

**STAFF REPORT**

**TYPE IV HEARING - COMPREHENSIVE PLAN AMENDMENT**

**Article 11 Appeal Procedures**

**TO:** Gresham Planning Commission  
**FROM:** Ashley Miller, Community Development Director  
Jim Wheeler, AICP, Planning Manager  
Tabitha Boschetti, AICP, Planner 2, Urban Design & Planning

**HEARING DATE:** June 10, 2024, 6:30 pm

**REPORT DATE:** June 3, 2024

**FILE NUMBER:** CPA-24-00168

**PROPOSAL:** To adopt Comprehensive Plan text amendments to Volume 3 (Development Code) of the Community Development Plan. These amendments include clarification of procedures when an appeal deadline falls on a weekend or holiday. The changes also create a new option for City Council to “call up” a Type III decision for an appeal hearing without need for an external Notice of Appeal.

- EXHIBITS:**
- A. Proposed Comprehensive Plan Amendments
  - B. Public Comment

**RECOMMENDATION:** Staff recommend that the Planning Commission forward the proposed Comprehensive Plan amendments as contained in the attached Exhibit ‘A’ to City Council with the recommendation of adoption.

**EXECUTIVE SUMMARY**

Gresham Community Development Code Article 11, *Development Permit Requirements* outlines specific land use procedures, including appeal procedures, eligibility, and notice standards. These standards are written to effectively implement state and local land use requirements including the 120-day review timeline requirements of ORS 227.178, while providing clear and predictable paths for appeal where warranted.

At present, the appeal timeline for Type I, Type II, and Type III procedures provides 12 days from the notice of decision to submit a Notice of Appeal. This deadline will sometimes fall on a weekend or holiday. Established practice has been to move the appeal deadline to the next applicable business day, however, this past spring City staff received legal advice that this position is not defensible based on the

existing code language. The proposed changes aim to provide unambiguous guidance to implement the prior practice of moving the deadline to the end of the next available business day.

City Council has also expressed a desire to change the existing appeals processes available in the Gresham Community Development Code. The current procedures limit initiation of appeals only to applicants and persons who have submitted testimony as part of the applicable land use record. Staff understand the City Council desires a path to “call up” Type III discretionary land use decisions of unique public interest, in situations where an appeal might not otherwise be filed, or where procedural issues are observed. This process would allow the equivalent of an appeal hearing at the City Council as the final local decision.

These changes have been considered as part of the larger forthcoming Development Code Update (DCPU), which aims to take a more comprehensive look at key areas to streamline and strengthen the Development Code. In light of recent community experiences with the existing appeals process, including shortcomings in the interpretation of the appeals deadline and limited recourse on the part of decision makers, these changes are being advanced as an earlier implementation phase of this larger work.

Comprehensive Plan Amendments to Volume 3 (Development Code) are described in the following section titled “Proposed Comprehensive Plan Amendments Overview”.

### **Citizen Involvement and Outreach**

The project included the following Public Participation:

- Email to Neighborhood Association presidents and land use chairs May 17, 2024
- Public Hearings notices in the Gresham Outlook
- Briefing to Design Commission June 5, 2024
- Planning Commission: Public Hearing scheduled for June 10, 2024
- City Council: Public Hearing scheduled for July 16, 2024

Notice of the Development Code changes were sent to the Department of Land Conservation and Development (DLCD) on May 2, 2024; complying with the requirement to provide such notice at least 35 days before the first hearing. Notice of the June 10, 2024 Planning Commission hearing was published in the Gresham Outlook on May 21, 2024. Notice of the July 16, 2024 City Council hearing will be published in the Gresham Outlook no later than July 6, 2024. A Measure 56 notice is not required for this comprehensive plan amendment.

### **Public Comment**

As of the date of this report, written public comment has been received from Carol Rulla of the Kelly Creek Neighborhood Association (Exhibit B). Ms. Rulla expressed an interest in allowing parties who did not participate in the original decision hearing to participate in Type III appeal hearings and presumably the new Council Review path.

Rulla expressed a disagreement with previous information about applicable standards for Type III hearings. Hearings on the record have been understood to consider the record established by the original decision body, though to allow new legal argument from the parties involved. Rulla also pointed to wording that could use additional clarification and correction. The draft has been revised since these comments.

The current proposal is for the Council Review process to mirror the existing implementation of the appeal hearing process. The proposal does not propose to change to a hearing that would allow new parties to participate in the existing appeal hearing process or Council Review. The Council Review proposal is put forward as a hearing on the record, where the record is compiled by the original decision body. Alternatives that were considered include a change to a de novo hearing, however, de novo hearings allow new evidence from all parties and typically require the record to be held open for additional time for response to new evidence. Another alternative would be to allow new individuals who did not choose to participate either in writing or orally at the original hearing, but limited to new arguments (no new evidence). Managing that arrangement can be logistically challenging since it requires the ability to identify and halt new evidence, and can be perceived as unfair to parties who took the opportunity to participate in the original hearing by written or verbal testimony. Some jurisdictions also provide for alternative paths; for example, Portland allows an on the record appeal hearing as the default, but provides the option for a de novo hearing if the original applicant waives the 120-day timeline. The Planning Commission may consider if they wish to recommend any changes to the proposed process.

### **Proposed Comprehensive Plan Amendments Overview**

The overview provided below summarizes the changes proposed to the Community Development Plan (GCDP). The plan consists of three volumes—Volume 1 “Findings”, Volume 2 “Policies”, Volume 3 “Development Code”. Updates are proposed only to Volume 3. The full text of the proposed updates is provided in Exhibit ‘A’ (formatted as a ~~strikeout~~/underline).

#### **Volume 3 – Development Code (GDCD)**

The following amendments are proposed:

- Adding language to specify that deadlines for filing a Notice of Appeal are moved to the end of the next business day where the deadline would otherwise fall on a weekend or holiday.
- Adding language to allow City Council to “call up” a Type III decision made by another review body. The proposed procedure would mirror the appeal hearing process, but without the need for the role of a separate appellant.

## FINDINGS OF FACT

The proposed Community Development Plan amendments included as Exhibit 'A' and its attachments are consistent with all applicable procedures, goals, and policies of the Community Development Plan, applicable titles of the Metro Urban Growth Management Functional Plan, and applicable Statewide Planning Goals as indicated in the following findings.

### **A. Community Development Code Procedures (Volume 3)**

#### ***Section 11.0200 Initiation and Classification of Applications***

##### *Section 11.0201 – Initiation of an Application*

This section provides that the City Council may initiate a Type IV legislative application to amend Volume 3 (Development Code) of the Community Development Plan.

The Type IV Comprehensive Plan Amendments represent an early phase of the Development Code Process Update (DCPU) implementation, initiated by City Council on July 18, 2023. City Council will review these amendments at a hearing on July 16, 2024.

##### *Sections 11.0203 and 11.0204 - Classification of Applications and Review Authorities*

These sections provide that Type IV procedures are legislative and typically involve the adoption, implementation, or amendment of policy by ordinance and that it generally applies to a relatively large geographic area containing many property owners. They also provide that the Planning Commission provide a recommendation on Community Development Plan Amendments and the City Council be the decision-making authority. This Type IV Comprehensive Plan Amendment project meets those conditions and is being processed under the Type IV procedures, including review and recommendation from the Planning Commission on June 10, 2024, and a City Council hearing on July 16, 2024.

#### ***Section 11.0600 – Type IV Legislative Procedures***

##### *11.602(C) Application Initiation*

This section provides that the City Council may initiate a Type IV legislative application to amend the text of the Community Development Plan. The Type IV Comprehensive Plan Amendments represent an early phase of the Development Code Process Update (DCPU) implementation, initiated by City Council.

##### *11.602(D)(1) Type IV Public Notice for Comprehensive Plan Amendments*

(a) For a Type IV Comprehensive Plan Amendment this section requires a submittal to the DLCD at least 35 days prior to the Planning Commission hearing date. Notice was submitted on May 2, 2024, which is at least 35 days prior to the hearing date of June 10, 2024.

(b) The section requires notice to owners of properties for which the application affects permissible uses of land. No proposed changes affect the permissible uses of land.

(c) This section also requires that at least 10 days before the initial hearing, a notice be published in a newspaper of general circulation in the city and copies of the hearing notice made available in City Hall. Required notice of public hearing for these proposed amendments were published in the *Gresham Outlook* on May 21, 2024, and made available through City Hall as required by this section.

### *11.602(E) Type IV Decision Authority and 11.602(F) Type IV Notice of Decision*

This section requires that the Planning Commission shall hold a public hearing and make a recommendation to the Council for an amendment to the Community Development Plan. The Council shall hold another public hearing and make a final decision. Interested persons may present evidence and testimony relevant to the proposal. The Planning Commission will make a recommendation during a public hearing on June 10, 2024, and the Council will make a decision at a public hearing on July 16, 2024 that will be based on findings of fact contained in this report and in the hearings record, and a decision will be sent to those who participated in the hearings. A decision shall be made accompanied by findings and an order.

### **Section 11.1000 - Public Hearings**

This section provides for a hearing process consistent with Section 11.1000. Both the Planning Commission and the City Council, at public hearings in conformance with provisions of this section, will consider this proposal.

### Conclusion

The applicable Community Development Code Procedures have been met as of the date of this report and will be met prior to the issuance of a decision, or with the issuance of the decision.

## **B. Community Development Plan Goals and Policies (Volume 2)**

This section identifies the applicable Community Development Plan goals and policies. The text (*italicized*) of the policy is followed by corresponding findings and conclusions.

### **Section 10.014 Land Use Policies and Regulations**

*Goal: Maintain an up-to-date Comprehensive Plan and implementing regulations as the legislative foundation of Gresham's land use program.*

*Policy 1: The City's land use program will be consistent with state and regional requirements but also shall serve the best interests of Gresham.*

*Policy 2: The City's land use regulations, actions and related plans shall be consistent with and implement the Comprehensive Plan.*

*Policy 20: The City shall periodically review and update the Comprehensive Plan text and the Community Development Plan Map(s) to ensure they remain current and responsive to community needs; provide reliable information and dependable, factually based policy direction, and conform to applicable state law, administrative rules, and regional requirements.*

*Policy 21: Council may, upon finding it is in the overall public interest, initiate legislative processes to change the Comprehensive Plan text and Community Development Plan Map(s) and Development Code.*

*Action Measure 11: Revise the Comprehensive Plan Text, Map and related findings as needed to maintain its reliability and timelines to ensure consistency among goals, policies, implementing measures; accuracy of findings and compliance with regional,*

*state, and federal laws and rules. This includes review by the Planning Commission every two years; a formal evaluation every five years and an overall update at least every ten years.*

### Findings

Gresham Community Development Code Article 11, Development Permit Requirements outlines specific land use procedures, including appeal procedures, eligibility, and notice standards. These standards are written to effectively implement state and local land use requirements including the quasi-judicial land use hearing provisions of ORS 197.797, review procedures in ORS 197.830, provisions for “review” or “appeal” in ORS 215.422, and the 120-day review timeline requirements of ORS 227.178. The Development Code is intended to provide clear documentation for effective implementation of these procedures.

The proposed changes to appeal deadline language respond to community needs for greater certainty in the appeal process, addressing a known gap in the Development Code language for appeal deadlines. Providing for moving the Notice of Appeal deadline to the next business day provides a more consistently reliable set of standards for all parties, while also maintaining the City’s ability to meet applicable timelines for a local decision.

The new proposed process for City Council to call up Type III decisions for review is also consistent with provisions in ORS 215.422 that allow an appellate authority on its own motion to review the action of a hearings officer or other decision-making authority. Type III decisions have specifically gone through a Type III hearing process in front of either the Hearings Officer, Design Commission, Planning Commission, or City Council as prescribed by GCDC Table 11.0204, summarized for broad categories of Type III review below (Figure 1). As further established by GCDC 11.0204, all Review Authorities that make quasi-judicial decisions do so under the authority delegated by the City Council. Where an appeal is filed in line with the procedures outlined in Article 11, the Appeal Authority is also defined by GCDC Table 11.0204. The Decision Authority and Appeal Authority are varied based on the primary content of the given land use review, summarized for Type III application categories in Figure 1 on the following page:

Figure 1:

Type III Application Categories	Hearings Officer	Historic Resources	Design Comm.	Planning Comm.	City Council
Historic & Cultural Landmarks	D	R	A		
Open Space Boundary Revisions	D			A	
Gresham Butte Scenic View Boundary Revisions	D			A	
Planned Developments	D			A	
Design Review E, Design District			D		A
Special Use Review III	D			A	
Institutional Master Plans and Modifications				D	A
New Community Master Plans				D	A
Major Variance	D				A
Large (Scale) Wind Energy System	D			A	
New or revised future street plan, independent of other land use review	D				A
Resource Utilization Permit	D				A
Plan Map Amendments				R	D
Miscellaneous Type III	D				A

*D= Decision Authority; R= Recommendation A= Appeal Authority*

The proposed changes would enable City Council to act in the stead of the appeal bodies to whom they would otherwise delegate their authority, and review the initial decision of a hearing body on its own motion. In instances where City Council is the decision-making body (specifically, Plan Map Amendments), there is no opportunity for local appeal; in that case, City Council is not granted the ability to make a further review of their own decision where no appeal opportunity otherwise existed.

Gresham’s Community Development Plan has previously been found to be in compliance with state and regional requirements. The proposed amendments have been found to be in compliance with Gresham’s Community Development Plan and State and regional requirements as described in this staff report.

As required by State regulations a draft of the proposed amendments were sent to the DLCD at least 35 days prior to the scheduled June 10, 2024 Planning Commission hearing. Although the changes are limited in scope, notice was also shared with Metro on May 14, 2024. As of the date of this report, staff have not heard feedback from DLCD or Metro regarding the proposed changes. Those suggestions are incorporated into Exhibit A.

## Conclusion

The Land Use and Policy Goal (Section 10.014) and related policies and action measures are addressed through the notifications to DLCD and Metro and the changes to the Development Code related to recent updates to State rules (see the Proposed Comprehensive Plan Amendments Overview section above). The proposal is consistent with the applicable goals, policies, and action measures listed in this section.

### **Section 10.100 - Citizen Involvement**

*Goal: The City shall provide opportunities for citizens to participate in all phases of the planning process by coordinating citizen involvement functions; effectively communicating information; and facilitating opportunities for input.*

*Policy 1: The City shall ensure the opportunity for citizen participation and input when preparing and revising policies, plans and implementing regulations.*

*Policy 5. The City shall keep citizens informed of issues confronting the City.*

*Policy 6. The City shall ensure that technical information necessary to make policy decisions is readily available.*

*Policy 7. The City shall facilitate involvement of citizens in the planning process, including data collection, plan preparation, adoption, implementation, evaluation and revision.*

*Policy 9. The City shall ensure that citizen involvement plans and activities incorporate Gresham's diverse constituencies regardless of age, sex, religion, social or business affiliation.*

*Policy 10. The City shall ensure the opportunity for the public to be involved in all phases of planning projects and issues.*

*Action Measure 4. Keep the public informed of opportunities for involvement in all phases of land use planning issues...*

*Action Measure 5. Provide citizens timely access to all public information related to land use matters under consideration...*

*Action Measure 7. Engage in outreach activities to inform and encourage public involvement...*

*Action Measure 8. Facilitate citizen input into the process for revising local land use plans and ordinances...*

*Action Measure 9. Make public participation processes user-friendly...*

*Action Measure 10. Encourage broadly based public participation including all geographic area and diverse interests...*

*Action Measure 11. When appropriate, provide culturally sensitive participation opportunities, which may include language translation and interpretation.*

## Findings

The proposed changes to clarify appeal deadlines better facilitate public participation in the land use review process by providing a more predictable and legally defensible timeline in which to file appeals.



The proposed addition of the Council Review process adds a new opportunity for a further public hearing where there might otherwise be none, while preserving all existing appeal opportunities for an individual or organization to appeal a land use decision. As proposed, parties who participated in the original decision, either by written or verbal testimony, would retain their ability to participate in the Council Review hearing. As noted under Public Comment, Carol Rulla of the Kelly Creek Neighborhood Association has requested further consideration for opening testimony in a Council Review or appeal to parties who did not participate in the original Type III hearing; the Planning Commission may consider recommending further changes to the proposal.

The project itself has included the following efforts:

- Public Hearings notices in the Gresham Outlook
- Email to neighborhood association presidents and land use chairs, as well as neighborhood coalition contacts, May 17, 2024 with access to an early draft of the proposal
- Briefing at Design Commission June 5, 2024
- Planning Commission Hearing: June 10, 2024

The public was informed of opportunities for involvement through the City's calendar, the project website, and emails to an interested parties sign-up list. Translation services are advertised on the footer of City web pages.

#### Conclusion

The Citizen Involvement Goal (Section 10.100) and related policies were addressed through the public notice and presentations at the Planning Commission and City Council and other activities listed above. The proposal is consistent with the applicable citizen involvement goals and policies listed in this section.

#### **C. Metro Urban Growth Management Functional Plan 3.07**

The Metro Urban Growth Management Functional Plan implements regional goals and objectives adopted by Metro Council. Changes to local Comprehensive Plans and land use regulations generally must be consistent with regional policies.

#### Findings

The proposed changes are limited in scope to the implementing process for land use appeal procedures. The changes do not directly relate to housing capacity, water quality and flood management, protection of industrial or employment areas, centers and corridors, urban reserves and the Urban Growth Boundary, residential neighborhoods, natural areas, or other policy areas of the Metro Urban Growth Functional Management Plan. The proposed changes will not influence Gresham's consistency with the Functional Plan.

Notice was sent to Metro on May 14, 2024. As of the date of this report Metro has not contacted the City regarding this notice.

## Conclusion

The proposed changes will not change the City of Gresham's compliance with the Functional Plan.

## **D. Oregon Statewide Planning Goals**

### ***Statewide Planning Goal 1 - Citizen Involvement***

This goal requires that cities *"insures the opportunity for citizens to be involved in all phases of the planning process."*

#### Findings

The proposed changes to clarify appeal deadlines better facilitate public participation in the land use review process by providing a more predictable and legally defensible timeline in which to file appeals.

The proposed addition of the Council Review process adds a new opportunity for a further public hearing where there might otherwise be none, while preserving all existing appeal opportunities for an individual or organization to appeal a land use decision. As proposed, parties who participated in the original decision, either by written or verbal testimony, would retain their ability to participate in the Council Review hearing. As noted under Public Comment, Carol Rulla of the Kelly Creek Neighborhood Association has requested further consideration for opening testimony in a Council Review or appeal to parties who did not participate in the original Type III hearing; the Planning Commission may consider recommending further changes to the proposal.

The public process was provided through emailed information and published notices posted in the Gresham Outlook in advance of the Planning Commission hearing. Additional notice will be posted ahead of the City Council hearing. See Section I of this report for a full list of public outreach activities.

#### Conclusion

The proposed amendments comply with Statewide Planning Goal 1.

### ***Statewide Planning Goal 2 - Land Use Planning***

This goal requires cities to *"establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions."* The goal requires that *"plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268."*

#### Findings

The City has a state-acknowledged Comprehensive Plan, and Development Code within the larger body of this plan. The proposed changes provide greater clarity in the land use planning process for Notice of Appeal deadlines, and provide an additional opportunity to ensure that decisions are well-grounded with consideration for all applicable criteria by providing an additional clear path for City Council to call up Type III decisions for further review of the record.

Conclusion

The proposed amendments comply with Statewide Planning Goal 2.

**CONCLUSION**

The proposed comprehensive plan amendments attached as Exhibit 'A' are consistent with applicable criteria and policies of the Community Development Plan, the applicable Development Code of the Community Development Plan, applicable Metro UGMFP Titles, and the applicable Oregon Statewide Planning Goals as indicated by findings contained in this report.

**RECOMMENDATION**

Staff recommends that the Planning Commission forward the proposed Development Code changes with the recommendation of **adoption** of the proposed comprehensive plan amendments as contained in the attached Exhibit 'A' and its attachment.

*End of Staff Report*