DLCD Representative Matt Spangler to coordinate the project. In answer to Commissioner questions, CDC Klem reported the proposed conditional use option was discussed with DLCD and they believed this was a good approach during the interim period. The ordinance was reviewed by the State and some modifications were made based on their comments. Commissioners discussed the ability for a legal opinion from the State as well. Fallout is expected with any change, but there needs to be research so there are no holes in any new policies. Changes from the COG analysis will be expected within the next 18 months. Commissioner Learned-Ellis stated that if the proposed ordinance is adopted, it is expected to be delayed in appeals, up to a year. CDC Klem added that the COG study will be a significant weapon for any change to the zoning ordinance. Commissioner Miller stated he was pushing for something quickly, but did not expect to see a blanket approach. Commissioners discussed the timeline and delays if appeals are filed, keeping the public hearing open for two weeks, and possibly pulling the ordinance. Planning Commissioners can work on a policy to provide a directive to staff regarding private property and determinations. There will be more information available by the next meeting and CM Amberg reported the City Attorney can review the concerns presented tonight.

DECISION ITEM: REVIEW AND MAKE A RECOMMENDATION FOR THE CITY OF TOLEDO PUBLIC INFRASTRUCTURE DESIGN STANDARDS MANUAL:

CDC Klem noted this topic was discussed last month. The City has infrastructure design specifications, but it is outdated and no longer adequate. A new manual was created by the City's engineer, which complies with American public works standards. A recommendation from the Planning Commission to the City Council for adoption has been requested by staff. Commissioner

Learned-Ellis reported she and Commissioner Grafe attended the joint worksession last month and reported the document will cost about \$50 for purchase or an electronic version can be provided. Good information was presented showing the need for the standards.

It was moved and seconded (Learned-Ellis/Brodeur) to recommend the City Council adopt the Public Infrastructure Design Standards Manual. The **motion passed** unanimously, noting the absence of Grafe.

DISCUSSION ITEMS:

Planning Commission "To-Do" List:

CDC Klem stated this was brought up last month to start tackling projects. In 2007, the Planning Commission created a to-do list and this list was presented again to Commissioners. Many items have been resolved or are waiting other coordination. The following are highlights from CDC Klem's review:

- Substandard downtown buildings and design review standards should have input from the Main Street Committees.
- Affordable housing and tenant rights are on the list. Toledo has allowed manufactured homes in both residential zones for years and this is a very affordable option for housing.
- A code enforcement questionnaire was created and it illustrated a large problem with cats. Code enforcement is hard and there should be some directive where to focus. As new regulations are adopted, it gets more difficult to enforce. Code enforcement is a difficult program, but there has been success with varied approaches to reach compliance.

CM Amberg provided the following information in response to questions:

- Toledo Police officers continue to perform animal control when called, but it is a County program. The modified County program will not begin until next fall and Toledo will not see as much with animal control as Lincoln City and Newport, because those two communities pay extra into the program.
- She discouraged Commissioners from approaching property owners when they see an item is in violation of the Planning Commission's terms of approval. As a volunteer, they have certain liability and if Commissioners begin enforcement, they experience greater liability. They were encouraged to contact staff or the Police Department when a violation is seen.

Updates and Reports:

CDC Klem noted that the packet included one "FYI" item from the Main Street Committee visioning clinic. The document is interesting and he thought it would be helpful to the Planning Commission. President Strom provided a recap of the visioning process and getting the statement. She was encouraged that most participants were focused on what Toledo currently provides, how to enhance those service, and the feeling that they all want to move in the same direction. It was an impressive and inspiring process and it is exciting to see it move forward.

STAFF COMMENTS:

CDC Klem reported the City will submit a Transportation Planning Grant before the March 12th deadline. The City made an application in 2009 and from feedback from the State, the application is good with some slight revisions. The request is for \$50,000 to complete a transportation system plan. Commissioner Learned-Ellis reported this would be a good tool to have.

COMMISSIONER COMMENTS:

Commissioner Learned-Ellis and President Strom welcomed new Planning Commissioner Seth to the Commission and noted it was an interesting night to start.

There being no further business before the Commission, the meeting was adjourned at 9:40 pm.

Secretary

President