

June 5, 2020

TO: Gresham Planning Commission
FROM: Carol Rulla

RE: DCPU Project – Hearing Body for non-design Type III decisions -- and
Citizen Involvement Oversight of Gresham’s Public Testimony Policy during the COVID-19 Emergency

I am writing to make two comments for the 6/8/20 Planning Commission meeting.

My first comment is related to the Development Code & Process Update (DCPU) project. I ask that an upcoming phase of DCPU include a review of the way non-design Type III decisions are handled when applications require a Design Commission review of design elements.

Currently the Design Commission decides all issues, except Future Street Plan (FSP) modifications, when an application requires a Type III review of design elements. Staff previously recognized that the Design Commission isn’t the appropriate decision authority for Type II FSP modifications, and the city subsequently changed the code to specify that staff would make the decision on FSP modifications within an application that is before the Design Commission. However, there are many similar issues that are outside of the Design Commission’s area of expertise, such as regulations concerning trees, overlays, parking, etc. When those other issues require a Type III review (often a Type III variance) that’s unrelated to the Type III design review, it seems that the Planning Commission or the Hearings Officer should be the decision authority for those non-design issues.

The code currently allows one decision authority to make a recommendation to another decision authority. I would ask the Planning Commission to discuss the merits of either:

- Having the Hearings Officer make a recommendation to the Design Commission on the non-design Type III issues within a Type III design review application, or
- Having the Design Commission make a recommendation to the Planning Commission on the Type III design elements within an application with other Type III issues.

My second comment is related to the Planning Commission’s role as the oversight body for citizen involvement. My concern, as well as concerns expressed by members of the Coalition of Gresham Neighborhood Associations, is with the city’s new policy prohibiting oral public testimony during public meetings and hearings during the COVID-19 emergency.

As you know, the city suddenly implemented this policy the day of your 4/13/20 hearing on the Capital Improvements Program. Since then, various Coalition members have asked the Council for an explanation and reconsideration of this policy. As I conveyed to the Council in written testimony for their 5/19/20 meeting,

Coalition members noted that oral testimony is much more effective than written testimony for raising specific issues to be considered at a meeting or hearing. This is

particularly true for raising issues to a hearing body and having those issues considered by the hearing body before a decision is made. Furthermore, prohibiting oral testimony is a particular hardship and deterrent for those with limited writing abilities and writing disabilities and for some non-native speakers.

The city's new policy is especially inequitable for land use hearings, where applicants are allowed to speak and answer questions during the hearing but members of the public are prohibited from speaking. The legality of allowing one party to speak while prohibiting all other parties from speaking during a quasi-judicial hearing is highly questionable.

This new city policy is likely to have two perverse effects on quasi-judicial hearings:

- The public will be forced to rely on requests for the record to be kept open in order to respond to what is presented and said during hearings. The effect of the policy will be to increase the likelihood that hearings will need to be conducted over two or more meetings.
- If hearing bodies don't adequately address the written testimony, the city's policy is likely to result in more appeals. This would also extend the time for processing land use applications, as well as the costs to the city and everyone involved in the application.

Other jurisdictions have created ways to take oral public testimony during meetings and hearings. Here's a sampling:

- City of Sandy – Using Zoom to take oral public testimony for public hearings on a code change, a zone change and an annexation.
- Clackamas County – Allowing the public to “testify online or by telephone” about a Comprehensive Plan Map Amendment on Sandy's Urban Growth Boundary
- Rockwood Water PUD – Allowing the public to use Zoom's “Raise Hand function” to comment at its budget committee meeting.
- Hoodland Fire District #24 – Allowing the public to “appear and discuss the proposed programs” at its Zoom budget committee meeting.
- Government Camp Sanitary District – Allowing the public to “join the video/audio conference and discuss the proposed budget items” at its Zoom budget committee meeting.
- Beaverton – Allowing oral public testimony with a call-in phone number for meetings and hearings.
- Hillsboro - Allowing the public to register to give oral testimony via Zoom for public hearings and the budget committee meeting.

- Portland – Allowing the public to register to give oral testimony via Zoom for meetings and hearings.
- Wood Village – Allowing the public to register to give oral testimony for meetings and hearings.
- Metro – Allowing the public to register to give oral testimony via Zoom for meetings and hearings.

Sources: 5/5/20 & 4/28/20 Pamplin Media public notices; Beaverton, Hillsboro, Portland, Wood Village & Metro websites

So far, we have not received an explanation for the city's policy prohibiting oral testimony. However, the mayor has responded to me with a note saying that he intends to return to the usual oral public comment structure when the city is able to return to physical meetings, which he hopes will be sooner rather than later.

I have since found this legal guidance on the League of Oregon Cities website:

<https://www.orcities.org/resources/reference/coronavirus-resources/covid-19-guidance-beh>

The fifth paragraph under the "Public Comment" section states:

A governing body needs to remain mindful, however, that it likely may not limit participation to just written comments. For example, the state's land use laws require public hearings where individuals may submit evidence, arguments, or testimony. **Arguably, this requires the acceptance of both written and oral testimony.** In addition, federal laws, such as the Americans with Disabilities Act (ADA), will likely require a governing body to accept oral testimony from those individuals who are not capable of providing written testimony. *[Emphasis added]*

I respectfully ask that the Planning Commission exercise its oversight role concerning citizen involvement to:

- advocate for the allowance of both written and oral testimony, at least for land use hearings but hopefully for all testimony, while we are restricted to remote meetings, and
- monitor the city's return to oral public testimony during physical meetings and ensure that accommodations are made for those who wish to give oral testimony but cannot attend physical meetings.

Please note – I wish to convey my thanks and appreciation to UDP staff who have made adjustments to help the public manage within the constraints of the city's current policy prohibiting oral testimony. Staff is immediately forwarding written public comments to the hearing body upon receipt and has added documents to the hearing body webpage to help members of the public who'd otherwise have trouble accessing those documents on ePlan.

Thank you for your consideration.