

EXHIBIT D-2
LU 12-0032

CITY OF LAKE OSWEGO

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MEMORANDUM

TO: William Gaar, Planning Commission Chair, and Planning Commission members

CC: Brant Williams, Assistant City Manager
Denny Egner, Assistant Planning Director
Debra Andreades, Senior Planner

FROM: Evan P. Boone, Deputy City Attorney

SUBJECT: LU 12-0032 – Foothills Comp Plan and Code Amendments
Public Notice for Oct. 8, 2012 Public Hearing

DATE: Oct. 11, 2012

Objection Raised: Ms. Erin O'Rourke-Meadors submitted to the Commission Exhibit G-5, dated Oct. 8, 2012, and testified at the October 8, 2012 public hearing, in the nature of a "point of inquiry", stating that public notice for that public hearing was insufficient because was not given pursuant to LOC 50.07.003.3.e. Specifically:

"Compliance would require that the Public Hearing Notice for this Application to have been mailed no later than September 18, 2012. Instead, as you will note, in the lower right-hand corner of the Notice, as indicated by the City, said notification was 'Mailed: 09/28/12.' It appears that the City failed to adhere to its own requirements."

The Commission took the objection under advisement.

[Staff also spoke with DLCD Staff member Jennifer Donnelly on Oct. 11, 2012, who relayed a part of a conversation she had with Diane Cassidy (who also testified at the Oct. 8, 2012 public hearing), raising to DLCD the same question raised by Ms. O'Rourke-Meadors.]

Answer: Proper notice was given for this legislative public hearing, pursuant to LOC 50.07.003.3.c. Ms. O'Rourke-Meador's confusion regarding the applicability of LOC 50.07.003.3.e is understandable, but subsection 3.e is not applicable to this public hearing.

Discussion:

I first turn to LOC 50.07.003.3¹, and particularly subsection e, the code subsection cited by Ms. O'Rourke-Meadors. However, subsection 3.e cannot be read without the clause applicable to all subsections, the first paragraph of subsection 3. In reading the applicability clause, one find that all subsections (at least as directly applicable by subsection 3) are applicable only to *minor development permit application* public hearings:

3. PUBLIC NOTICE/OPPORTUNITY FOR PUBLIC COMMENT

Except as set forth in LOC 50.07.003.3.d, prior to making a *final decision on a minor development permit application*, notice of the opportunity to comment upon an application and, if applicable, the date of a *public hearing upon the application*, shall be given as follows:

[Emphasis added].

The Foothills Comp Plan and Code Amendments are legislative amendments to the Comprehensive Plan and Community Development Code.² Thus, no subsection of LOC 50.07.003.3 is directly applicable to this

¹3. PUBLIC NOTICE/OPPORTUNITY FOR PUBLIC COMMENT

Except as set forth in LOC 50.07.003.3.d, prior to making a final decision on a minor development permit application, notice of the opportunity to comment upon an application and, if applicable, the date of a public hearing upon the application, shall be given as follows:

- ***
- e. Notice for Initial Public Hearing
 - i. Notice of a public hearing before a hearing body containing the information required below shall be mailed at least 20 days before the initial public hearing as follows:
 - (1) To the applicant;
 - (2) To property owners in the same manner as provided in LOC 50.07.003.a.i(1);
 - (3) To neighborhood associations in the same manner as provided in LOC 50.07.003.a.i(2);
 - (4) To the Oregon Department of Transportation and affected railroad company if the application indicates that a railroad-highway crossing provides or will provide the only access to land that is the subject of the application; and
 - (5) Persons filing comments within any comment period: If the hearing regards an appeal of a City Manager decision on a minor development application, to any person not otherwise required to be notified by this section who submitted comments during the 14-day comment period.
 - ii. ****
 - iii. ****
 - iv. ****

² "The proposed text and map amendments would apply to approximately 40.4 acres that are currently zoned I, PF, PNA, and R-0/EC. *This application is being processed as a legislative decision [LOC 50.07.003.16.a].* A legislative decision is an amendment to the Policies, Procedures and Standards criteria or map designations to a large number of parcels.

The Planning Commission reviews applications for legislative text amendments and makes a recommendation to the City Council." Staff Report, LU 12-0032, pg. 4.

See also LOC 50.07.003.16. LEGISLATIVE DECISIONS

a. Legislative Decisions Defined

- i. A "legislative decision" is an *amendment to the policies, procedures, standards, criteria or map designations of the Comprehensive Plan, and this Community Development Code, unless such amendment applies to a small number of identified properties only* or is required to effect a particular development permit application.

proceeding unless by reference through another code section that is applicable to legislative amendments.

The public notice requirement for public hearings for legislative amendments is found in LOC 50.07.003.16.d:

16. LEGISLATIVE DECISIONS

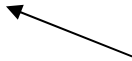
d. Planning Commission Recommendation Required

i. ****

ii. The Planning Commission shall hold at least one public hearing on the proposed legislative decision.

iii. Notice

Notice of a Planning Commission hearing on a legislative decision shall be published pursuant to LOC 50.07.003.3.c, Published Notice.



For legislative decisions, LOC 50.07.003.16.d.ii requires that the notice of the public hearing be published pursuant to subsection 3.c, not section 3 in its entirety. This makes sense because only subsection c is applicable to legislative decisions:

c. *Published Notice* for Legislative Hearing

*Published notice of a hearing on a legislative decision shall be published at least once in a newspaper of general circulation in the City of Lake Oswego at least ten days in advance of the hearing.*³ Where published notice is required, *notice shall also be mailed at least ten days in advance* to the Committee for Citizen Involvement and to all recognized neighborhood associations. The notice shall include:

- i. The time, date, and place of the public hearing;
- ii. A brief description of the proposed legislative amendment; and
- iii. A phone number for obtaining additional information.

By contrast, if this were a major development, LOC 50.07.003.15.c requires that public notice of the major development public hearing be given in the manner required by the entirety of section 3, not just subsection 3.c:

ii. An amendment to the policies, procedures, standards, criteria or map designations of the Comprehensive Plan or this Community Development Code which is not a "legislative decision" as defined in subsection 16.a.i of this section shall be considered "quasi-judicial" and shall be processed as a major development.

³ Published notice was given not less than 10 days prior to the October 8, 2012 public hearing in the Oregonian: "On September 28, 2012, public notice of the proposed CDC text amendment and Planning Commission public hearing was published in the Oregonian and on October 4, 2012, in the Lake Oswego Review." Staff Report, LU 012-0032, p. 4.

c. Public Notice/Opportunity for Public Comment [Major Development]

Notice shall be provided pursuant to LOC 50.07.003.3, Public Notice/Opportunity for Public Comment.



This distinction between the different notice process for public hearings is reflected, in the prior format of the Code:

LOC 50.75.020 Planning Commission Recommendation Required.

1. ****
2. The Planning Commission shall hold at least one public hearing on the proposed legislative decision.
3. Notice. Notice of a Planning Commission hearing on a legislative decision shall be published at least once in a newspaper of general circulation in the City of Lake Oswego at least ten days in advance of the hearing. Notice shall also be mailed at least ten days in advance to the Committee for Citizen Involvement and to all recognized Neighborhood Associations. The notice shall include:

The public notice requirement for development applications was found separate from legislative decisions, in LOC 50.82.020⁴ [Review of Major Development Applications and Appeals of Minor Development Decisions].

It is understandable that Ms. O'Rourke-Meadors was confused as to the applicability of subsection 3.e. The first cause of confusion was the staff report itself. In stating the public notice given, it stated:

"A. Newspaper Notice ***

B. Public Notice to Surrounding Area

The City has provided public notice to property owners within the district, to neighborhood associations, and to government agencies. Adequate opportunity to comment on this application has been provided consistent with the requirements of LOC 50.07.003.3.e. As of the date of this report, no written comments were received.



C. Required Notice to DLCD ****

⁴ **LOC 50.82.020 Notice of Public Hearing. [Review of Major Development Applications and Appeals of Minor Development Decisions] (Repealed).**

1. Notice of a public hearing before a hearings body containing the information required by subsection (3) of this section shall be mailed at least 20 days before the initial public hearing as follows:
 - a. To the applicant.
 - b. To property owners: in the same manner as provided in LOC 50.81.010(1)(a).
 - c. To neighborhood associations: in the same manner as provided in LOC 50.81.010(1)(b).
 - d. Oregon Department of Transportation and affected railroad company: ***
 - e***

D. Metro Notice. ****"

Staff Report, LU 12-0032, p. 4-5.

As the Commission will recall, at the start of the public hearing the subsection reference was corrected by staff (me) to be subsection 50.07.003.15.c (Published Notice for Legislative Hearing), rather than e (Notice for Initial Public Hearing). Since subsection 3.e was cited in the staff report as the public notice requirement for the public hearing, it is certainly understandable that Ms. O'Rourke-Meadors thought that subsection 3.e was indeed applicable, and reading its text, would conclude that the mailed notice requirement had not been met. As discussed above, that code section reference was in error.

The second cause of confusion may be from the placement of the *legislative* public notice process within section 3, which by its applicability provision in the introductory paragraph of section 3 relates only to minor development application permits. In no instance would a minor development application notice of a public hearing under LOC 50.07.003 need to include the *legislative* notice provided under its subsection 3.c. (I have asked that this section be flagged for future code amendment, to segregate the minor development public notice requirement from the legislative public notice requirement. As discussed above, this was much clearer under the Code's old format.)

Ms. O'Rourke-Meadors raised in her testimony the broader policy question – why is individualized mailed notice given to property owners when there is a development application near their property, but not for a legislative amendment which is proposed for an area? I note that there are two additional noticing requirements applied to legislative amendments⁵ that are not applied to development applications, one of which requires – when applicable – mailed notice to the property owner.

a. DLCD notice. Both our Code (LOC 50.0.003.16.c) and state law (ORS 197.610) require notice to the Dept. of Land Conservation and Development of proposed amendments to the Code and Comprehensive Plan, at least 45 (local code) days / 35 (state law) days prior to the first evidentiary hearing. DLCD forwards notice to persons that have requested copies of notices of proposed amendments.

b. ORS 227.186 (also known as Measure 56) notice. This statute requires mailed notice to property owners not less than 20 days prior to the public hearing of the amendment if the proposed code amendment or comprehensive plan amendment would “rezone” the property (code amendment), or would require the rezoning (comprehensive plan amendment) of property.⁶

⁵ORS 192.640 (Oregon Public Meetings Law) applies to all public meetings generally. “Reasonable notice” to interested persons, including the media” is required, of a public meeting. The notice must include a list of principal subjects anticipated to be considered at the meeting. Since at least 24 hours notice is required for special sessions, I have recommended that at 24 hours notice of regular public meetings, and their agenda, be given.

⁶ORS 227.186 **Notice to property owners of hearing on certain zone change; form of notice; exceptions; reimbursement of cost.**

(3) Except as provided in subsection (6) of this section, at least 20 days but not more than 40 days before the date of the first hearing on an **ordinance that proposes to amend an existing comprehensive plan** or any element thereof, or to adopt a new comprehensive plan, a city shall cause a written individual notice of a land use change to be **mailed to each owner whose property would have to be rezoned in order to comply with the amended or new comprehensive plan** if the ordinance becomes effective.

“Rezone” is a defined term:

- (9) For purposes of this section, property is rezoned when the city:
 - (a) Changes the base zoning classification of the property; or
 - (b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone.

ORS 227.186(9).

As applied to the proposed Foothills code and comprehensive plan amendments, they neither change the base zoning classification of property nor limit or prohibit land uses previously allowed in the zone. This is because the proposed amendments create the text of an FMU zone but no property is being rezoned or is required to be rezoned to the FMU zone. At some later date property may be rezoned (it is envisioned that the property owner would apply for the rezone); at that time, prior to the hearing upon the application for the rezone of the property, notice to the property owner (as well as other parties entitled to notice of quasi-judicial development applications) would be mailed notice of the application to rezone property to FMU.

(4) At least 20 days but not more than 40 days before the date of the first hearing on an **ordinance that proposes to rezone property**, a city shall cause a written individual notice of a land use change to be mailed to the owner of each lot or parcel of **property that the ordinance proposes to rezone**.