

## COMMENTS ON “CLEAR & OBJECTIVE HOUSING: APPROVAL CRITERIA UPDATE” AGENDA ITEM

### Part I – Draft Project Charter

May 6, 2018

Dear Planning Commissioners,

The “Clear & Objective Housing: Approval Criteria Update” agenda item summary and the attached “Clear & Objective Housing: Approval Criteria Update Draft Project Charter” and “Clear & Objective Housing: Approval Criteria Update Draft Public Involvement Plan” were made publicly available only late on Friday, May 4<sup>th</sup>, so there has been very little time available for thorough public review and comment on the 31 pages of critical information about this project.

Such a deficient approach to public engagement doesn’t bode well. *“No good ending can be expected in the absence of the right beginning.” – I Ching*

#### Draft Project Charter defines “needed housing” incorrectly

It’s also inauspicious that the project team, including the city attorney misstated the effects of Senate Bill 1051. On page 3 of the “Draft Project Charter,” staff states:

*“With the passage of Senate Bill 1051 in 2017 (codified at ORS 197.303(1)), “needed housing” means **all** housing on land zoned for residential use or mixed residential and commercial use and includes the following housing types: attached and detached single-family, multiple family, government assisted, mobile home or manufactured dwelling. Needed housing developments are entitled to a land use application process under clear and objective approval standards as required by State law.” (Bold emphasis in original.)*

This is clearly not true. Here is the actual, revision to the definition of “needed housing” from SB 1051:

ORS 197.303 is amended to read: 197.303. (1) As used in ORS 197.307, “needed housing” means all housing [~~types~~] **on land zoned for residential use or mixed residential and commercial use that is** determined to meet the need shown for housing within an urban growth boundary at [~~particular~~] price ranges and rent levels[~~, including~~] **that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a. “Needed housing” includes [at least] the following housing types:**

\* \* \* \* \*

First note that to meet the criteria for “needed housing,” the housing must be “on land zoned **for** housing.” (Emphasis added.) That would obviously include all of the residential zones and, perhaps, some of all special area zones. However, a reasonable interpretation of Eugene Code “Purpose” sections for each zone is that the “Agricultural,” “Employment and Industrial,” “Natural Resource,” “Park, Recreation and Open Space,” and “Public Land” zones are *not* zoned “for” housing. The Commercial Zones are less clear; only the C-2 and GO “Purpose” sections mention housing. In any case, which of Eugene’s zones are “for housing” is an important issue to get right. It should be obvious from the city staff’s mistake in stating the new definition clearly that the Planning Commission should also seek opinions from independent and qualified land use attorneys.

The new definition also has a second criterion for “needed housing.” Such housing must be “determined to **meet the need shown for** housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes.” (Emphasis added.) “Shown for” requires empirical evidence, and the “need” means there is a current or anticipated shortage. Evidence published by city staff shows a surplus of housing that is “affordable” to the population of households in most income brackets. This evidence shows that the “need” is largely in the ranges of “very low incomes” and “extremely low incomes.” In the past, the city attorney has mistakenly ignored this criterion and asserted the same erroneous interpretation. However, this past (and current) interpretation is based on a failure to do the local analysis to legitimately “show” the “need.” Instead, “need for housing” has been misinterpreted as housing which some (theoretically even just one) household has a “desire and ability to afford.” Again, the Planning Commission should obtain outside expertise before accepting the statement in the draft project charter.<sup>1</sup>

### **Draft Project Charter cites the wrong SB 1051 section as the scope for “clear and objective standards”**

While this paragraph in the draft project charter should be deleted or corrected, the definition of “needed housing” is somewhat moot with respect to “clear and objective standards.” The proper basis for the Planning Commission to consider is a radical change slipped into a different section of SB 1051:

ORS 197.307 is amended to read: 197.307. \* \* \* \*

(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the

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<sup>1</sup> The charter’s “Objective (2) Maintain compliance with State law by ensuring the approval criteria for needed housing applications are clear and objective, and do not have the effect of discouraging needed housing through unreasonable cost and delay” also needs revision, since clear and objective standards are applicable to *all* housing, not just “needed housing.”

Ditto “The project is only intended to broadly address the land use application criteria and related standards for all types of “needed housing” as defined in State law, which now encompasses all housing.” On page 7.

development of **housing, including** needed housing [~~on buildable land described in subsection (3) of this section~~]. \* \* \* \* \*

Whereas ORS 197.307(4) used to require clear and objective standards for *only* “needed housing,” the amended section now requires clear and objective standards for *all* housing, except in historic areas designated for protection under a land use planning goal protecting historic areas. ORS 197.307(5)(b).

There are critical other aspects of the statutes, which the Planning Commission should carefully study and thoroughly understand. Here’s concise list:

- Eugene can set approval standards under which a particular housing type is permitted outright (i.e., the city can limit which housing types are allowed in which zoning districts, as long as the “need” can be met citywide).
- Eugene can have an “alternative,” discretionary approval process, as long that process allows a density at or above the density level of the clear and objective standards process and criteria.
- The clear and objective standards can include provisions regulating the density or height of a development.
- The clear and objective standards may not have the effect of discouraging *needed housing* through unreasonable cost or delay. (Note how this provision is limited to “needed housing.”)
- Eugene can impose conditions of approval on specific development proposals.

This leads to another major error in the draft project charter on page 4:

*“Geography*

The scope of work will include amendments to the land use application approval criteria for partitions, subdivisions, site reviews, conditional use permits and planned unit developments and related procedures for needed housing that apply City-wide.”<sup>2</sup>

Glaringly, the scope must include *all* housing, regardless whether the housing meets both criteria for “needed housing.” So, for example, while a caretaker’s house on land zoned PRO is almost certainly *not* “needed housing,” and so there must be clear and objective standards for approval of this house.

Equally important, *only partitions and subdivisions land use applications must have an approval process with clear and objective standards*. With intelligently written code amendments, the other three land use actions can fall under the provision of ORS 197.307(6), which allows *discretionary* processes and criteria, as long as there is a clear and objective path for housing

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<sup>2</sup> “Also stated on page 7: “The scope will be limited to clear and objective approval criteria pertaining to partitions, subdivisions, planned unit developments, site reviews, and conditional use permits.”

that is allowed outright in the zoning district. (This may or may not require eliminating or revising the /PD and /SR overlay zones.)

I confirmed with my highly-respected land use attorney, William Kabeiseman, that the city could have a single, discretionary process and standards for PUD approval, as long as the code was properly crafted. Although we discussed PUDs specifically, similar considerations apply to the processes and criteria for site review and conditional use permits.

Planned Unit Developments (PUDs) are intended to provide the flexibility to produce *better* outcomes<sup>3</sup> than would be possible under the clear and objective standards that are set forth in the code provisions for the residential zones and the provisions for dividing land, i.e., partitions and subdivisions. As recent city decisions have demonstrated; however, both the “General” and “Needed Housing” criteria for PUDs is operating as a means to circumvent meaningful standards to protect the safety and livability of existing residents in and around the area of a proposed PUD.

Whether or not the EPC ultimately decides to maintain both clear and objective, as well as discretionary standard for PUDs, site review and/or conditional use permits, the commissioners should not accept the staff’s proposed scope without getting additional legal opinions and considering which approach (single or dual approval tracks) would be the better outcome. The EPC should at the very least establish that the “scope” does not necessarily mean that the three land use processes cited above need both a clear and objective and discretionary set of standards so that the public isn’t foreclosed from weighing in on both approaches. As the charter itself states on pages 49-50 that the project “will require any proposed changes put forward by key stakeholders, the City Attorney’s Office, City staff, or others to undergo thorough technical analysis and public review prior to beginning the formal adoption process.” This can’t happen if range of options is narrowed prematurely.

**The “code audit” should refer to the “Minor Code Amendment Process Library” and to the Jefferson Westside Special Area Zone.**

On page 6, “Phase 1” is stated to include the following task:

“c. **Land Use Code Audit.** Determine the specific range of possible land use code amendments through a Code Audit that will identify the land use application criteria and related standards to be included in the clear and objective update. This Code Audit will be supported by an outside consultant to help provide a neutral and knowledgeable third-party perspective for the project.”

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<sup>3</sup> **EC 9.8300 Purpose of Planned Unit Development.** The planned unit development (PUD) provisions are designed to provide a high degree of flexibility in the design of the site and the mix of land uses, potential environmental impacts, and are intended to: **(1)** Create a sustainable environment \* \* \* \* \*

First off, this audit should engage the public with a means for effectively submitting both general and specific comments on current code provisions.

There is a *huge* list of items from the public “audit” that occurred during MiCAP – the Minor Code Amendments Process. (I can supply this library to the staff and commissioners.)

Secondly, there are exemplary examples of *good* clear and objective housing code in the Jefferson Westside Special Area Zone.<sup>4</sup> It would be shortsighted for the “code audit” to identify only problem areas and ignore positive examples of clear and objective code, including the criteria in S-JW and, potentially, other sections of code.

### **Decision process is not clear or adequate**

On page 6, the draft project charter describes an extremely critical point in the public process:

**“2) Concepts and Evaluation.** Using the Summary of Key Issues generated in Phase 1, hold stakeholder working group meetings to review and vet issues, generate concepts, and evaluate potential clear and objective approaches. Preferred concepts will be recommended by staff based on criteria and input. Produce a Preferred Concepts report once the preferred concept for each issue has been identified.”

The decision on what to recommend as “preferred concepts” is one of the most important, highest leverage decision in the whole process. This statement is deficient in two ways:

- a) There is no clear explanation of who will be on the “stakeholder working group” or how this group will operate.
- b) It is ultimately left *solely* up to staff to determine what gets recommended to the planning commission. This essentially gives a few staff “veto” power over ideas that do not have staff support.

Before approval of this element of the charter, there needs to be:

- a) A more complete statement of how members of the “stakeholder working group” will be appointed and how their rules and work product are determined.
- b) An explicit procedure for alternative “recommendations” to have the same level of presentation to the Planning Commission as recommendations in a staff report.<sup>5</sup> There are several good ways to do this, which should be part of the public engagement before the Planning Commission approves a project charter.

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<sup>4</sup> Although some planning staff have in recent times made disparaging remarks about the S-JW zone, these comments ignore the substantial and successful public process that produced unanimous support from the City Council. To date, the planning staff’s only attempt – the South Willamette Special Are Zone – blew up spectacularly.

<sup>5</sup> Note that this would not prevent commissioners from giving more (or less) weight to the staff’s own recommendations. But it would avoid an *a priori* decision that the staff’s own recommendations were the only ones that had a “first class” place before the commissioners.

The development of land use code must engage the public before it is fully “cooked.”

On pages 50-51, the charter states:

**a. Land Use Code Writing.** Draft preliminary land use code amendment language based on the Preferred Concept report. This work will be performed by the project management team with assistance from the outside consultant.

**b. Working Group Consult.** Consult with stakeholders once draft code language is created to get feedback on the proposed changes.”

This is a flawed approach that is likely to result in the same kinds of problems that arose with the South Willamette Special Area Zone.

The public must have an opportunity to be engaged throughout the code-writing process for two critical reasons:

- a) The final ordinance, which would include “legislative markup,” is almost certain to be too lengthy and complex to be adequately absorbed by the public (or planning commissioners) and to be so “massive” that it would be very hard to effect substantial changes in the time available and over predictable staff resistance.
- b) The staff are not “all knowing” in writing code. There are numerous individuals who’ve been involved in land use issues and code who can contribute and critique as the code is written. This is an invaluable way to gain early awareness of problems and potential improvements to the code. This is entirely practicable, as the **Jefferson Westside Neighbors** have demonstrated in developing the code for the Jefferson Westside Special Area Zone (S-JW). The code for S-JW was developed through a committee of the Infill Standards Compatibility Task Team and a joint staff and JWN representatives working group *before* it went to the Planning Commission. The result sailed through the formal hearing and approval process and won unanimous approval (and applause) by the City Council.

Draft Charter scope fails to consider critical related code provisions

On page 7, the draft charter states:

*“Scope Exclusions*

\* \* \* \* \* General development standards applicable to housing not subject to a land use application are not part of this update (e.g., multi-family or secondary dwelling standards).

The scope also does not include an exhaustive analysis of existing refinement plan policies or attempt to establish clear and objective standards that would implement these various policies through a comprehensive set of design standards. Such an effort would greatly exceed the scope of available resources and is not the focus of Council’s

direction on the clear and objective/needed housing update. Code changes that address area-specific policies would best be accomplished as part of future area plan and refinement plan updates.”

These are overly broad and seriously misguided exclusions.

It’s very puzzling why planning staff or the city attorney would think that “multi-family” standards are an example of standards “not subject to a land use application” or that clear and objective standards are only required for land use actions.

ORS 197.307(4) requires: “clear and objective standards, conditions and procedures regulating the development of housing.” EC **9.5500 Multiple-Family Standards** “regulat[es] the development of housing. In numerous places, the code requires conformance with EC 9.5500. For example EC 9.8215(1)(k) requires a propose partition to conform with “[a]ll other applicable development standards for features explicitly included in the application.” If an apartment was proposed as part of a tentative partition, that apartment would be subject to the multiple-family standards,

In addition any code amendment that’s proposed *must* be consistent with applicable comprehensive plan policies. That may require consideration of plan amendments, which would involve a public process that engaged the residents (and others) who live within the scope of the respective plan.

Finally, in simple terms, it is logically impossible to create clear and objective criteria that simultaneously accomplishes all three outcomes:

- a) Prevents development that would have significant negative impacts; and
- b) Does not prevent a significant range of development that would have beneficial impacts; and
- c) Is manageable in terms of length and complexity.

Ignoring this reality will inevitably lead to irresolvable conflicts between protecting neighborhood livability and the flexibility for denser housing that is in suitable locations and well-designed. In fact, this reality gave rise to the concept of PUDs, although the original concept has been twisted into PUDs being a means to get approval for negatively impactful projects in R-1 zoning districts.

The only way to get to “win” is to craft clear and objective standards that prevent significantly negative development and have some *limited* complexity that provides some degree of flexibility without undermining the protections. The S-JW development standards are a good example of this strategy applied in a particular context of the area encompassed.

And then add a reasonably efficient and effective process for a discretionary process to allow conformance with an alternative set of standards. If the staff and Planning Commission had been applying the PUD “General Standards” as intended – *which the recent commission has not* – this would be a good example of such an approach as an alternative to the R-1 clear and objective development standards. The solution is not what staff proposes ...



i.e., to ignore reality and attempt to craft clear and objective standards that will be acceptable to the legitimate stakeholders (i.e., residents, property owners and home builders).

### **Draft Project Charter “Public Involvement Plan/Key Stakeholders” is incomplete and flawed**

I’ll address the problems with this section of the charter in “Part II” of my comments because it belongs more appropriately under the “Public Involvement Plan.”

The draft charter inconsistently uses “stakeholder,” “working group” and “stakeholder working group” without any adequate description of what criteria a person or group must meet to entitle that party to some greater influence than a party that doesn’t meet the “stakeholder” criteria.

It’s also clear that the initial list of stakeholders is extremely tilted towards parties who support laxer standards to increase profit or further a political or social interest. Neighborhood residents and neighborhood business owners have a minimal presence.

Contrary to staff’s statement on pages 3 and 4 of the AIS: “We will strive to communicate with all stakeholders, including under-represented groups, in ways that people understand and can relate to,” the stakeholders list completely neglected groups whose members reflect minority, senior, disabled, renter and other “under-served” citizens. It also ignored Eugene’s Bicycle and Pedestrian Advisory Committee, which advocates for the safety of pedestrians and bicyclists.

I’ll elaborate on this further in Part II, but the Planning Commission cannot legitimately approve such a poorly cobbled up list of so-called “stakeholders.”

### **Draft Project Charter “Decision Making Process” is cursory and inadequate**

This section is little more than a terse enumeration of the previously described phases and the formal adoption process. What’s required of a “charter” is a clear identification of the roles, responsibilities and authorities of individuals and group representatives who will make or significantly determine the outcome at each decision point.

I will also address this issue in Part II of my comments.

### **Questions for the Planning Commission to Consider**

In conclusion, here are the brief responses to the questions posed by staff in the AIS:

1. Does the Draft Project Charter clearly explain the *why, what, how, who and when* of the project?

**Response:** *No. As described above, there are numerous serious errors and deficiencies in this draft of the Project Charter.*

2. Are the Planning Commission's roles in the project clear?

**Response:** Perhaps, but only at the obvious level: Have discussions, recommend revisions to Charter and Public Involvement Plan, discuss and deliberate on "preferred recommendations," Approve a set of recommended code amendments to City Council.

The underlying *responsibility* of the Planning Commission should be to critically examine the issues raised above (and others) and ensure the citizens' rights and interests are fully protected in the adopted charter (and PIP).

3. Do you have any suggestions to improve the Draft Project Charter?

**Response:** The commissioners should insist on taking the time to *thoroughly* understand the draft charter and to address the deficiencies raised above (and others).

Respectfully submitted,

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